INFORMATION GOVERNANCE IN JAPAN

Towards a New Comparative Paradigm

Kenji E. Kushida, Yuko Kasuya, Eiji Kawabata

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Part II: Economy

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Information Governance in Japan: Towards a New Comparative Paradigm

Kenji E. Kushida, Yuko Kasuya, Eiji Kawabata

The history of human civilization has been about managing information, from hunting and gathering through contemporary times. In modern societies, information flows are central to how individuals and societies interact with governments, economies, and other countries. Despite this centrality of information, *information governance*—how information flows are managed—has not been a central concern of scholarship. We argue that it should be, especially now that digitization has dramatically altered the amount of information generated, how it can be transmitted, and how it can be used.

This book examines various aspects of information governance in Japan, utilizing comparative and historical perspectives. The aim is threefold: 1) to explore Japan's society, politics, and economy through a critical but hitherto under-examined vantage that we believe cuts to the core of what modern societies are built with—information; 2) articulate a set of components which can be used to analyze other countries from the vantage of information governance; and 3) provide frameworks of reference to analyze each component.

This book is the product of a multidisciplinary, multinational collaboration between scholars based in the US and Japan. Each are experts in their own fields (economics, political science, information science, law, library science), and were brought together in two workshops to develop, explore, and analyze the conception and various of facets of information governance. This book is frontier research by proposing and taking this conception of information governance as a framework of analysis.

The introduction sets up the analysis by providing background and a framework for understanding the conception of information governance. Part I focuses on the management of government-held information. Part II examines information central to economic activity. Part III explores information flows crucial to politics and social life.

1. Introduction

Kenji E. Kushida
Yuko Kasuya
Eiji Kawabata

The accumulation of information and its use as knowledge is the fundamental building block of civilization. Over the past few decades, as digitization has dramatically transformed the amount of information our societies can produce, transmit, analyze, and use, it is high time we focus on various facets of how information flows are governed in society.

Information is all around us, and information flows of various forms are governed by rules and regulations. These rules and regulations can differ across societies, and they often change by some form of political logic.

This volume is an initial foray into building a framework of analyzing societies according to how they govern information. There are a variety of typologies of how political economies of advanced industrial countries are organized, and even more on how various political systems are organized. However, as the advent of digital technologies is opening up a range of policy debates surrounding the management and governance of information, such privacy (who is authorized to get access to what information), access to government data, and even what digital tools can be used in elections, the time is ripe for a volume that brings many facets of information governance together.

Japan is the starting point of our analysis, but the issues are not unique to Japan. This is a building block in a cross-national comparison that identify patterns and yield hypotheses about how countries behave along particular dimensions of information governance.

Rather than force the diverse chapter into a single framework, this volume lets the chapters do the speaking for themselves. One might loosely consider a simple inductive framework that places

policymaking processes as the result of relatively top down processes, driven by national political elites and top bureaucracies without major grass-roots or explicit societal demands ("administrative governance"), versus processes driven by iterative interactions between societal actors such as business or civil society, and governmental actors ("interactive governance").

In building future comparative analyses across various domains of information, this volume is divided into three parts: government, economy, and society & politics. Each part of the volume covers several key areas of how actors interact with information in the government, the economy, and among societal and political actors, respectively. The figures below align each area with a specific policy area, since governance of information is the central theme of this volume.

The selection of topics each of the government, economy, and society & politics sections are not designed to be comprehensive, but they do represent critical areas that the contributors believe are critical for cross-national comparison. With that in mind, each chapter has an international comparative component, and they follow a rough template of that includes historical developments of the issue are with relevant government policies (or practices), driving forces for how they developed, and implications for Japan looking ahead.

Part I of this volume is focused on the management of information held by the government. Access to information held by the government is a key tenet of democracies, in which those government have a voice in choosing leaders to represent them, significantly based on information they obtain about government.

Part I: Government

Information Interaction with the Government	**Relevant Policy Area**	**Chapter**
Citizens obtaining information from the Government	Freedom of Information Act (FOIA)	Ch. 2: Kasuya
Government providing data openly	Open Data	Ch 3. Watanabe
Government keeping track of its actions	Archives and Public Records Management	Ch 4. Koga

Yuko Kasuya's chapter deals with regulations that require governments to be respondent to citizens' requests for information—a type of regulation known as the Freedom of Information Act (FOIA). She begins by noting that Japan's adoption of a FOIA in 1999 was later than other advanced industrial countries, with a wave of adoptions in the 1980s. Examining the politics surrounding its enactment, she finds an explanation in the Liberal Democratic Party (LDP)'s prolonged rule, uninterrupted from 1955 until 1993. With the LDP dominating the deliberative stage and lobbying activities have little impact, FOIA did not gain legislative momentum until the LDP was ousted briefly in 1993. Kasuya find that although the 1999 FOIA does represent a step forward, citizens continue to face difficulties accessing governmental information.

Tomoaki Watanabe takes up the topic of open data—the use and reuse of government-held information by non-government entities, with legal permission for reuse in formats that are convenient for users. As computing power prices have decreased and data analytical tools have become radically more powerful, all connected by the Internet as a global open platform, there have been movements around the world for governments to release data to be put to constructive use. Origins of the concept date from at least the early 2000s, with the EU and US moving ahead of Japan to adopt rules and practices to support open data, such as texts of legislation, reports, geo-spacial data, and all sorts of other data. Japan began to

engage seriously with open data policy in 2012. Watanabe finds that the Japanese government, though having come a long way, is still not very proactive in relinquishing control of data. That being said, the non-governmental sector has flourished, although major commercial users are still not very visible.

Archives and records kept by government are important in democracies, enabling citizens access to information about governmental and political processes. Takashi Koga takes up this topic with his chapter focusing on Japan's Public Records and Archives Management Act (PRAMA), passed in 2009. Historically, Japan was relatively late in establishing national archives, and once established, centralized governance was relatively weak. Koga contends that compared to Western democracies, which hark back to the French Revolution, Japan lacked a concentrated or sustained policy interest in promoting strong measures surrounding archives. The enactment of PRAMA was driven by key political leadership, which accelerated and gained popular support after a series of public scandals regarding public records occurred in the mid-2000s, in particular the government's loss a vast number of citizens' pension records. Koga calls for further attention in developing expertise in public records management beyond a small and centralized few, towards local governments and in the archival profession itself, so that sustained policy interest can be cultivated to strengthen measures in this area.

Part II of this volume includes chapters that examine information as used in various areas of the economy.

Part II: Economy

Information Interaction with the Economy	**Relevant Policy Area (s)**	**Chapter**
Information disclosure by companies	Accounting rules	Ch. 5: Kagaya
Protection of proprietary information owned by companies	Trade secrets	Ch 6. Rademacher
Information used for innovation	Unexpectedly numerous: competition, ICT, entrepreneurial ecosystem-related	Ch 7. Kushida

Regulations requiring the disclosure of particular information from companies is usually covered by corporate accounting regulations, the topic of Tetsuyuki Kagaya's chapter. Kagaya examines the specific area of regulations requiring quarterly financial statements. While regulators in some major industrialized countries require mandatory quarterly financial statements from all listed firms, others do not, allowing firms to report only to investors. Japan's stock markets adopted quarterly financial statement disclosures in 1999 (Mothers Market in the Tokyo Stock Exchange) and 2003 (Tokyo Stock Exchange), with the Financial Service Agency requiring quarterly auditing since 2008. Kagaya seeks to understand the relationship between regulations requiring mandatory quarterly reporting regulations and corporate investment behavior, the topic of a well-developed theoretical debate. He finds that firms facing mandatory quarterly financial reporting invest less in long-term capital than those facing voluntary disclosure, or no obligation to disclose. In particular, more profitable firms and higher foreign shareholder ratios decrease their long-term investment, while those with more investment opportunities and larger market capitalization increase their long-term investment.

Christoph Rademacher's chapter brings to the forefront an often underappreciated area of

information used by corporations—trade secret law, a body of laws and regulations that protects confidential information from misappropriation. It is an area within the broader scope of intellectual property that is critical in protecting and enforcing exclusive rights to certain information. Japan's trade secret law was enacted in 1991, and evolved under the guidelines of the Ministry of Economy, Trade and Industry, and Japanese case law. Japan was hesitant to implement trade secret protection legislation in the 1970s and 80s during its rapid industrial catch-up phase, by partly as a response to US trade pressure and rising patent activity, it overhauled its trade secret protection area regulatory area in 1990. He shows how the application of case law led to information owners having an extremely high bar to get information recognized as trade secrets, followed by a reversal fed by political discourse following some high profile cases of large Japanese firms against Korean competitors. He compares the cases of Germany, the US, and Japan, and finds that although the US and Japan have similar levels of trade secret protection, higher than Germany, according to OECD measurements, he notes that there is still a sense that the proof of "reasonable effort" in maintaining secrecy, which is not quantified, seems higher in Japan. He concludes that the relative use of confidentially requirements may explain some of the difference, but also cautions against their excessive use to maintain flexibility.

Kenji Kushida examines use of information in societies for innovative activities. In the late 1990s, governments around the world recognized that broadband Internet access and high speed mobile networks and services would be critical to future innovation. They engaged in a race to buildout high speed broadband, and Japan won the race with high speed and low cost broadband, along with fast and innovative mobile Internet service platforms and a robust content ecosystem. However, Japan did not become a leader in IT services. This chapter contends that Japan was a front-runner in discovering that several other factors mattered in fostering innovation: high levels of competition among large firms allowing them to become "lead users" of IT by investing heavily in IT and experimenting and innovating with IT tools; building competencies in internationalizing services rather than selling goods; and quickly

removing unexpected regulatory roadblocks.

Part III examines the role of governing information in politics and society. Central issues in a variety of policy debates that affect all areas of citizens' lives include information security and information privacy. Often discussed in tandem but conceptually very different, information privacy refers to the rules and regulations surrounding who gets access to what information about whom. Information security, or cyber-security, is about protecting information from unauthorized access and manipulations. These are important policy areas that the current era of abundant information flows has made all the more relevant to citizens' daily activities.

Part III: Politics & Society

Governing information in politics and society	**Relevant Policy Area (s)**	**Chapter**
Protecting information from unauthorized access and modification	Cyber security policy	Ch. 8: Tsuchiya
Who gets access to what information for whom	Privacy policy	Ch 9. Kawabata
Information in the media	Informal practice of "press clubs" (lack of pro-competition policy in media)	Ch 10. McNeill
Information in electoral campaigns	Election campaigning policy	Ch 11. Freeman

Motohiro Tsuchiya takes up the topic of cyber security. He traces the development of Japan's cyber security-related legislation leading up to the much-awaited Cyber Security Basic Law in 2014. Legislation had developed with relatively weak governmental and societal actors interacting iteratively. However, precipitated by a series of high-profile cyber attacks, the government took the position that its

fragmented policymaking structure and response to cyber security threats no longer sufficed. The 2014 cyber security law strengthened and centralized the administrative apparatus responsible for the government's policymaking and response to ever-increasing threats of cyber attacks.

Eiji Kawabata's chapter examines Japan's privacy policy in historical and international comparative perspective. Kawabata traces the development of privacy regulation in Western Europe and the US since the 1970s, highlighting the trend of increased information privacy protection regulations, becoming part of social norms. Japan's development of privacy policy followed those of Western Europe and the US with the first piece of major legislation in 1988, which partially covered only a part of personal information held by the government. After lengthy political battles, the 2003 Personal Information Protection Act created a comprehensive privacy regime in Japan, and in 2013, it created a database to comprehensively manage information related to taxation and social welfare payments. The current status of Japan's privacy governance is a hybrid of Western European and US privacy regimes; it lacks a strong central authority with individual government agencies implementing privacy policy, it relies largely on self-regulation, and like the US, state and social actors interact to shape policy, but its trajectory is more similar to Western Europe because the law defines fundamental principles of privacy regulation applicable to all areas, and the government is considering a central data protection authority.

Information governance in the media is the topic covered by David McNeill's chapter. The role of journalism as guardian of the public interest against abuses of power has long been understood as perhaps its key function in liberal democracies. The conflicting view -- prevalent in wartime Japan and perhaps contemporary China -- is that media should be an instrument of state power. While Japan's media was reformed in the postwar era, putting it closer to a "watchdog" model, the ideal was circumscribed by monopolies, official and informal restrictions, political pressure, and most significantly, a layer of formalized control in the form of press clubs. While dramatic change seemed to be around the corner when the new government of the Democratic Party of Japan in 2009-2010 came into power, the watchdog

function was quickly undermined when the long-ruling Liberal Democratic Party (LDP) returned to power in late 2012. The chapter contends that watchdog journalism, always an embattled project, has retreated as conservative forces aligned to the state have increasingly demanded a less autonomous line from the nation's media. Similar struggles rage elsewhere, but Japan's defense has been weakened by the press club system with its cosseted and co-opted army of well-paid journalists. McNeill posits that solutions are as prosaic as they are difficult: media professionals should end the divided, cartel-like conditions of the industry, and abolish the press club system. Universities must fight to establish proper critical journalism courses and train graduates who identify their allegiances first to independent-minded professional reporting, not to their companies. Above all, McNeill contends, Japan needs to fight for the integrity of watchdog journalism.

Laurie Freeman's chapter covers the rules governing information in electoral campaigns. She notes that the control and regulation of information provided to the public during election campaigns by candidates, parties and the mass and electronic media is a long-neglected, yet vitally important, aspect of information governance in Japan. She notes that Japan's Public Offices Election Law (POEL), enacted in 1950, but having its roots in prewar electioneering laws, is possibly the most rigid election campaign law among democratic nations, and has remained largely unchanged in the postwar era despite electoral system revisions in 1993. Until quite recently, the POEL was interpreted in such a way as to prohibit the use of the Internet and other social media by politicians and the electorate during the campaign period. Freeman points out that a large number of constraints also are in place on the provision of information to voters through the more traditional mechanisms found in other democracies, including print and broadcast media advertisements and endorsements, as well as door-to-door canvassing and debates. In contrast, the United States now has one of the least restrictive election campaign regimes among advanced industrial democracies, with contrasting principles of aiming for "information fairness" in Japanese electoral laws versus "information freedom" for those of the US. However, the excesses of American electioneering by

"Super PACs" and other ostensibly independent groups in the most recent (2012) presidential election suggests a need to rethink electoral policy in both nations.

Part I: Government

2. Access to Governmental Information in Japan: Enactment Timing, Legal Strength, and Enforcement of the 1999 Freedom of Information Act (FOIA)

Yuko Kasuya
Keio University

Abstract

The Japanese parliament has enacted the Act on Access to Information Held by Administrative Organs in 1999. The Act, known in generic terms as a Freedom of Information Act (FOIA), in principle, guarantees citizens' access to information held by the government. This chapter traces the historical evolution of societal demands for a FOIA, and the legislative process that led to its enactment. It then examines how Japanese FOIA has been implemented, and its impacts. Placing this analyses in international comparison, the chapter shows that Japanese FOIA was enacted relatively late among OECD countries, and its legal scheme is relatively weak among the FOIAs enacted around the same period. The chapter ends with a discussion about issues to be addressed in future.

1. Introduction

In May 1999, the Diet passed the Act on Access to Information Held by Administrative Organs. The Act is a type of law generally known as a freedom of information act (FOIA). In principle, FOIAs guarantee citizens access to information held by public authorities, and FOIAs are one of the major legal instruments to realize governmental transparency (Fenster 2011). Governmental transparency, in turn, has many desirable consequences: it reduces corruption (Reinikka and Svensson 2003, Paisakuhin and Pinto 2010), makes governments more responsive to people (Basely and Burgess 2001), and promotes economic development (Gelos and Wei 2002). While some point out several undesirable consequences (Lord 2006), the benefits of transparency seem to outweigh its "dark side."

The enactment of the Japanese FOIA is part of a global trend that started around the end of the Cold War. Until the 1980s, only a handful of countries had FOIAs as national level legislation. These included Sweden (1766), Finland (1951) the US (1966), France (1978), the Netherlands(1978), Australia(1982), New Zealand(1982), Canada(1983), and Austria (1984). Since the 1990s, the number of countries enacting FOIAs has increased exponentially on a global scale. By mid- 2014, as will be shown later in this chapter, about 100 countries had a FOIA.

Situating the case of Japan's FOIA in this global trend, this chapter analyzes three questions. First, why was the Japanese FOIA was enacted only in 1999, relatively late in comparison to those of other developed nations? This chapter argues that Japan's relative tardiness in enacting a FOIA was due to governance by the Liberal Democratic Party (LDP), a conservative party founded in 1955, which maintained uninterrupted power until the early 1990s. The change of government in early 1993 created momentum that led to the enactment of a FOIA in 1999. Second, why is the legal framework of Japan's FOIA relatively weak? In the cross-national ranking that scores the legal strength of FOIAs, Japan's FOIA is 82nd out of 100 countries that have FOIAs. This chapter points out several factors that contributed to such weakness. One is that in the drafting stage of the bill, the terms of reference were mainly the pre-existing local government disclosure ordinances, which were rather conservative. Another is that conservative LDP politicians dominated the deliberation stage in the Diet. Advocates of a stronger FOIA were a minority, and lobbying activities by civic groups had little impact on LDP politicians. Third, what impact has the FOIA had on Japanese society? This chapter demonstrates that despite a handful of anecdotal success stories, citizens continue to face difficulties accessing governmental information, mainly due to legal constraints and to bureaucratic inaction.

This chapter proceeds as follows. The first section places Japan's FOIA in a comparative perspective by discussing how this legal instrument came about globally, and how Japan's FOIA

can be situated in the global map with regard to the timing of its enactment and strength of its legal scheme. The second section analyses the reasons for the late passage and the weak legal scheme. The third section turns to a discussion of implementation following passage of the law in 2001. After providing a statistical overview, the latter half of the third section enumerates frequently voiced complaints by requesters. The conclusion first summarizes the findings, and then discusses future prospects in making the Japanese FOIA more effective.

2. Japan's FOIA in Comparative Perspective

This section outlines the background to succeeding sections. It first gives a brief history of FOIAs internationally, and then discusses comparative timing of enactment and strength of the Japanese FOIA. The section continues with analysis of the seven sub-dimensions of FOIAs to further illustrate the strength and weakness of the 1999 Japanese FOIA in comparative perspective.

2.1. The Rise of Transparency as a Global Issue

Governmental transparency has become a global issue since the 1990s. Many international organizations, such as the United Nations (UN), the World Bank (WB), and the Organization of Economic Corporation and Development (OECD) started addressing the issue of transparency at about this time. Several factors explain this trend. First, the end of the Cold War in 1990 allowed the global policy community to shift its attention from ideological rivalry to good governance, which included the issue of governmental transparency as a solution to corruption and other inefficiencies. Second, the Asian Financial Crisis of 1997 also made policy-makers realize the importance of transparency in financial transactions. After this crisis,

many international organizations urged national governments to increase transparency, including the enactment of a FOIA.

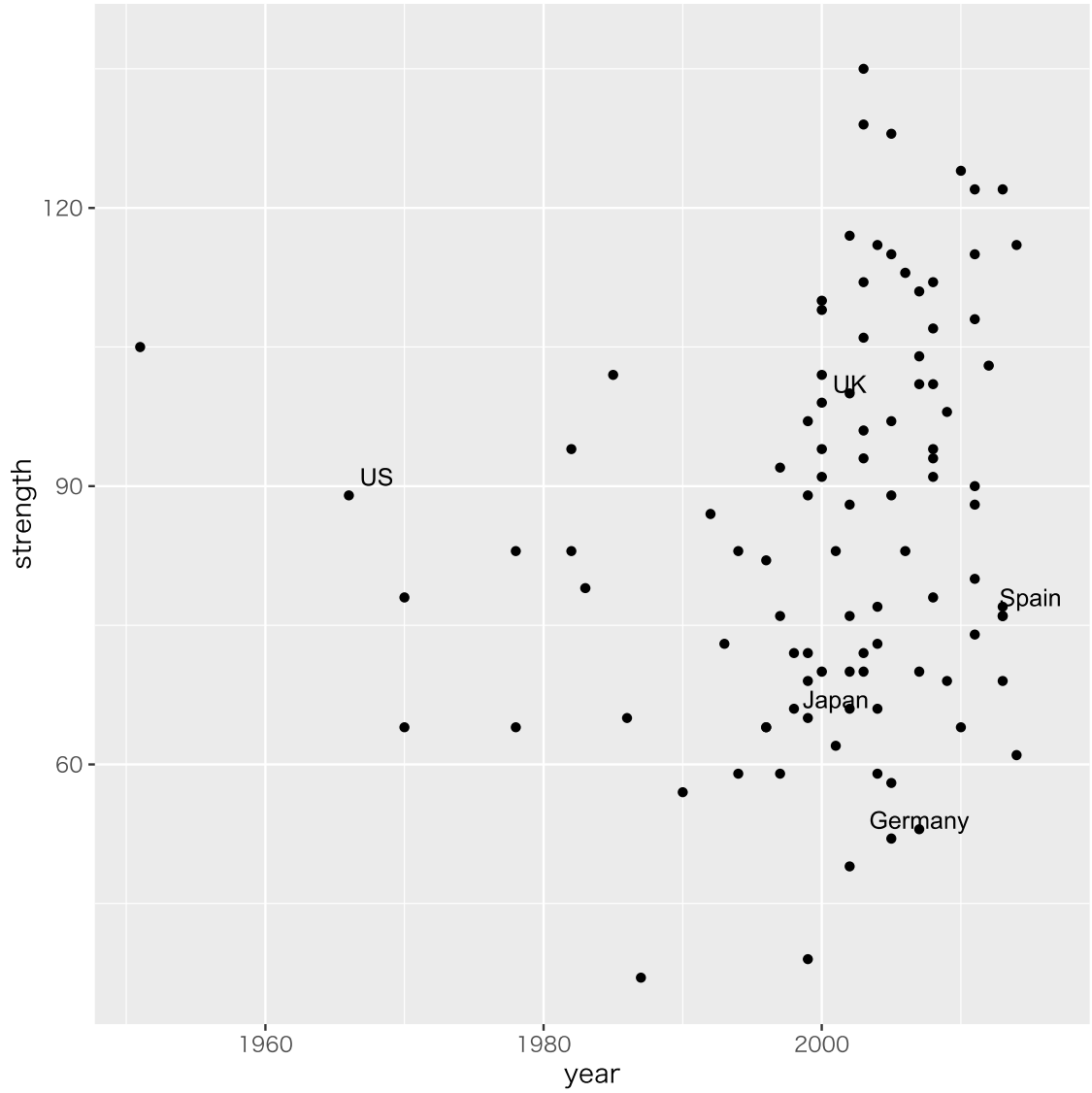
FOIA is a generic term used for national legislation that allows citizens access to government held information. Usually, information disclosure of private entities is beyond scope of this law, although whether or not to include private entities providing services that are usually carried out by public entities is still a matter of contention among FOIA experts. Laws disclosing the information of public entities can be provided at various levels of governments, from municipal to national levels. This chapter is mainly concerned with freedom of information laws at the national level.

The history of national level FOIAs dates back to Sweden's Freedom of the Press Act in 1766. Aimed at establishing the freedom of press, the Swedish law in principle abolished governmental censorship of pre-publication, admitted the freedom of distribution of reprints of public documents to citizens, and protected the right of citizens to access public records. The Swedish Freedom of Press Act was a byproduct of the era of enlightenment when liberal ideas were popularized among intellectuals. However, the law was repealed once the king's supremacy was reestablished in 1772 (Manninen 2006, p.52). During the era of absolutist states and the successive two World Wars, most governments prioritized state secrecy over governmental transparency. The United States' Freedom of Information Act of 1966 is widely considered as the harbinger of the modern FOIA with many countries following suit. In the 1970s and 80s, several other industrialized nations enacted FOIAs, but the vast majority did not join the club of FOIA countries until the end of the Cold War in 1990.

As of 2014, 100 countries have FOIAs. Figure 1 plots the countries that have enacted FOIAs and the "strength" of their legal frameworks. The measurement methodology is developed by two NGOs, the Center for Law and Democracy and Access Info, located in Canada

and Spain respectively, hereafter called the CLD rating. The CLD rating provides an overall numerical score for each country's FOIA based on the assessment of seven categories discussed below. The categories chosen are based on the international standards developed by UN along with human rights NGOs (Article 19, 2006). The rating shows that as a general trend, the number of countries enacting FOIAs has increased dramatically since the 1990s. At the same time, it also reveals that those countries enacting FOIAs in more recent years have tended to enact stronger FOIAs.

Figure 1. The Enactment/Revision Year and Strength of FOIAs



Source: Compiled by the author based on Center for Law and Democracy, n.d.

Locating Japan's FOIA in international comparison, Figure 1 reveals that, first, the timing of enactment was relatively late, especially as one of the developed nations. Most other OECD countries had enacted a FOIA before Japan did so, except for the UK (2000), Germany (2005),

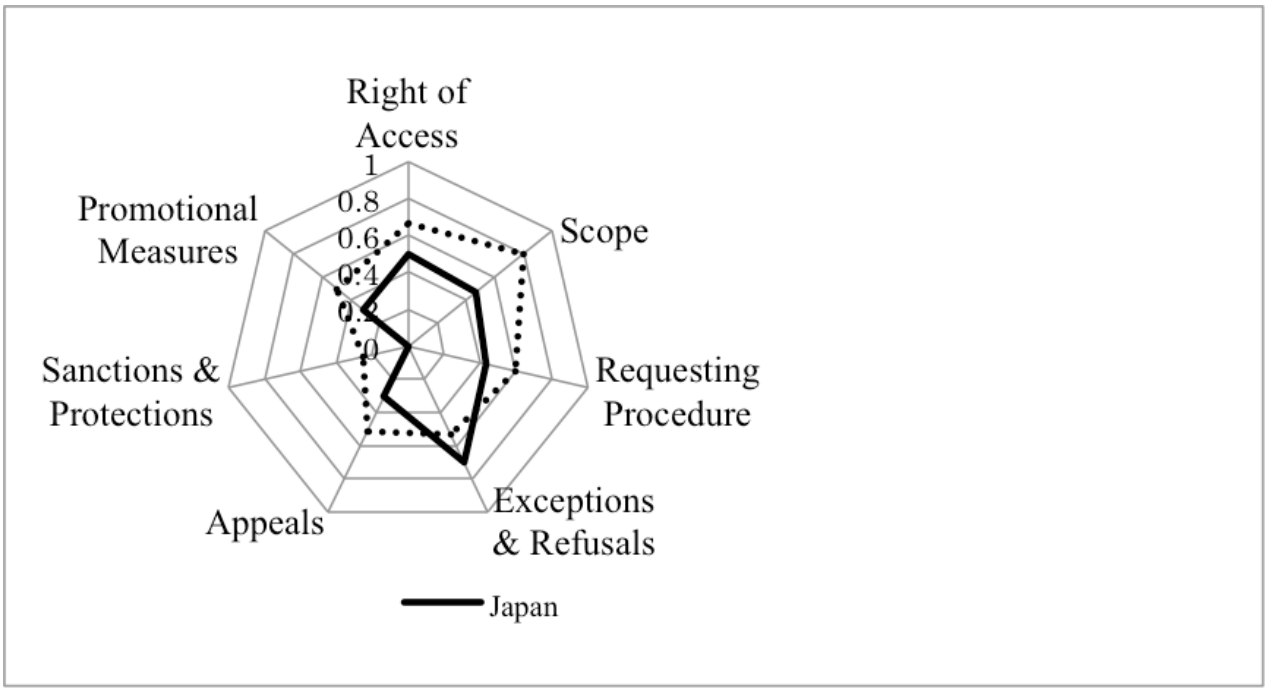
and Spain (2013).[1] Second, the figure shows that the Japanese FOIA has a relatively weak legal framework. Japan's FOIA scores 65 points out of the theoretical maximum of 150 points, while the median value for 100 countries is 83. Out of 100 countries, Japan ranks 82nd.

2.2. The 1999 Information Disclosure Law

Figure 2 breaks down the overall score of Japan's FOIA into seven dimensions, which form the basis for the total score in the CLD measure. The figure also shows the median value of 100 countries for each dimension as a point of reference. It reveals that Japan's FOIA scores lower than the world's median except in the dimension of exceptions and refusals. Details of each dimension are discussed below.[2]

[1] The OECD countries here refer to the original OECD members since the 1960s.
[2] The Act on Access to Information Held by Administrative Organs is available at: http://www.japaneselawtranslation.go.jp/law/detail/?id=99&vm=04&re=01 (accessed December 1, 2014).

Figure 2. The Breakdown of Japan's 1999 FOIA Rating



Source: Compiled by the author based on the CLD rating (Center for Law and Democracy, n.d.).
Note: Scores for each dimension are adjusted for a minimum of 0 and maximum of 1.

(1) Right of Access (2/6)[3]

The 1999 FOIA does not include the phrase "citizens' right to know" in requests for disclosure. The law only recognizes the "right to request disclosure" (Article 1), thus scoring only 2 points out of maximum score of 6. Whether to include the "right to know" phrase has been a point of contention since the preparatory stage of the bill; how it failed to be included is discussed in Section 2.2.

(2) Scope (8/30)

In terms of the type of requesters, the Japanese FOIA is inclusive. Article 3 provides that

[3] The numbers in parentheses denote the score for Japanese FOIA against the theoretical maximum. Same for (2) to (7).

requests can be made by any person, which means that not only Japanese citizens, but also corporations and foreigners can request information from the Japanese government. However, the law has a relatively restricted scope with regard to the entities and the types of materials to which the right of access applies. As for the entities covered under the FOIA, the executive branch, namely, the ministries, agencies, and subsidiary bodies they establish, is included. However, the FOIA does not apply to the legislature and the judiciary. Also, private bodies that perform a public function and/or private bodies that receive significant public funding are excluded. The types of materials that can be requested are limited to documents produced by the agency, while internal documents are excluded. The law refers to "documents," rather than information (Article 2, Chapter 2). This implies that governmental entities are not required to produce documents upon request based on the information they hold.

(3) Requesting Procedures (14/30)

The Japanese FOIA contains some features that are considered characteristic of strong legal schemes: requesters are not required to provide reasons for their requests; there are fee waivers for requesters with financial difficulties (Article 16(3)); there are no limitations on or charges for reuse of the information received from public bodies; and public officials are required to provide assistance to requesters (Article 4(2)).[4]

At the same time, the law fails to provide the following features that are generally considered desirable. First, the regular charge per filing a request is 300 yen (3 US dollars), and the fees for delivering documents are based on the actual volume and methods. In the case of photocopying, it is 20 yen (20 US cents) per page. This pricing scheme can be very costly

[4] Article 4 (2) provides that the head of the administrative organs must make efforts to provide information to requesters even when there is a deficiency in the request format.

depending on the number of documents to be provided.[5] Second, the requirement of responding within 30 working days or less is relatively long in international comparison.[6] In addition, the head of the administrative organ is given discretion to extend the response up to 60 days when there is a justifiable reason to do so (Article 10 (2). Further, Article 11 provides that the head of the administrative organ can, when the number of documents to be disclosed is massive, decide to extend the limit of response to "within a reasonable time period." Third, requests must be submitted in writing (by mail), and other types of requesting methods, such as oral or Internet based, are not mentioned.

(4) Exceptions and Refusals (21/30)

The Japanese FOIA's exemptions to the right of access are fairly consistent with international standards. Internationally recognized permissible exceptions include: national security; international relations; public health and safety; the prevention, investigation and prosecution of legal wrongs; privacy; legitimate commercial and other economic interests; management of the economy; fair administration of justice and litigation privilege; conservation of the environment; and legitimate policy making and other operations of public authorities (Article 19 1999). The Japanese FOIA's scope of exemptions falls within these categories (Article 5). Also, the law provides for a harm test and a public interest override. The former refers to a test to see if disclosure of the requested information poses a risk of actual harm to a protected interest; if it does, the request may be refused (Article 5 (2)). The latter means that when the head of the administrative organ recognizes the need for disclosure in the public interest, he or she can disclose the document in question if it contains information that falls under

[5] Since 2006, due to the revision of Enforcement Order of 1999 FOIA, documents can be recorded in such digital devices such as CD-R and this can be sent in lieu of photocopied papers

[6] Less than 20 days is recommended in Article 19's model law (Article 19 1999).

the exempted category (Article 7).

The Japanese FOIA is weak in that it does not specify the standards to be followed concerning information disclosure in relation to other legislation. In other words, it is not clear whether FOIA trumps restrictions provided in other legislation. Also, when the head of the administrative organ decides not to disclose information, he or she only needs to inform the requester of that decision, but not the legal grounds and reasons for the refusal (Article 9(2)).

(5) Appeals (14/30)

Requesters have the right to lodge an external appeal with an independent administrative oversight body, the Review Board, although there is no internal appeal, that is, to a higher authority within the public authority that first refused access, before proceeding to an external appeal. The decisions of the Review Board are consultative in nature, which means they do not have legally binding effects. The 9-member Review Board is an institutional setting found only in Japan (Uga 2000, p.73). While it is limited to advisory status, the Board is deemed a third party independent organ since the Prime Minister appoints its members.

The Japanese FOI appeals process is rated as relatively weak for having the following features. First, there is no internal appeal, which means to lodge complaints to a higher authority within the public authority that first refused access or failed to comply with the law before bringing the case to an external appeal process. Having an internal appeal procedure would reduce burdens involved in the appeals process for requesters. Second, there is no clear mention of procedures in dealing with external appeals, including the timelines.

On the second point, some improvements have been made at the level of ministerial-level regulations; thus the actual score should be higher. In 2005, the Ministry of Internal Affairs and Communications issued a memorandum as a mutual understandings among administrative

organs, which stipulated that the agencies shall make efforts to carry out the process of review, stating that the appeals shall reach the Review Board within 30 days after registering the complaint. Also, the same memorandum asserted that for the cases deemed reasonable to disclose, the Review Board should make decisions within 30 days after the complaint was received, with other cases to be decided within a maximum of 60 days. It also stipulated that the decisions of the Review Board, including the reasons behind the decisions, must be published annually (*Gyosei Kanri Senta* 2006).

(6) Sanctions and Protections (0/8)

The Japanese FOIA's weakest dimensions in international comparison are sanctions against administrative organs and protections for whistleblowers. Requesters not satisfied with the disclosure decisions can bring the case to the court in accordance with the Administrative Case Litigation Law, which regulates litigation against administrative organs in general. However, the 1999 FOIA does not include any sanctions on those who willfully act to undermine the right to information, including through the unauthorized destruction of information. Also, there is no system for redressing the problem of public authorities that systematically fail to disclose information or otherwise underperform. The members of the Review Board and its staff are not granted legal immunity for acts taken in pursuit of their mandate. Another important omission is the lack of so called whistle blower protection. The law does not include any mention of protection for those who, in good faith, reveal wrongdoing.

(7) Promotional Measures (5/16)

The law itself does not provide any measures to promote access to governmental information, such as a dedicated officer or unit responsible for such purposes; thus the Japanese

FOIA scores relatively low on this aspect. However, efforts are being made at the level of the ministerial order. In 2000, the Enforcement Order of the 1999 FOIA provided that the Ministry of Internal Affairs and Telecommunications shall set a general window to provide information on the law and to assist requesters. At the same time, under the Order, each ministry and agency is required to have an information disclosure window.

Overall, in comparison to FOIAs around the world, the Japanese FOIA is weakest in the aspects of scope and sanctions/protections. The law covers only the administrative organs and not the legislature, the judiciary, or public corporations, and it lacks provisions sanctioning non-compliance and providing whistleblower protection. Other seemingly weak aspects, such as the appeals process and promotional measures, are lacks in the provisions of the law itself, but some efforts are being made at the level of administrative orders.

3. The Politics of Legislating Japan's FOIA

Two questions are addressed in this section. First, why was Japan's FOIA enacted relatively late in comparison to other OECD countries, and despite the existence of civic demands since the 1960s? Second, why is the legal scheme of the Japanese FOIA legal scheme relatively weak in comparison to that of FOIAs enacted in other countries during the same approximate time period? Strictly speaking, due to the nature of research design[7], the analyses in this section cannot identify the ultimate causes giving rise to these questions; instead, the aim of this section is to point out important political circumstances of interest that led to the outcome.

[7] The problem here is the small number of cases. Two cases (pre-enactment Japan and post-enactment Japan) are compared for the analyses of the timing, and for the analyses of the weakness of legal contents, there is only one case.

3.1. Why Was Japan's FOIA Enacted Relatively Late?

The idea of enacting a FOIA in Japan started in the 1960s. The legislation of FOIA in the United States in 1966 stimulated the discussion among Japanese legal scholars and concerned citizens about the need for a similar law in Japan[8]. Domestic social and political problems also created demand for a FOIA. With the increasing problems associated with consumer goods, the Homemakers Association (*Shufu Rengokai*) became active in requesting minutes of policy-making meetings held by government bodies that regulate health and other products. The Japan Consumers' Association publicly demanded enaction of a FOIA in the context of obtaining safety information about consumer goods (Akiyama 1997, p.9). Political scandals in the 1970s also galvanized the demand for a FOIA. For example, the Nishiyama Case addressed the issue of citizens' right to know. In this incident, Takichi Nishiyama, a journalist, was convicted of revealing state secrets concerning a deal between Japan and US on the reversion of Okinawa in 1972. Another major example was the Lockheed Incident, when former Prime Minister Kakuei Tanaka was arrested in 1977 for accepting bribes from the Lockheed Corporation as payment for influencing All Nippon Airways to purchase Lockheed jets. This scandal revealed a large gap in the degree of governmental transparency between the US and Japan in releasing documents concerning the transactions. Prompted by these incidents, the Japan Civil Liberties Union (JCLU), a non-government organization devoted to protecting civil liberties in Japan, prepared and published a draft information disclosure law.

In the 1980s, the first citizen group dedicated to advocating enactment of a FOIA, the "Citizens Movement for an Information Disclosure Law (hereafter the Movement)," was born. It was a network of various NGOs and individuals.9 The Movement issued two documents: one

[8] About the history of the movement calling for a FOIA in Japan, see Miyake (1999) and Uga (2000).
[9] The member NGOs included JCLU, the Japan consumers' association, the Association of Housewives, environmental groups, labor unions, scholars and journalists.

was called "The Declaration of the Right to Information Disclosure" and the other was "The Right Fundamental Principles of Information Disclosure" in 1981 (Japan Civil Liberties Union n.d.).

The local governments were quick in addressing the citizens' demands to enact a FOIA. In 1982, Kanayama-cho, a municipality in Yamagata prefecture, issued an ordinance on public records disclosure. In 1983, the legislative assemblies of Kanagawa Prefecture and of Saitama Prefecture, both of which are near Tokyo, passed information disclosure ordinances. Other local governments followed suit in succeeding years. By 1998, all prefectures had a FOIA (Ito 2002).

At the national level, the 1980s also saw FOIA become an issue among politicians. In the 1987 general election, all opposition parties included FOIA among their campaign issues (Ito 2002, p.95). In the 1987 general election, the LDP failed to obtain a majority of seats, and the New Liberal Club's external support allowed them to form a Cabinet led by Masayoshi Ohira. Since the New Liberal Club included enactment of a FOIA in the coalition agreement with the LDP, Ohira publicly supported enaction of a FOIA (Ito 2002, p.95). However, Ohira's sudden death, and the following general election that gave a landslide victory to LDP led to the disappearance of the FOAI agenda from LDP's policy priorities.[10] FOI bills were submitted by opposition parties on several occasions both at the lower and the upper chamber of the Diet, but none resulted in passage of a law.[11]

[10] In May1980, the cabinet approved a "measure to improve the provision of information" at a cabinet meeting, and in October of the same year, every ministry and agency was instructed to provide a desk for citizens to inspect government information. However, there were no official standards for disclosure, or any legal sanction, and little impact was felt. On May 27, 1987, the Cabinet issued an order entitled "Measure to Improve the Service of Providing Information" that laid out procedures for releasing public documents, indexing these documents, establishing a desk for document inspection, and transferring them to the national archives.

[11] At the lower house, the Democratic Socialist Party submitted the Public Document Displeasure Law bill in 1980, and the Communist Party and the Socialist Party respectively submitted a Freedom of Information bill in 1981. Komei, Democratic Socialists, New Lib Club, and Socialist Democrats jointly submitted a FOI bill in 1985. In 1993, before the collapse of LDP government, 6 parties and groups including the Socialist, Komei, the Democratic Socialists submitted a bill. In the upper house, since the 1989 election, LDP lost the majority status. In January 1991, the Socialist, Komeito, Socialist Democratic and Rengo Parties jointly announced a bill on public disclosure of

The change in government from LDP to a non-LDP led multi-party coalition in the early 1990s created momentum for enacting a FOIA at the national level. In July 1993, following a parliamentary vote of no-confidence that brought down the LDP government, a coalition government led by Prime Minister (PM) Morihiro Hosokawa took office. The coalition memorandum among the 8 parties included the promotion of information disclosure. Hosokawa, as governor of Kumamoto prefecture, had enacted an information disclosure law, and was personally supportive of the agenda (Ito 2002, p.97). Shortly after the launch of the coalition government in August of 1993, he formed a working group for legislating an FOIA in December of the same year, and in 1994 February, a cabinet meeting decision included a plan to submit a FOIA bill in the succeeding year. However, Hosokawa announced his sudden resignation in April 1994.

The succeeding government led by PM Murayama of the Socialist Party, in coalition with the LDP and *Sakigake*, did not proceed to enact a FOIA, but instead passed a bill on Establishment of the Administrative Reform Committee. The Reform Committee was tasked to "investigate the matters concerning the enactment of an information disclosure law and other related institutions" within two years following the passage of the law (Article 2(4)). It should be noted that the bill had no specific mention of the enactment of a FOIA. According to a newspaper report, the coalition could not explicitly agree on the enactment of a FOIA because one of its coalition partners, Shinseito, whose members were mostly former LDP politicians, rejected the idea (Yoshimuta 2012, p.408). Another reason for the delay, according to Ito (2002, p.97), was that the Management and Coordination Agency within the Ministry of Interior

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administrative information. In June 1993, again, the Socialist, Komeito, and the Democratic Socialist, together with three small new parties, jointly submitted a bill on information disclosure. However, the upper house was dissolved in the same month; thus the bill expired.

encouraged postponement of a FOIA because the agency allegedly believed that justifying the need for a FOIA as a part of the administrative reform agenda would make it easier to achieve consensus among the ministries as well as among citizens. The bill passed in 1994. Within the Administrative Reform Committee that was formed upon enactment of the law, a Subcommittee on Administrative Information Disclosure (hereafter the Subcommittee) was created and started its task of studying and proposing a national freedom of information law after March 1995. Among the government appointed 13 Subcommittee members, a retired Supreme Court justice became the chair, and members included administrative law scholars and other experts on the issue. The final report of the Subcommittee submitted to PM Ryutaro Hashimoto in November 1996 recommended that the government enact a FOIA.

However, the cabinet did not act on the final report of the reform committee for 14 months, until it submitted the bill on Information Disclosure Held by Administrative Organs to the Diet in April of 1998. Some attribute this to PM Hashimoto's lack of personal enthusiasm for the issue of FOIA (Yoshimuta 2012, p.414). After almost one year of Diet deliberation, on May 7, 1999, a plenary session of the House of Representatives passed an amended bill, Japan's first national-level information disclosure law. The law has been enforced since 2001. Since the housewives association first started demanding information disclosure, it took almost 30 years to enact a FOIA.

The above chronology of events suggests that the long reign of a conservative party, the LDP, is a major reason why Japan enacted a FOIA no earlier than 1999. Societal demand for a FOIA had existed since 1960s, but the influence of those making the demand—citizen groups and the opposition parties—was limited until the launch of the non-LDP Hosokawa government in 1993. Yet the 1993 government change did not immediately lead to the enactment of a FOIA; it took another 6 years. After 1994 (until 2009), the LDP returned to power and could have killed

the bill, but did not. Several reasons can be suggested for this development. First, once the Subcommittee on administrative information disclosure was appointed in 1995, its existence created legitimacy for enaction of a FOIA as its activities were closely monitored by journalists and citizen groups; thus it was hard for the LDP to withdraw the plan. Second, although the LDP was the solo ruling party from November 1996 until the time of FOI enactment, it had external coalition agreements with the Social Democrats and *Sakigake*, both supportive of FOIA enactment. Hashimoto and Obuchi, LDP prime ministers during this period, would have no doubt considered that cancelling the bill was not politically sound for maintaining cooperative relations with these two small parties. Third, the newly adopted electoral system, the mixed proportional system combining the single member district tier and the proportional representation tier, may have influenced LDP leaders to support policies of "programmatic" nature (Yoshimuta 2012, p.414). The previous SNTV-MMD system was known to promote the "personal vote," in which a candidate's individual characteristics were emphasized over his or her party's policies.[12] It is likely that the new electoral system created an incentive for LDP leaders to promote broadly applicable policy issues to boost their party reputation.

3.2. Why Is Japan's FOIA Relatively Weak?

As discussed in the previous section, the Japanese FOIA ranks 85th among 100 FOIAs around the world with regard to the strength of the legal framework. In a broad context, the weakness of the legal framework can be attributed to the lack of international pressure to enact a strong FOIA, unlike the cases of some developed and/or newly independent countries where the influence of international organizations such as the World Bank resulted in enactment of a strong

[12] SNTV-MMD creates such incentive for big parties such as LDP because one party tends to field several candidates in the same district. Those candidates tend to compete on the basis of their personal attributes, rather than relying on party label. Thus the role of policy in electoral campaign is relatively minor in this system.

FOIA; an example is post- Suharto Indonesia which enacted one in 2008 (Aug 2014).

This section focuses on domestic political reasons for weakness of the legal framework, by dividing the legislation process into (1) the agenda setting stage and (2) the Diet deliberation stage. As mentioned in the previous subsection, the Subcommittee on Administrative Information Disclosure first prepared the FOI bill. It started meeting in March 1995, and after 57 meetings submitted a final report to PM Hashimoto in November 1996. As the FOI bill was based on this final report, the Subcommittee preparation process of the final report is considered as the agenda setting stage. The deliberation stage was the 11 months of Diet deliberation, from the April 1998 submission to the May 1999 passage. Below, the major actors involved, their preferences, and their power balances are analyzed.

Agenda Setting Stage

The major arena of the agenda setting stage, the Subcommittee on Administrative Information Disclosure, was dominated by conservative forces (Tsuruoka and Asaoka 1997, p. 11-12). The Chairperson, Reijiro Tsunoda, was formerly a civil servant of the Ministry of Internal Affairs before becoming a Supreme Court Justice. Other "private sector representatives" were also former civil servants. Among the 13 members, only three clearly advocated a more progressive FOIA: a lawyer and two legal scholars.[13] In addition, the Management and Coordination Agency served as the secretariat for the Subcommittee and prepared the meeting agenda. According to Tsuruta and Asaoka (ibid), then PM Murayama intended to appoint a private sector person as the secretariat, but this plan was denied by the LDP, the larger coalition partner.

The Subcommittee held many public hearings, which created the appearance that it was

[13] They were Mikio Akiyama (lawyer), Masao Horibe and Koji Sato (law professor, respectively).

open to various types of opinions. Attendees included, for example, representatives of the prefectural governments that already had FOI ordinances, journalists, trade unions, lawyers associations, law scholars, and NGOs such as the housewives associations and the Citizen Network Demanding for FOI Enactment.

However, judging from the contents of the report, the voices of civil society groups did not influence the 13 Subcommittee members. As evidence, on the day when the interim report was made public, the Japan Lawyers Association issued a public statement expressing their disappointment. Specifically, the lawyers association pointed out that the interim report provided a wide scope of exemptions on the grounds of privacy concerns as well as "future possibilities of causing trouble in carrying out administrative tasks." [14] It also stated discontent about the provision that exempted administrative organs from revealing whether or not requested documents existed. These points were also absent in the final report. Other stipulations demanded by NGOs for inclusion in the report were the "right to know" and free access fees.[15] Again, the final report failed to reflect their demands in these respects.

In sum, the conservative forces had the upper hand in the agenda, setting the stage and creating a relatively weak legal scheme for a FOI bill. The majority members of Subcommittee had conservative backgrounds, and the public hearings did not function as a venue to materialize civic groups' demands such as fewer exemptions and free access fees in the final report.

Deliberation Stage

The cabinet bill, sponsored by the coalition government of LDP, Socialist Party and *Sakigake* Party, was submitted to the Diet in April of 1998.[16] It was first referred to the

[14] http://www.nichibenren.or.jp/activity/document/statement/year/1996/1996_21.html (accessed December 1, 2014).
[15] Minutes on June 23rd, 1995, May 31, 1996.
[16] Bill on Disclosure of Information held by Administrative Organs（Cabinet Bill 102, the 412th Diet）. Two months

Committee of the Cabinet in the House of Representatives. Around the same time, opposition parties submitted two bills on information disclosure that were referred to the same committee. One was a bill sponsored by three opposition parties, namely, *Shinshin*, Democratic Party of Japan (DPJ), and *Taiyo* in April 1998.[17] The Communist Party submitted the other bill in June 1997.[18] The report produced by the Cabinet Committee was approved by the plenary session of the House of Representatives without substantial change; the lower house bill was then transferred to the Committee on Internal Affairs and Communications in the House of Councilors for deliberation. The minutes of the committee meetings at both chambers reveal that the debate took place using the cabinet bill as the basic point of reference, while using the two opposition bills as occasional references. Table 1 lists the salient points of debate and differing provisions of the Cabinet bill, two opposition bills, and the final FOI law on these points.

later, the Cabinet submitted a related bill called Bill on the Related-laws concerning the Act on Disclosure of Information held by Administrative Organs (Cabinet Bill 103, the 412th Diet).

[17] Bill on Disclosure of Administrative Information, submitted by Tetsuo Kitamura and 5 others, the 412th Diet, Bill No.11.

[18] Bill on Information Disclosure submitted by Yoshiaki Matsumoto and one other, the 411th Diet, Bill No.5.

Table 1. Comparison of Salient Points in Three FOI Bills and the Final Law

Points of Contention	Cabinet Bill	Three Party Bill	Communist Party Bill	Final Law
(1) "Right to Know"	Not included	Included	Included	Not included
(2) Coverage	Administrative organs only	Including Special Public Corporations	Including Special Public Corporations	Administrative organs only/ a separate law to be enacted for Special Public Corporations
(3) Exempting individual names of public officials	Title only	Title and name	Title and name	Title only
(4) Glomar denial	Included	Not included	Not included	Included
(5) Exempting decision-making process documents	Excluded	Not included	Not included	Excluded
(6) Litigation jurisdiction	Only the Tokyo District Court	Any district court	Any district court	Eight appellate court

Source: Compiled by the author based on Miyake 1999, p.225.

(1) Right to Know

Whether to include the phrase "right to know" in the law was one of the frequently raised issues after preparation of the Subcommittee report. Article 21 of the Japanese Constitution guarantees freedom of expression, but does not have a concrete phrase protecting the right to receive information from the government. Meanwhile, the Supreme Court decision in 1969

recognized a "right to know" of the citizens. After many deliberations on the issue among the members, the Subcommittee did not include the phrase in its final report.

Following the Subcommittee report, the Cabinet bill dropped the "right to know" phrase, contending that statement of the law's purpose as the "ideal of the sovereignty of the people" fulfilled the constitutional basis for enaction of a FOIA. In rebuttal, opposition parties as well as the NGOs advocated the inclusion of the "right to know" phrase. Their argument was that the presence of this phrase would promote its use by citizens, and constrain the government from resorting to exemptions. After deliberation, the Cabinet Committee approved a version of the bill that omitted the "right to know" phrase. In the upper house deliberation, however, the opposition achieved a minor success. They added a supplementary resolution urging the government to continue examining the inclusion of the "right to know" phrase.[19]

(2) Coverage

Whether or not to include the Special Public Corporations (*tokushu hojin*) under the coverage of the law was another debated issue. There were about 85 corporations of that category in the late 1990s. Civil society groups and opposition parties demanded that they be included, as they use taxpayer money in principle, and there have been corruption scandals involving such corporations.[20] The original Cabinet bill did not include the Special Public Corporations, but the final law was a compromise in that the Supplementary Provision was added, mandating that another law be adopted in two years to legislate a disclosure law covering these entities. In 2001, the Diet passed a government bill on disclosure by special public corporations.

[19] Minutes of the Cabinet Committee of the House of Representatives, February 12, 1999.
[20] Examples include the Power Reactor and Nuclear Fuel Development Corporation's *Monju* incidence, where one of the reactors called *Monju* leaked sodium and caused fire in 1995.

(3) Exempting the names of public officials

Exempting the individual names of public officials was one of the debated issues during the deliberation. The Cabinet Bill stated that identification of names should be excluded on the ground of privacy concerns, and only the title of the public official could be disclosed. The opposition bills demanded that public officials' titles and names should be disclosed. In the end, the final law (Article 5(1-c)) mirrored the Cabinet Bill, stipulating that only the job position of a civil servant can be disclosed.

(4) Glomar denial

The Cabinet Bill provided so called "Glomar denial," which refers to an administrative reaction neither confirming nor denying the existence of the requested document when answering existence/non-existence itself may cause harm. The opposition bills did not include Glomar denial, but the final product included it in Article 8.

(5) Exempting documents concerning decision-making process

In specifying exemptions, the Reform Committee report included the exemption of information concerning deliberations, examinations or consultations internally conducted by public servants, on the ground that disclosure of such information might harm the open exchange of opinions, or have other undesirable impacts. Citizens' groups have opposed inclusion of such clauses on the grounds that this type of information is of vital importance. The Cabinet Bill included such deliberations as an exemption, while the opposition bills did not. In the end, the 1999 FOIA included internal deliberations, examinations, or consultations by public servants as one of the exemption items in Article 5(5).

(6) Litigation jurisdiction

In case of a lawsuit demanding rescission of a Disclosure Decision, the Cabinet Bill merely stated that the procedure should follow the provisions of the Administrative Case Litigation Act of 1962. In practice, this meant that lawsuits against the central government had to be filed at the Tokyo District Court. Opposition politicians argued that such provisions would severely harm the interests of citizens residing outside of Tokyo. The Cabinet Committee members agreed to insert a special provision for the transfer of lawsuit (Article 21) that allows lawsuits to be transferred to one of the eight appellate court venues near the residence of citizen filing the lawsuit.[21] In addition, during the deliberation in the House of Councilors, the opposition managed to add the Supplementary Provision that some measure should be taken regarding the jurisdiction of appeals in the future.

Based on the above description of agenda-setting and deliberation process, the dominance of conservative forces can be seen as the major factor that contributed to weakness in the legal framework of the Japanese FOIA during both stages. In the agenda-setting stage, legal scholars and civil servants relied primarily on legal precedents of weak FOIAs. Two important references were to local government disclosure ordinances, and to the national laws of foreign countries such as the U.S., France, Canada, and Australia.[22] These are, in general, relatively conservative among the current pool of FOIAs around the world (see Figure 1). It is important to note that not only did the demands of the opposition lose against the interests of the ruling party, but also some of the important issues did not surface, including the sanction against non-compliance, whistleblower protection, and coverage of the legislature and judiciary in the law's scope. In the deliberation process, although civic groups lobbied to insert liberal provisions (Repeta 2011),

[21] These include local courts in Osaka, Nagoya, Hiroshima, Fukuoka, Sendai, Sapporo, Takamatsu, in addition to Tokyo. Opposition Diet members demanded, but failed, to add Naha in Okinawa as a ninth venue.
[22] Minutes of the Cabinet Committee, May 29, 1999.

most of the original Cabinet Bill remained intact in the face of solidarity by the LDP majority.

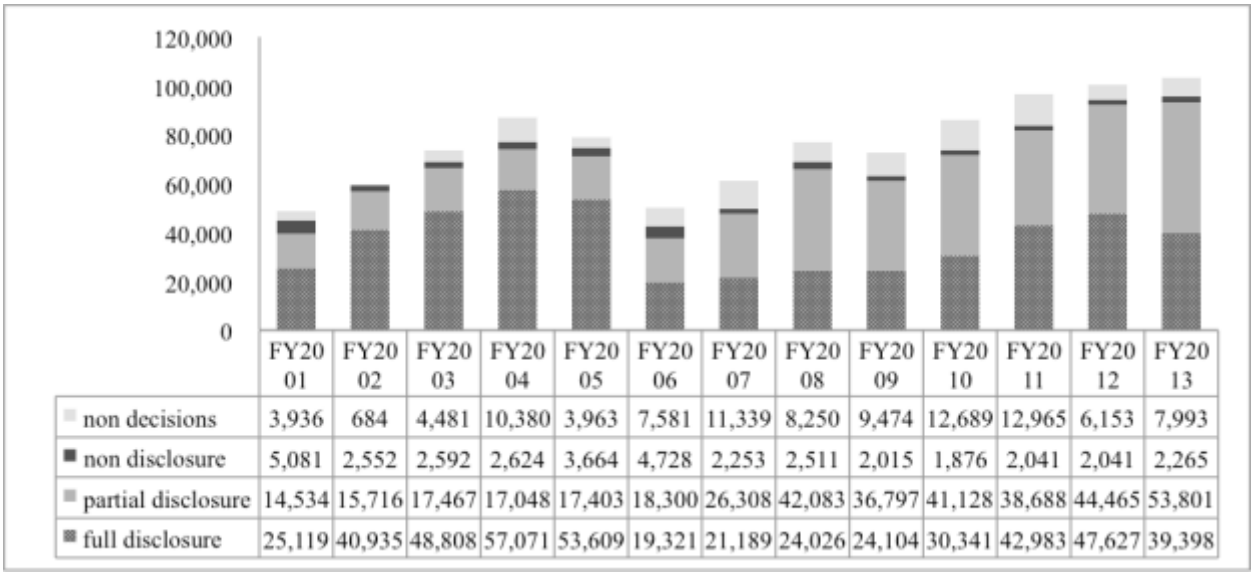
4. Implementing the 1999 FOIA

The Japanese FOIA has been implemented since April 2000. In order to evaluate the impact of the FOIA on Japanese society, this section first provides a statistical overview of how the law has been used. It then reports frequently voiced complaints by users of the FOIA.

4.1. Statistical Overview

As reported in Figure 3, the number of requests has increased over the years. In fiscal year (FY) 2001, about 48.7 thousands requests were made, and in FY 2013, the number of requests almost doubled to 103 thousand. However, with regard to the ratio of full disclosure among the requests made, little improvement is seen. In FY2001, the percentage of full disclosure was 51%, while it was 38% in FY2013. The Ministry of Land and Transportation, Ministry of Justice, and Ministry of Health usually rank high among the organs that receive large number of requests（*Soumusho* 2014).

Figure 3. Numbers of FOI Requests and Their Response Status (FY 2001-2013)



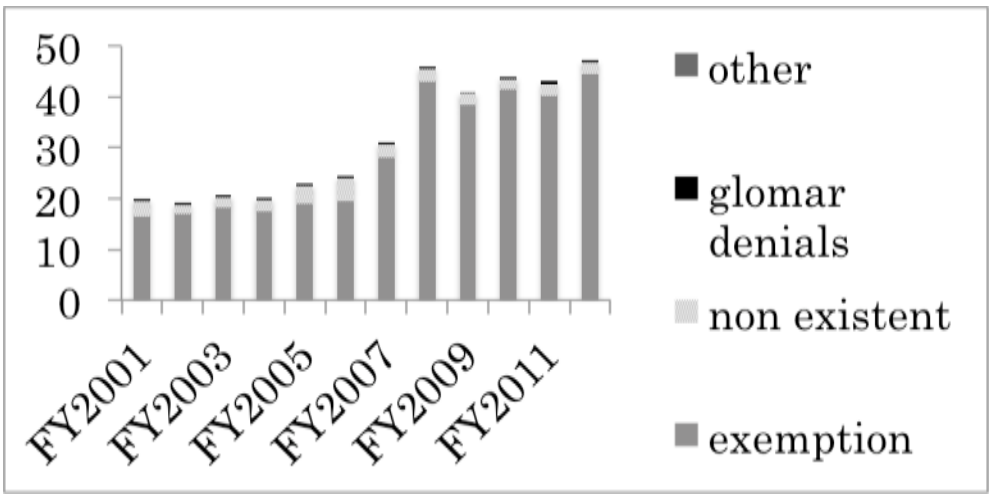
	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006	FY2007	FY2008	FY2009	FY2010	FY2011	FY2012	FY2013
non decisions	3,936	684	4,481	10,380	3,963	7,581	11,339	8,250	9,474	12,689	12,965	6,153	7,993
non disclosure	5,081	2,552	2,592	2,624	3,664	4,728	2,253	2,511	2,015	1,876	2,041	2,041	2,265
partial disclosure	14,534	15,716	17,467	17,048	17,403	18,300	26,308	42,083	36,797	41,128	38,688	44,465	53,801
full disclosure	25,119	40,935	48,808	57,071	53,609	19,321	21,189	24,026	24,104	30,341	42,983	47,627	39,398

Source: Compiled by the author based on *Soumusho* (2014).

Figure 4 reports the reasons given for the cases of non-disclosure decisions. It shows that "exemption" (the request falls into one of the exempt categories) is the most frequently used justification for non-disclosure. Among the exemption categories, the vast majority fell into the category of cases protecting "individual" and "judicial person" rights.[23] The provisions allowing for "Glomar denials" and "non-existence" were a concern during the law-making process because of their potential for abuse in justification of concealment, but the implementation record thus far shows that they have been a minor justification used by the administrative organs.

[23] Respectively, 73.5% and 76.7% of exemptions (multiple choice) were classified into these categories (*Soumusho* 2014).

Figure 4. Number and Reasons of Non-Disclosure Cases



Source: Compiled by the author based on *Soumusho* (2014).

Table 2 reports the number of objections to the non- or partial-disclosure decisions, among the cases brought to the Review Board, and of cases brought to court upon the decisions of the Review Board unsatisfactory to the requester. There are about 800 to 1400 each year in which requesters objected to the decisions of the administrative organs. Not all objections are brought to the investigation of the Review Board, as some drop the objection or are dealt with in the succeeding year. Among the decisions of the Review Board, the general trend is that a majority (60% to 88% each year) uphold the decisions made by the requested body. Only a small fraction (2% to 12%) of the decisions reversed the non-disclosure decisions. Among cases denied by the Review Board, fewer than 10% are filed at court. In comparison to the case of the U.S., the number of court cases filed in Japan is very small. In fiscal year 2014, 422 cases of FOIA lawsuits were filed in the U.S.,[24] while the latest figure in Japan is 16 in fiscal year 2012. In addition to the difference of "litigation culture," it is likely that the existence of the Review

[24]http://foiaproject.org/2014/12/22/foia-suits-jump-in-2014/ (accessed December 9, 2014).

Board functions to reduce the number of lawsuits since the Board can settle many of the disputes at the stage of investigation.

One might question the effectiveness of Review Board decisions since the Board has only an advisory status. Although its decisions are not legally binding, most of its review decisions have been complied with the governmental organs concerned. According to Nakajima (2005, p.24), from fiscal year 2001 to the end of fiscal year 2003, only 2 cases of Review Board's decisions to disclose formerly denied information were not obeyed by the administrative organ concerned.

Table 2. Number of Objections and Appeals (FY 2001-2012)

	Total Objections to a Disclosure Decision	Objections brought to Review Board	Review Board's decision			Court appeals (district court)
			Upholding non-disclosure decision	Partially denying non-disclosure decision	Denying non-disclosure decision	
FY2001	1359	384	107(60.1)	48(27.0)	23(12.9)	15
FY2002	914	703	314(57.5)	192(35.2)	40(7.3)	39
FY2003	1158	885	490(62.5)	249(31.8)	45(5.7)	15
FY2004	1367	692	470(70.5)	178(26.7)	19(2.8)	21
FY2005	744	646	473(73.3)	156(24.2)	16(2.5)	28
FY2006	800	782	415(80.1)	89(17.2)	14(2.7)	22
FY2007	1018	513	485(88.2)	55(10.0)	10(1.8)	13
FY2008	851	698	474(80.1)	91(15.4)	27(4.6)	16
FY2009	739	615	477(71.6)	166(24.9)	23(3.5)	14
FY2010	952	735	463(73.8)	131(20.9)	33(5.3)	13
FY2011	1077	697	446(76.0)	121(20.6)	20(3.4)	12
FY 2012	862	795	374(67.6)	148(26.8)	31(5.6)	16

Source: Compiled by the author based on *Soumusho* (2014).

Note: The number of Review Board's decisions is that issued in the given fiscal year. It differs from the number of objections brought to the Board because investigation of the latter may span a period of multiple years.

4.2. Impacts and Limitations

As it is extremely difficult to gauge the impact of FOIA in numerical terms, this subsection provides anecdotal stories to assess the impact of FOIA on Japanese society. One of the major achievements due to FOIA, about one year after the implementation of the law, is the disclosure of medical accidents at national hospitals. This information became public because journalists of the Asahi newspaper, one of the major newspapers, used FOI requests to obtain the information from the Ministry of Health and Labor. Although the Health Ministry initially

refused, upon the advice of the Review Board, the Ministry did release the requested information (Nakajima 2005, p.7). Other major "scoops" made possible through FOI request include: exposing the "*Amakudari*"(descent from heaven) practice among civil servants, the unaccounted expenses for postal matters, and illegal political contributions (Nakajima 2005, p.20-21).

In 2005, in accordance with the Supplementary Provision that mandated a review of implementation, the Examination Committee on the Institutional Management of the Information Disclosure Act released a report that identified problems with enforcement of the Act. This report was compiled by a team of legal scholars based on a series of public hearings and online solicitation of opinions. The report identified the following limitations: (1) expensive fees, (2) partial release or non-disclosure, and (3) delays in the appeals process (Soumusho 2005).[25] Each point is elaborated below.

(1) Expensive fees

The implementation order provides that one incident of request costs 300 yen; to view documents, 100 yen is charged per 100 pages; to photo-copy, 20 yen per page; to download data, 220 yen per 0.5 mega byte.[26] These pricing schemes were intended to deter abusive requesters who might overburden public servants. Yet many local governments set lower pricing schemes—many do not charge for requesting, 10 yen per photocopy, and so on.[27]

Under these rules, some of the requests incur exorbitant expense. For example, for the request made by a citizen group against the Ministry of Land and Transportation on the planning of Kawabegawa Dam in Kumamoto Prefecture, the Ministry charged 8400 yen (80 USD) to

[25] Other issues raised in the Report include: the purpose of the Act (whether to include the right to know phrase, types of documents covered under the Act, the proper administration of public records, procedure of lawsuit, and promotional measures.

[26] Implementation Order of the Act on Disclosure of Information held by Administrative Organs. In addition, 80 yen is charged for purchasing a floppy disk.

[27] For details of local government rules on fees, see Nakajima 2005, pp.162-163.

submit requests, an estimated 570,000 yen (5,700 USD) to view the requested documents, and 510,000 yen (5,100 USD) to obtain the photocopied materials (Nakajima 2005, p.165).

This is perhaps an exceptionally expensive case, yet there is a structural reason for such a case to occur. In the FOI law as well as in its implementation order, there is no specific rule as to how to count the number of requests. In some cases, a document request that spans several years is counted as one, and in some other cases, each year is counted as a single request. Also, a document concerning administrative activities in several locations is sometimes counted as one request, and sometimes counted separately by location. The above case of the Ministry of Land occurred due to the latter method of calculation.

One can say that the current implementation order on service fees does not meet the 1999 FOIA provision that "consideration shall be given to make the amount as affordable as possible" (Article 16(2)). The implementation order stipulates that those who live on welfare benefits can be exempted from paying access fees, or when the request has a highly public service nature. In practice, requests that were granted fee waivers were very few- 95 in fiscal year 2012. This is 0.01% of the total number of requests. There is a need to revise the implementation order in this regard (Kobayakawa 2005).

(2) Deducted Release or Non-disclosure

Another frequently heard complaint is that the needed information is not actually released, either by partial deduction, or is wholly denied. As discussed, the most frequently used grounds for exemption are privacy and corporate concerns. In particular, the privacy concern is often arbitrarily used by administrative organs to refuse information disclosure (Nakjima 2005, Chapter 4). Article 5(1) stipulates that information concerning an individual, when he or she can be identified, or when the disclosure of an individual's information is likely to cause harm to the

rights and interests of that individual, disclosure can be exempted. Nakajima (2005, p. 68-80) points out that provision protecting "the rights and interests" of individuals is often a convenient cover for not disclosing information inconvenient for civil servants.

(3) Delays in Appeal Process

As reported in Table 2, the Review Board does not redress the majority of objections. Another common complaint is the lengthy and unpredictable time required to reach a decision. In the case of FY2012, among the 923 cases of settled objections, 14.8% were settled within 90 days, 51.5% within 91 days to 1 year, 23.3% between 1 year and 2 years, and 10.4% took longer than 2 years. One reason why the review process sometimes takes longer than a year is the lack of legal provision for a time limit on the Review Board's decisions. In comparison, the 1999 FOIA stipulates that the information requests should be addressed within 30 days, except when the administrative organ in question can provide a justification for delay. In practice, around 80 to 90 % of requests are answered within the time limit of 30 days (*Soumusho* 2014). This type of specification will mitigate the complaints about the delays in appeals process.

5. Conclusions

Two salient characteristics of Japan's FOIA in international comparison are that it was enacted relatively late (in 1999), and its legal framework is relatively weak. This chapter has demonstrated that the delayed passage can be mainly attributed to the long reign by the LDP. Although civic groups and the opposition parties had demanded a FOIA beginning in the 1960s, the ruling conservative party did not consider such enaction to be in their interest. When the LDP lost power in 1993, the new coalition government included FOIA as one of the agenda items in the administrative reform package. Although the non-LDP government collapsed in less than a

year, this change of government imparted a lasting impact on FOIA in the sense that enacting a FOIA became an unavoidable agenda for the succeeding LDP governments. The reason for weakness of the legal framework can be attributed to the upper hand held by the conservative forces (mainly the LDP politicians and civil servants) over those who pushed for a stronger law.

Since enforcement of FOIA has begun, many criticisms have been raised concerning the inadequacy of the law as well as its handling by civil servants. These include the high costs of requesting and photocopying documents, high rates of non- or partial disclosure, delays in the appeals process, the lack of promotional measures, and so on. The government has made efforts to alleviate some of these flaws, yet many issues remain unattended.

The future prospect of revision for strengthening the FOIA is bleak. Between 2009 and 2012, there was a narrow window of hope to revise the law under the DPJ government. When the DPJ replaced the LDP in the 2009 election, its election manifesto included a plan for reform of the information disclosure law. The DPJ formed a task force to examine administrative transparency and appointed members supportive of strengthening the law.[28] The task force recommended that a revised law include issues that were excluded in the 1999 FOIA, such as the "right to know" phrase, and making access free of charge (Uga 2013, pp.26-53). Based upon the task force recommendation, the DPJ drafted a bill on revising 1999 FOIA and submitted it to the parliament in August 2011. However, while no action was taken on the bill, in November 2012, a general election was called and the DJP lost power to the LDP; thus the bill was dropped. Under the LDP government, which has been in place since 2012 up until the writing of this chapter, the general trend is not towards more openness but toward more secrecy. The LDP has made no efforts to revise the 1999 FOIA. Moreover, it has enacted the Act on the Protection of Specially

[28] The members include: Shibuya Hideki, Akio Nakajima, Hiroyuki Hashimoto, Shizuo Fujiwara, Masao Matsumura, Hiroshi Miyake (they were all university professors at the time of their appointment), Yukiko Miki (Information Clearinghouse (NGO)).

Designated Secrets, which opposes the principle of citizens' right to know. Under LDP rule, promotion of governmental transparency is unlikely in the near future.

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3. Open Data in Japan: Cultural Tensions Behind Policy Formation

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Abstract

Open data supports the (re)use of government-held information by non-government entities by releasing data with legal permission for reuse in formats that are convenient for users. The types of data discussed are often numeric and vector data such as statistics and maps, but the scope of data usually includes textual, image, and other types of information as well. The Japanese government began to seriously engage with open data policy in 2012, and has since made some impressive achievements. However, the economic benefits that this open data policy was expected to bring about have not yet been observed. The developments so far suggest that the Japanese government has come a long way, releasing nearly 10,000 data sets in December 2013 under a Creative Commons Attribution license, and gradually replacing terms of use for government web sites to allow for more flexible use of online material. At the same time however, discussion of these two rounds of data provisions reveals that agencies are still not very proactive in relinquishing their control over data to let anyone use them for any purpose. Open government is never easy or frictionless because a culture of openness often conflicts with the culture of government bureaucracy. The non-governmental sector too, has flourished in these past few years in the open data space. These developments counter some of the more moderate, if not pessimistic, initial expectations that were held by close observers. However, still, commercial users are not very visible. The formation of open data policies shows characteristics of interactive governance since the beginning, and the efforts are driven by general expectations and international trends. What the future holds is not yet clear, and possible reasons for the current state, especially the lack of visible commercial use cases, point toward different directions.

1. Introduction

Open data, which is government provision of data for general use, allows citizens, businesses, and other entities to access that data for their own purposes and benefits. Provision of such access is a recent development in the relationship between governments and

non-governmental actors. So far, Japan's policy formulation process in this area has been less scripted by bureaucrats and more influenced by exploratory discussions among various stakeholders than is typical of Japanese policymaking. This more inclusive approach is probably appropriate given that open data policy has to take into account a wide range of potential data users, and success of open data policy means data usage by many entities for a variety of purposes.

It is too early to evaluate the relative success of open data in Japan, but the 2011 Great Tohoku Disaster was a turning point in accelerating the perceived value of open data.

1.1. What is Open Data?

The term *open data* may need some explanation and definition before substantive discussion. As a relatively new term, *open data* began to receive worldwide attention after the Obama Administration in the U.S. launched what they called *open data*, as a part of their open government initiative. The concept entails government provision of data for general use, so that citizens, businesses, and other entities can reuse it for their own purposes and benefits. A successful example of reuse can be found in the Climate Corporation, a well-known entity among open data policy circles. The company, formed in 2006,[29] primarily provides algorithm-based disaster insurance for farmers. The Climate Corporation assesses weather-related risks, based on weather patterns, historical crop yield and loss data, weather forecasts, and so on. The payment is automated as well: as opposed to filing a claim and going through a review process, certain weather data from third parties is used to automatically trigger payment to the insured.[30] Most notably, the company was purchased by Monsanto, an

[29] The Climate Corporation (undated) "David Friedberg Chief Executive Officer," http://www.climate.com/company/leadership/david-friedberg/

[30] "WeatherBill Changes Company Name to The Climate Corporation; Appoints Former U.S. Senator Byron

agricultural conglomerate, for approximately 9.3 billion dollars.[31]

Thus, in the context of discussion in this book, we can say that open data is a policy to transform information governance of government-held data sets from an *administrative* to an *interactive* model, especially as concerns reuse. While this is a subject worthy of analysis in and of itself, the focus of this chapter is not on governance of data sets. Rather, the focus is on overall open data policy formulation at the national level – setting principles, establishing directions, drawing action plans, and drafting guidelines for management of government-held data in general.

It should be noted that the idea of opening up government data for reuse by others is not completely unprecedented – in the EU, directives on the reuse of so-called public sector information (PSI) date back to as early as 2003. In Japan, too, there have been major initiatives to provide better access to statistical and geo-spatial data. Reuse of geo-spatial data is supported by the Basic Act on the Advancement of Utilizing Geospatial Information, passed in 2007.[32] Much like open data, there was a government-wide, inter-ministry conference dedicated to this matter. A major revision of Statistics Law in 2009 led to the emphasis on reuse for the purpose of public interest.[33]

Seen this way, *open data* is a new label for a type of practice that is now nearly a decade-old. This does not mean open data, once the label is removed, is a traditional or established practice. Open data is a new global movement, inspired by global movement for greater openness in other

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Dorgan to Board of Directors" Corn and Soybean Digest, Oct 11, 2011 , http://cornandsoybeandigest.com/weatherbill-changes-company-name-climate-corporation-appoints-former-us-senator-byron-dorgan-board-d

[31] Monsanto press release Oct. 2, 2013 at: http://news.monsanto.com/press-release/corporate/monsanto-acquire-climate-corporation-combination-provide-farmers-broad-suite

[32] Geospatial Information Authority of Japan (undated) "Basic Act on the Advancement of Utilizing Geospatial Information," http://www.gsi.go.jp/kokusaikoryu/kokusaikoryu-e30004.html

[33] Ministry of Internal Affairs and Communications (undated) "About Statistics Law" http://www.soumu.go.jp/toukei_toukatsu/index/seido/1-1n.htm

fields, such as software (free software & open source movements), scholarly materials (open access), educational materials (OpenCourseWare and Open Educational Resources) and the like.[34] Thus the term *open data* means more than simply sharing data with the public. *Open data* emphasizes the role of public and other non-governmental entities, and collaboration between those entities and the government agencies.

In a more formalized manner, *open data* can be defined as provision of user-friendly data to the public for reuse with very little restriction. *Data* in this context typically means any piece of information, most importantly numeric data such as statistics, government budget and spending data, and so on. Vector data, which includes maps, is another important category. Broadly speaking, data also includes texts of legislation, reports, pictures, charts and web pages. "Very little restriction" here actually means something more specific. Most notably there is "Open Definition" which purports to define when a data set is "open" and when it is not.[35] Technicalities aside, open definition means that neither copyright and other similar legal restrictions, nor technological restrictions, apply to the given data set. Thus people are free to make use of the data for business, speech, or other purposes. Open definition therefore requires licensing to overturn legal default in copyright and possibly other laws. (Default in copyright means that reuse of someone else's work without proper permission is infringement of copyright, and therefore illegal.)

Legally ensuring the availability of data is one thing, but technologically ensuring availability is another. Open data as a policy presupposes the existence of computers, the Internet, and other electronic devices. An open data policy typically emphasizes or mandates that the data

[34] Opening up informational resources to public reuse exist in many other fields in many countries. The most famous would be Wikipedia and its sister projects developing open reference materials. Others include cinema, architectural plans, apparel design, and so on. See Bollier, D. (2009) Viral Spiral, New Press, for its early history.
[35] http://www.opendefinition.org

be published on the web, at a marginal cost, and in a file format that users can easily process and manipulate with computers. Additionally, some policies may emphasize that the data should be available for bulk download.[36] Others may emphasize that the data should be available in formats that are defined by open standards.[37]

Noting similarities and contrasts with comparable norms would be helpful here. First, as mentioned above, open data is becoming one of global movements that push for greater openness of entities, information, and/or processes. Organizations and individuals involved in open source software, open content, open education, open access, or open Internet are frequently active in the open data scene.

Open data, however, is not merely about the right to know or about greater transparency. If transparency were all that mattered, provision of viewable data online would suffice, but provision of data must include usability. More important than simply provision of data is that such data be easy to grasp, providing, for example, interactive visual interface.

It is sometimes assumed that open data necessarily means the focus would be on types of data revealing government operation. Open data may do this, but simply providing transparency in government does not constitute open data. What is important is **reuse** - anyone can process, change, combine with other data, or do other things for varied purposes other than understanding the government. Because of this, open data is not solely focused on data on government operations, such as how decisions are made, money collected and spent, and laws enforced, but also entails public provision of a vastly wider range of data. This might include for example, historical weather patterns and soil quality data that may help agricultural business. Such data

[36] See, for example, Principle 3, G8 Open Data Charter (2013) available at: https://www.gov.uk/government/publications/open-data-charter/g8-open-data-charter-and-technical-annex#principle-3-usable-by-all

[37] Lee, Tim-Berners (2009). "Linked Data," available at: http://www.w3.org/DesignIssues/LinkedData.html

therefore represent a positive use of open data practice.

2. Actors Involved in Open Data Policy

Seen as an issue of information governance, the introduction of open data policy in Japan, which took place in late 2012, was a change in how much internal information is shared with the public, and how much freedom government grants regarding use of such information by other entities, including commercial use and modification. Accordingly, the key actors shaping the change are those leading the policy development and implementation.

Through interviews and more casual interactions with open data advocates, practitioners, and researchers, it is relatively easy to find a perceived recipe for success in pioneering open data at an early stage. The introduction of open data is characterized by tension between the existing regime of information governance and a more open one to come. Before introducing individual actors in the space, it is useful to set this tension as a basic framework for understanding why certain actors are worthy of attention in the policy implementation process that brings about transformation.

Many of the pioneering governments in open data in Japan, Europe or the U.S., both national and local level, involve multiple actors. One is a key figure within the government who knows what it means to be open, typically with prior experience in or exposure to, openness movement elsewhere, and another is a team in charge of policy implementation. There also should be political leadership showing strong support for the transformation. The basic dynamics of open data are that individual government agencies often resist openness for a number of reasons. First, the transparency resulting from openness invites potential criticism and other intervention, both legitimate and less so. Second, openness also means ceding a degree of decision-making power to others. Data could now be used in wider contexts than previously.

Governments may be apprehensive, not simply because of reduced control over the use of information, but also because of potential misuse, abuse, or harm to the users and others. Undesirable use of data may open the government to potential criticism, rightly or wrongly, for allowing such harm to be incurred in some corner of the society. To overcome this governmental resistance to greater openness, the early phase of open data policy requires a strong push. Strong will of the leadership, backed by a key figure who understands the mission, and an execution team, is therefore a typical recipe for success in terms of actors in the early stage of open data.

2.1. State Actors

Reflecting the evolving nature of open data in Japan, the actors were still in flux, even for the short period between 2012 and 2014. The main state actor in the open data space was the so-called IT Policy Office of Cabinet Secretariat Office, and it, too, changed names in 2013, when it was combined with the Government CIO Office, created in 2012. The Government CIO was a newly established post for overseeing the use of ICTs within the government, including procurement and security. These players were involved in the open data policy because it cut across organizational silos –i.e. all the government agencies were expected to open their data in a concerted manner. (Editing questions: What does CIO stand for? What does ICT stand for?)

The policy decision took place at a conference called IT Strategic Headquarters,[38] and its subordinate groups. The IT Strategic Headquarters is composed of all the Ministers and some private sector members, and chaired by the Prime Minister. It was set up in 2001, when the Basic Law on the Formation of an Advanced Information and Telecommunications Network Society was enacted.[39] This body has been responsible for developing national IT strategic policy,

[38] http://japan.kantei.go.jp/policy/it/index_e.html
[39] http://japan.kantei.go.jp/it/it_basiclaw/it_basiclaw.html

spurring, among other things, a world-class broadband infrastructure deployment throughout Japan. In June 2012, it adopted Open Government Data Strategy (or E-government Open Data Strategy, if literally translated from the Japanese title of the policy document),[40] setting the principles and outline of the open data policy in Japan for the first time in document-length. The strategy document was developed by the E-government Taskforce, placed two levels down the decision chain, with an intermediary conference in between. E-government Open Data Conference of Working-Level Personnel was created December 2013, to develop detailed policies and monitor progress of open data. While some other countries, such as EU member states, have established open data through legislation, Japanese open data is based on executive decisions. When the E-government taskforce drafted the national open data strategy and IT Strategic Headquarters adopted this strategy, the majority party was the Democratic Party of Japan, and the prime minster was Yoshihiko Noda. The party suffered a huge loss in the December 2012 election, and a new administration was formed under Shinzo Abe, of the Liberal Democratic Party, marking a change from a liberal to a conservative regime. Open data, based only on executive decisions, could easily be put on hiatus, or overturned. In fact, it is customary to see the highest level IT strategy to be redrawn after the majority party changes. The Abe administration indeed did just that, but open data policies, coupled with policies for big data were given greater importance in the new overall IT strategy, the Declaration to be the World's Most Advanced IT Nation.[41] The prior national open data strategy was not abolished. On the contrary, the meeting of Working-Level Personnel Conference started with discussions on the need to accelerate the implementation of the policies.

[40] http://japan.kantei.go.jp/policy/it/20120704/text.pdf
[41] http://japan.kantei.go.jp/policy/it/2013/0614_declaration.pdf

Figure 1. Formulating National Strategy under Noda Administration

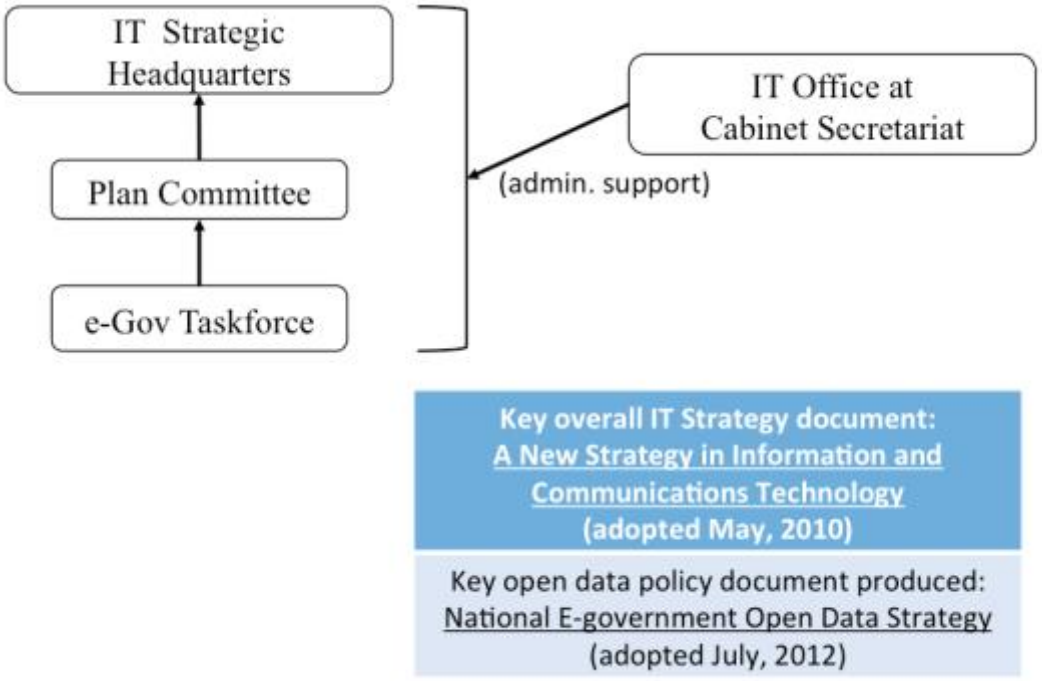
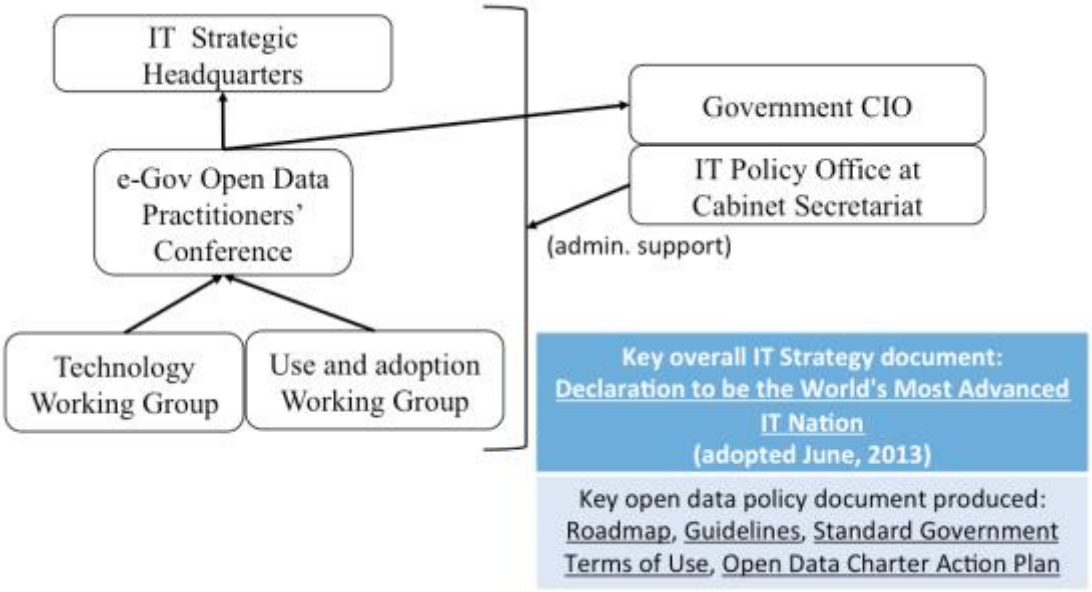


Figure 2. Implementing Strategy under Abe Administration



Referring back to the recipe for success – strong will of the leadership, backed by a key

figure and a team for execution- mentioned in the beginning of this section, the formal establishment of the government CIO[42] was a significant factor. It was widely believed that, for a number of reasons, the Cabinet Secretariat in the system of government agencies lacked power. Such weakness would work against policy implementation when the team responsible for implementation met resistance from other agencies. Government CIO was expected by some in the policy circle to empower the implementation team, the IT Policy Office of the Cabinet Secretariat.

Other public forums for policy discussion existed in relation to individual Ministries. The Open Data Promotion Consortium was supported by the Ministry for Internal Affairs and Communication, and the Public Data Working Group of IT Fusion Forum was sponsored by the Ministry of Economy, Trade and Industry. The Consortium was turned into an incorporated organization VLED, or Local Economy Organization by Open Data & Big Data.

2.2. Actors in Private Sectors

The private sector in Japan saw numerous groups form as open data drew attention. One of the earliest and most influential was OKFJ, or Open Knowledge Foundation Japan, formed in April 2012, with its existence publicly announced in July. Its strength is policy advocacy, pushing for increased openness of greater data. Active members include academics, media specialists, and technologists, some of whom have prior experience in openness movements, such as the open street map. Members were also drawn from the government conferences mentioned above, partly because the group was formed of people interested in open data policies. Equally pioneering was LODI, or Linked Open Data Initiative, incorporated in August of 2012, and evolved from LODAC, or Linked Open Data for Academia. This is a more

[42] Government CIO existed for a short while before formally backed by law.

technology-oriented group, advocating greater adoption of linked open data throughout society. This group also includes some members of the Working-level Personnel Conference and its working group on technologies, as well as forums associated with individual ministries.

Additional groups were subsequently formed by people involved in these two organizations. Code for Japan was formed in 2013, with an event celebrating its public launching in November. Many of its governing members were previously active in OKFJ. The Code for Japan aims to help and collaborate with government in ICT use, but open data is one of their strong interests. Open GLAM[43], another group, was formed to promote creation of open cultural data and archives with many people involved in LODI and some from OKFJ. Many of these people were academics, business owners, or freelance engineers. Open Spending Japan, still another group, was formed mainly from people in the Open Knowledge Foundation. It should be mentioned that some participants in the open data policy discussions from the earlier period, say, from early 2012, feared insufficient attention from private sectors. It turned out, however, that the civic sector showed a good deal of interest, as seen by the emergence of these organizations.

Some organizations existed before open data played a significant role in the formulation of norms, expectations, and policies. These were either research institutes or specialized groups, or both. Notable among them are CSIS, the Center for Spatial Information Science, specializing in geo-spatial information reuse at Tokyo University; the LOD Challenge organizers anchored in the Shonan Fujisawa Campus (SFC) of Keio University; Center for Global Communications of International University of Japan, where OKFJ's activities took place; the National Institute of Informatics, where many of the LODI people work; and YRP Ubiquitous Research Lab, headed by Ken Sakamura, a well-known professor at the University of Tokyo.

[43] GLAM stands for Galleries, Libraries, Archives, and Museums. They are sometimes referred to as memory institutions because their missions are often to collect important piece of informational works and records for preservation and dissemination.

Specialized groups include Creative Commons Japan[44] (later named CommonSphere, making Creative Commons Japan a project), which focuses on licensing issues, and the g-Contents Exchange Promotion Association of JIPDEC, Japan Information Processing Development Center, focusing on the technical and business side of spatial data reuse.

Corporate sector actors are also present in the scene. Most notably, Mitsubishi Research Institute was behind some of the key implementation projects, and served as the secretariat for the Open Data Promotion Consortium. Hitachi Consulting, NTT DATA Institute of Management Consulting, and NTT DATA, are some of the companies performing underlying research that feeds into policy discussions, or providing secretariat support for some of the government-hosted forums.

3. The History of Open Data Policy in Japan

The transformation in information governance through open data policy implementation is ongoing, and the changes may eventually prove major. The scope and magnitude of the change is not predictable. As such, the changes so far are more or less incremental. The overall direction of the transformation is spelled out to a degree, because of the international discussions and practices influencing Japanese counterparts, and the policy goals set by the relevant documents. In this section, I analyze the change in relation to the stated goals and also examine the potential for failure.

3.1. Endpoint: Benefits of Open Data

The endpoint of open data policy is increased economic, social, and governmental benefit based on data reuse. Economic benefits are relatively simple to understand. A business may

[44] http://creativecommons.jp

employ government-provided data, making their operations more efficient, or otherwise reducing cost, or developing new services or products. New jobs may be created as a result. Some of the efficiency gains are not in the corporate sector, but seen in the daily lives of citizens. They may benefit from easier access to a wide variety of relevant information when they select a neighborhood to move into, for example. They may be able to assess flood and earthquake risks better than before. Those who provide these and other benefits may or may not, in return, gain some revenue from advertisement or other ways.[45]

Government, too, may benefit from open data. A government agency may be able to make a better-informed decision exploiting data they were previously unaware of, because the data was administered by another agency, not easily locatable. Government operation and policy may be better understood by stakeholders and citizens, possibly leading to better feedback and input.

These potential benefits of open data are widely recognized both in Japan and elsewhere. The Japanese open data strategy document adopted in July 2012, recognized economic, social and governmental benefits.[46] Economic benefits were stressed by the next administration, when open data and big data policies were given greater place in the overall strategy in June 2013.[47]

3.2. Potential Failures: Supply, Demand, and Cycle of Rising Expectations

The benefits of open data are far from guaranteed – the policy could fail in a number of different, known ways. It is helpful to think of these possible failures with supply and demand side issues, and their relations.

In order for open data policies to succeed in generating these benefits, the supply of data

[45] Some applications making use of open data are provided for free without even advertisement.
[46] eGovernment Open Data Strategy (電子行政オープンデータ戦略) available in Japanese at: http://www.kantei.go.jp/jp/singi/it2/denshigyousei.html
[47] Forging the World-Leading IT Nation (世界最先端 IT 国家創造宣言) available in Japanese at: http://www.kantei.go.jp/jp/singi/it2/kettei/pdf/20130614/siryou5.pdf

must be meaningful. There are certain things that only government can do in implementing open data policies – locating data, and providing it in a usable format without legal or technological constraints. In the Japanese context, legal constraint has to do with licensing and technological restrictions with file format and meta data. A failure could result if insufficient data, either in terms of quantity or quality is available, or if available data is not useful because of legal or technological constraints. As mentioned above, governments tend to resist openness, and may want to keep data from the public, or put legal or technological restrictions on its use.

Supply does not guarantee demand or usage. Awareness, skills and talent, and/ or capital, may turn out to be insufficient at the demand side to generate use, or benefit-generating use. There could be insufficient interest on the demand side, as some worried initially. At some point, people started seeing the possibility that many events promoting usage – hackathons[48] for developing applications using data, for example, often lack applicability. While such events may succeed in raising awareness, serious service development requires dedicated engineers and investment to support it. Views differ as to whether talented engineers are available for taking up such small scale, emerging opportunities. A pessimistic view is that because many talented engineers work for major system integrators, there is insufficient talent available for the data to be used in generating benefits.

The relation between supply and demand is also quite important, because of the mutually reinforcing, chicken-and-egg like relation between supply and demand. If the supply is underwhelming, the demand is not likely to pick up. If the demand is not strong, and the benefits generated by open data policies are not obvious, governmental resistance may strengthen. If, on the other hand, a great deal of interesting data is made available in easily accessible ways,

[48] A hackathon is an event, typically held over a weekend, gathering hackers (those who can write codes) and others interested to develop a prototype or mockup of an application or a service.

demand will be stimulated, which in turn is more likely to stimulate the supply.

3.3. Two Waves of Data Provision

The first major-scale release of data came when the open data portal of the Japanese government, at data.go.jp, beta-launched with nearly 10,000 data sets in late December of 2014. The volume of the data sets grew quickly to hit the 10,000 mark, the target for the year 2014. The trial version of the data catalogue site, as it was called by the government, was a product of months of efforts by the open data team. However, calling it a lasting change in information governance may be an exaggeration. First, it seemed that the cycle of rising expectations between the supply and demand was not noticeable. There were many events, big and small, and the International Open Data Day in February 2014 saw a large participation throughout Japan, larger than in many countries around the world in terms of number of participating localities. Combined with the civic sector players' activities, there seemed to be a good amount of interest. Yet nothing like the Climate Corporation, an easy-to-understand business user of data with huge market valuation in the U.S., has emerged from it to date.

The second round of major data release started around April 2014, with the government's adoption of Government of Japan Standard Terms of Use.[49] It was meant to be adopted by all websites of government agencies. The transition is still ongoing, and the materials on those websites are becoming reusable for many purposes. The difference between this and the data portal was that the data portal contained extra meta data indicating the type of data contained in the data set, the date of data creation, and so on, to assist potential users in easy search and discovery of relevant data. So far, this second round has also apparently failed to bring substantial change.

[49] kantei.go.jp/jp/singi/it2/cio/dai57/sankou2.pdf

3.4. Beginning

The initial period of open data policy in Japan presents a different character, one that does not easily fit into the above-mentioned framework of strong governmental leadership, a key figure and an execution team. Instead, a pivotal moment was the 2011 Great Earthquake of Eastern Japan, which produced a rapid change in the Japanese government's interest in developing open data policies. Prior to the Earthquake, the idea of opening up government-administered information to the public was on the agenda, but the Cabinet Secretariat Office, in charge of developing more specific implementation plans, lacked specifics. The neglect is particularly clear when compared to other agendas such as introduction of Government CIO. The Earthquake inspired a number of dramatic uses of data for the public interest – one was the use of vehicle movement data collected by Honda, a major auto-manufacturer, combined with Google Maps, to show which roads were seemingly usable in the affected areas. Another, and perhaps the most notable example, had to do with the power management crisis resulting from the meltdown at the Fukushima nuclear power plant. The plant had generated power for Tokyo and its surrounding area. The lack of power for an extended period of time meant that some of the peak-time demands, such as summer weekdays, could not be met, possibly resulting in unexpected brownouts and blackouts. Japanese society was so dependent on a reliable power supply that shortage was a crisis of its own for institutions like hospitals, water cleaning facilities, train systems, and so forth. Tokyo Electric Power Company, TEPCO, initially declared that it would implement rolling blackouts for different areas with complicated and frequently revised schedules. This plan created further public complaints. In the midst of the uproar, TEPCO released its power supply and demand data, first in PDF, later in CSV. The release quickly led to development of a number of uses, including mobile phone

applications, real-time display of supply/ demand balance at a major web portal, and metro stations' public displays. People involved in open government experimentations- across government, academia, and private sectors- took note of these uses, giving rise to serious government engagement with open data.

4. Interaction Among Actors in Formulating Open Data Policy

Success in open data, when seen in terms of interaction among major actors in information governance, can be characterized as the successful formulation of rules, guidelines and conventions that lead to active governmental provision of data, and active use of data by private and civic sectors. It is not easy for the government sector to predict which data sets will be used by what kind of players. Policy makers also frequently point out that early involvement of future data users is a key to success in open data policy formation.

This interplay of policy makers and data users could be understood as something akin to interactive governance, departing from administrative governance that relies on existing, conventional ways of handling data. However, if global discussions and practice so far are any indication, success is neither guaranteed nor easy. To what degree, then, was policy formulation *interactive*?

Table 1. Patterns of Interaction and Success of Open Data

	Government	Potential Users
Initial	Reluctance, Lack of interest	Lack of interest/ awareness
Successful	Interest	Interest

4.1. Policy Discussion

Policy discussion primarily took place at the IT Strategic Headquarters, its subordinate Working-level Personnel Conference, and its subordinate working groups. The overall pattern of interaction was that civic, academic, and corporate sector participants were active, and government sector was very quiet. There are two main reasons for the silence. For one, the attendees from various government agencies at these conferences were not sufficiently empowered to make remarks without fearing later repercussions from their bosses and colleagues. For another, sending attendees without proper empowerment for active participation in policy discussion is a sign that government agencies lacked interest in open data.

It is possible that a lack of data users from non-governmental sectors is problematic – there are more advocates and observers than data users, and this means that some skeptical government officials remain skeptical as to the ultimate value of open data, which requires active use of data by various non-governmental players.

4.2. General Government Reluctance

More specifically, government reluctance can be seen in relation to the second round of major data release. While it was doubtless a major data release to the public, it was also a point of contention among those discussing policies.

The discussion over the development of Government of Japan Standard Terms of Use, and its subsequent adoption, demonstrates continuing reluctance, or even resistance, to opening data to the public. The Terms of Use became a subject of criticism at the Working-level Personnel Conference and by Open Knowledge Foundation Japan, when it became clear that the Terms were not compatible with Creative Commons Attribution License, (referred to as CC-BY

hereafter) because they contained some ambiguous restrictions on data reuse. CC-BY is a license adopted by an increasing number of governments around the world for open data, and Japanese government also adopted it for the open data portal when it beta-launched the web site. It meant that combining material from the data portal with material from a governmental website elsewhere, even when the Terms of Use grants permission for reuse, requires additional effort. The cause of the central issue was never clearly discussed in public, but the government wanted to introduce clauses prohibiting certain types of use, such as those critical of public policy, or threatening the safety of the state or its citizens. It was decided that the Terms of Use would be revisited at the end of 2015, thereby postponing difficult decisions to a future round. Informal discussion suggests that this is not a reflection of government-wide resistance, but rather the deep concern of one agency that affects government-wide decisions. While I have some reason to believe that this is indeed the case, there is no published evidence supporting such a view. For this reason, the matter should be left for future research. For the present, it should suffice to suggest that a government-wide attitude was apathy, or lack of resistance, rather than resistance.

Another more important indication of reluctance is evident in the way that policy can be seen in relation to the first round of data release. The open data portal features predominantly materials that have already been published online, or those that are published online as a matter of course. In other words, the government does not seem to be undertaking the labor of publishing previously unavailable data sets, even though they now understand that less control and more openness may lead to greater economic and other benefits. It should also be added that the data sets are mostly in PDF format, making them not easily reusable.[50]

In one sense, it is understandable that many government agencies lack interest in open data.

[50] Strictly speaking, PDF can be a reasonably good format for automated processing if implemented in certain ways. But most of the government PDF files as they are provided today are not this convenient kind.

Although the policy is supposed to be cross-cutting, many agencies find it only remotely relevant to their central missions. To such agencies, open data is more of an inconvenience than an opportunity for innovation.

4.3. Active Proponents within the Government

However, the fact that the open data portal reached 10,000 data sets relatively quickly, and surpassed 12,500 indicates that government agencies are willing to openly license data sets and submit meta data on them. This is far from a total standstill, or else more than 25% growth within a year would have been impossible. Similarly, while there was some resistance to an open Terms of Use, [51] the adoption is under way, making an even larger number of materials reusable for many purposes.

It is probably not appropriate at this level of analysis to treat the government as such a monolithic entity. In Japan as elsewhere, there are people and agencies with varying degrees of interest in open data. Other than the Cabinet Secretariat Office leading the policy implementation, the Ministries of Economy, Trade, and Industry (METI) and Internal Affairs and Communications (MIC) are two clear pioneers in breaking ground in policy discussion and implementation. METI had tried open government projects as early as 2011, and later launched its own data portal ahead of the beta launch of the national open data portal. In November 2014, it also started a pilot project on matching ideas and prototypes from hackathons and other events with a wider circle of people including business partners and investors. Policy discussions of vocabulary standardization, among other things, assisted government-wide discussion.

MIC has also been supporting the Open Data Promotion Consortium, which hosted

[51] Openness of rules for data use is usually judged by referring to Open Definition, developed by Open Definition Advisory Council. The definition is available at: http://opendefinition.org/od/

discussions on many important issues and drafted some of the key policy proposals on such issues as licensing and data format. Findings from some of its pilot projects fed into the government-wide policy discussion.

It should be noted that these two ministries are both related to ICT industries. They are in a position to learn about and understand open data ahead of others, and it is not a total surprise that they seek promotion of open data in Japan.

4.4. Active Involvement of non-State Actors

The policy discussions at the government level saw active involvement of non-state actors, though this development could be taken positively or negatively.

It is often said that government-convened committees and councils, such as the Working-level Personnel Conference, feature scripted and pre-planned discussion by government officials, thereby preventing real discussion.[52] Open data policy formulation process apparently does not fall into this stereotype. The participants do not mention such maneuvering, and agenda topics seem to require genuine discussion, as opposed to support for a conclusion pre-determined by government officials. Informal reports in fact suggested that some of the remarks made during policy discussion were so unexpected that the IT Office of the Cabinet Secretariat subsequently had to spend great effort to meet the suggested expectations. This active participation is due to the fact that open data is such a new type of policy for Japanese government, that learning from external experts is much more important than predicting appropriate conclusions and leading discussions towards them.

Yet viewed from another way, this same active discussion has a seemingly critical limitation.

[52] For a critical discussion of such a view, see, for example, Hosono, S. (2003) 審議会型政策形成と情報公開の意義:「決定の質」の政策分析. 公共政策研究 v.3, pp.55-67. http://ppsa.jp/pdf/31.pdf

Namely, the participants are limited mostly to advocates and observers, with few data reusers present. This pattern is more or less observable in other major discussions – common to the committees of Open Data Consortium and the Open Data Talk series organized by Open Knowledge Foundation Japan. It could mean that the policy formulation is done mostly by generalists in open data policy, not by those who have a specific need for particular data sets for defined uses and purposes.

While active participation of non-state actors in the policy formulation process, or *interactive governance*, generally helps open data to succeed, this pattern of participation may skew the understanding of demand for data – which are high priority data sets, which are convenient data sets, and if API or raw data are important, and other policy questions.

4.5. Lack of Interest from Users

Looking at the demand side and its interaction with the government sector, it is possible to find indications of lack of interest on the demand side. One such indication is that only a small number of requests were submitted at the open data portal,[53] only one in two months after it got out of beta, and only a handful of requests, with most of them focused on the same issue.[54]

While there are many hackathons, workshops, talk events, and seminars held in Tokyo and many other parts of Japan, some suggest that participants are mostly limited to familiar faces. So while there is at least some level of interest in open data among the public, the extent of this interest beyond advocates, observers, and consultants remains questionable.

Some contests, such as Linked Open Data Challenge and Mash-up Awards, have produced

[53] Data requests and other comments and requests, along with government replies, are published at: http://www.data.go.jp/communication/answer-to-requests/

[54] Official notices of the government became accessible only for paying users, and there were several requests on the open government portal to go back to freely accessible provision. Answer to these requests from the government was that some information contained in the announcement, such as bankruptcy required non-open treatment, although they may change their policy again in the future.

interesting entries using open data. Yet the major participants are still mostly in IT or consultancy industries, or research and academia, either advocating or supporting open data usage. Those trying to use data for business are less represented in policy discussions and events. It is also notable that the publicly expressed need for government data is neither very specific nor strongly emphasized by economic associations like Keidanren.

Continuation of this situation spells failure for the open data policy and implementation. There is no point in opening up government data if little use is to be expected. Open data will become even less interesting for government agencies, and it will be increasingly difficult for the IT Office to convince them of its merit.

4.6. Evaluation: Difficulties in Evaluating the Situation

Whether the lack of notable business-use cases of government data is proof of policy failure remains an unsettled question. First, experts around the world suggest that only a part of business use of open data is observable by government and those involved in the policy discussions.[55] Some users do not advertise widely on the web because they are business services, others are not forthcoming regarding the use of data because the sources of data are part of their competitive advantage, and yet others are not dealing with any external parties but internally using government data to improve their operational efficiency – all these types of data usage are likely to be difficult for outsiders to discover. From private-sector users of government data, the author of this chapter has learned first-hand that marketing and human resources departments of major corporations do use government data, and that firms from insurance, retail, transportation, and other industries also use this data.

[55] See, for example, p.5, Minutes from the 2nd meeting of FY2015, Public Data Working Group, IT Fusion Forum, available at: http://www.meti.go.jp/committee/kenkyukai/shoujo/it_yugo_forum_data_wg/pdf/h25_02_gijiroku.pdf

It may also be the case that developing a new business or service takes time, and the beta-launch of the open data portal open data took place only about a year ago (at the time of writing of this chapter).

Another possibility is that the lack of newly available data led to a lack of active reuse. First, any serious business users of data are already familiar with government data sources, and creation of the open data portal may be of limited help, since they have long known where to look for the data they need. Second, lack of a large amount of newly available data may mean that open data is simply not very interesting to many businesses. Behind this, some may argue, is insufficient influence that the open data team can exert over other government agencies, even after the arrival of government CIO and some other organizational changes. However, there are indications by the CIO that this state of affairs will change. As a matter of precedence, published and to-be-published data are the first to be released, but high demand data will be released in the future.[56]

Exact reasons aside, the fact remains that interest from potential data reusers seems less than overwhelming, while government supply of data is predominantly limited to that which had already been published online.

5. Behind the transformation

Many knowledgeable observers agree that although Japanese open data has come a long way, its achievements so far cannot be called a clear success.

Changes have been made in the way that government-held data, or other information, is handled. Formerly, online material was protected by Terms of Use, typically claiming full

[56] Remark of the government CIO at the first meeting of Working Group for Supporting Opening up Data, Feb. 4, 2015. Minutes are available at: http://www.kantei.go.jp/jp/singi/it2/densi/kwg/dai1/gijiyousi.pdf

copyright protection. Some websites explicitly prohibited use of the materials in any way, except when allowed by copyright law, thereby prohibiting, perhaps even unwittingly, printing out a web page or a published report for business purposes.[57] The change to open licensing for some data, and nearly open terms of use for much of the remaining material is substantive. Thanks to such change, users no longer need request permission case by case.

Previously, few people advocated wholesale, government-wide provision of data for reuse. Now there are a large number of advocates for various types of data. A number of organizations have been launched. The changes are observable, perhaps more dramatically, when we look at local governments and locally-based civic sector organizations and activities.

All this is not to say that open data policy implementation in Japan has brought the expected transformation. Yet the interactive governance, or the formulation of open data policy with active participation of non-state actors, is certainly a positive change for the policy goal.

5.1. Driving Forces

The primary forces driving this change so far are expectations, including those held by advocates, and similar developments overseas. It seems that advocates around the world are seeing less than overwhelming business use cases, or are having difficulty discovering them. Some have begun compiling a large number of use cases, most notably in the U.S. A U.S compilation dubbed Open Data 500 is currently replicated in the U.K. and is inspiring other similar efforts. The compilation is not necessarily rich in details, as experts have pointed out, but it is successful in demonstrating that uses are everywhere in the economy, in terms of both

[57] Under Japanese copyright law, printing out a web page for business use is not clearly legal. Some postulates that there is implicit permission for such common use of online materials. But when a terms of use of the web site denies any implicit permission, printing an online material, say, for an internal business communication or a meeting, ends of becoming simply illegal.

sectors and geographic regions.

Expectations are partly driven by estimates of economic effects of open data. The McKinsey Global Institute[58], most notably, estimated that increased usability of data (government data and others, such as Twitter feeds) would result in 5 trillion dollars of economic benefits annually.

Overseas developments serve as benchmarks. As in the case of other policies, Japanese governments conduct research into policies of open data adopted by foreign governments. They look into not only official policies, but also their implementations and outcomes. While it is clear that some phenomenal success cases exist, there seems to be an emerging consensus that short-term effects of open data may remain unclear to unimpressive. One success case is The Climate Corporation[59]. It is apparent that London hosts a number of start-ups related to open data, and the Open Data Institute is also involved.

Domestically, too, expectations formed after the Great Earthquake were arguably the strongest driving force in the initial phase, leading to the national strategy, organization of the open data team, and many subsequent developments.

There is some hope that open data will generate benefits to the economy, because a number of reports support such a view, other governments seem to be engaged in open data with similar goals, and at least some examples show success. Yet it is difficult to assess how big and widespread the benefits are to the economy. Reasonable people would disagree on how optimistic one can be about the eventual success of the policies, and the size of economic benefits.

[58] McKinsey Global Institute (2013) Open data: Unlocking innovation and performance with liquid information. http://www.mckinsey.com/insights/business_technology/open_data_unlocking_innovation_and_performance_with_liquid_information

[59] climate.com

6. Conclusion

Open data is a policy to transform information governance from an administrative to a more interactive model. In the short period of time since the 2011 Great Earthquake, the Japanese government and other sectors have shown remarkable development, greatly exceeding earlier expectations both in terms of rise of stakeholders showing interest in greater openness, and actual change in the way government-held data is provided. Part of this transformation is a much more *interactive* process of information governance, one involving many advocates and observers. There is still a long way to go before the transformation takes place in a meaningful way, however. The numbers of those actively engaged in open data within the government, and active users of government data that are opened up, remain limited. The opened data has been limited to materials that had already been published, as opposed to previously unpublished data. And we are yet to see a clear example of how open data can generate economic benefits.

Disclosure: The author is an insider to the open data policy discussion and developments in Japan. He was one of the three co-founders of Open Knowledge Foundation Japan Initiative, and became a vice-chair for the incorporated organization. He is a member of Open Data Working-level Personnel Conference, and deputy chair of the working group under the Conference on use and adoption, which was responsible for discussing and developing licensing policies. Another organization he has long been involved in is CommonSphere, formerly Creative Commons Japan. He has been an active member since December 2007, and became a director, later an executive director for the organization. He was involved in the initial launch of Creative Commons Japan, which was a project at Center for Global Communication (GLOCOM), a research institute at the International University of Japan. While he was not affiliated with GLOCOM at the time, he later became a researcher in 2008. GLOCOM is also functioning as a de facto meeting and public event venue for the Open Knowledge Foundation Japan.

4. Archives and Public Records Management

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Abstract

The biggest topic in the field of archives and records management in Japan in this decade is the enactment of Public Records and Archives Management Act (PRAMA) in July 2009. The Act regulates management of the records of all national government agencies, whereas previously the management policy was overseen independently by each agency. PRAMA also allows citizens the right to access both current and archived records, with some exceptions (e.g. national security, foreign affairs, privacy of ordinary people). The legislation governing archives and records management in Japan was established very late compared to other Western, as well as Asian countries, and PRAMA in 2009 shows that the field of archives and records management in Japan is still in its nascency, with plenty of room for further development. The policy process in enacting PRAMA took the form of top-down policy making by prominent politicians – especially former Prime Minister Yasuo Fukuda – and senior administrative officials, through several deliberative bodies. The process has been fragile in terms of weak grass-rooted policy backups by citizen movements such as those in freedom of information (FOI) issues, as well as by the field of archives and records management itself. This chapter describes this gap in the policy process leading up to the enactment of PRAMA, as well as the current status and future challenges for the system of archives and records management, including the status of the National Archives of Japan (NAJ) and the professions concerning archives and records management.

1. Introduction

In terms of creating public records and archives as well as the national laws governing those archives, Japan has lagged behind western states in 'information governance.' The passage of the Public Records and Archives Management Act (PRAMA) in 2009 represents a significant step toward addressing this lag. However, significant areas still remain in need of reform before Japan's sphere of 'information governance' may be able to rival those found in other developed democracies.

Archives and records serve an important function in democracies by recording the

actions and deliberations of their governments. A basic tenet of elected governments is that they are responsible to the people they govern. As such, the rules and regulations by which the government is required to record and store its actions can have important consequences for the nature of how its people monitor and make political choices. Indeed, establishment of the Archives Nationales of France, considered the world's pioneer of modern archives, was firmly rooted in the French Revolution and its aspirations for a more responsive and representative form of government. The origin of the archives in France is discussed later in this chapter.

The questions considered in this chapter are: (1) where does Japan stand comparatively on these issues of archives and records, (2) how did it develop its current information governance structure, and finally, (3) what reforms remain undone if Japan wishes to strengthen information governance in this domain? The short answer is that Japan was late to establish national archives and, once established, centralized governance was relatively weak, both in terms of the legal framework and in the size of personnel. Why? Historically in Japan, unlike in Western democracies, there has been a critical lack of concentrated or sustained policy interest in promulgating strong measures in this arena.

Japan's lack of information governance underwent a key, but limited, shift in 2009 when PRAMA formalized the Japanese government's archival and records policies for the first time. The enactment of PRAMA was driven partly by the presence of key leadership; a prominent politician who later became Prime Minister supported the bill for several years before its inception. Broader interest in the bill, however, was sparked by a series of scandals regarding public records, including the government's loss of a large proportion of citizens' pension records.

This chapter first provides definitions, since terms such as archives and records have specific meanings to specialists that are not commonly used outside these fields. The distinction is important in terms of what type of information is gathered and stored. We will then place

Japan in comparative perspective, illustrating Japan's late establishment of and relatively weak information governance in this domain. The main part of the chapter will discuss the path taken by various actors leading to the enactment of PRAMA, the watershed development in this area. Finally, we will conclude with a discussion of PRAMA, evaluating its strengths and limitations, and the insights it gives us into Japan's model of information governance in this arena. We conclude that the top-down leadership that resulted in PRAMA brings with it many challenges and raises future concerns for information governance in Japan. Further attention needs to be paid to developing expertise beyond the top, in the local governments and the archival profession itself in order to create a sustained policy interest in promulgating strong measures in this arena.

We note that the description of this chapter is based on information available as of the end of the year 2014.

2. Defining Key Terms

The following are definitions of key terms used in this chapter:

Archives:

1. Materials created or received by a person, family, or organization, public or private, in the conduct of their affairs and preserved because of the enduring value contained in the information they contain or as evidence of the functions and responsibilities of their creator, especially those materials maintained using the principles of provenance, original order, and collective control; permanent records.

2. The division within an organization responsible for maintaining the organization's records of enduring value.

3. An organization that collects the records of individuals, families, or other organizations; a

collecting archives. (Pearce-Moses, 2005) (Either 1, 2, or 3 apprises in a context, or, a mixture of these three meanings may apply.)

Archival institutions:

2 and/or 3 in the abovementioned definitions of "archives." This word may be used in order to distinguish archives as institutions from archives as materials.

Records:

Information created, received, and maintained as evidence and information by an organization or person, in pursuance of legal obligations or in the transaction of business. (ISO15489-1)

Public records:

The records created by public (i.e. government) organizations.

Documents:

Objects carrying organized/context information. (ISO15489-1)

The difference between records and documents is a particular problem in Japan. JIS X 0902-1, a Japanese translation of ISO 15489-1, translates records as *kiroku*, and documents as *bunsyo*. JIS X 0902-1 add in its notes (not included in the original ISO):

> The subject of records management is *kiroku* [records]. However, the subject of *bunsho kanri* [documents management], which is more popular in Japan, includes *bunsho* [documents] as well as kiroku. That is, *bunsho kanri* has a wider range.

The words of *bunsho* [documents] and *bunsho kanri* [documents management] are more popular than *kiroku* [records] and *kiroku kanri* [records management]. Worse, the word of *koubunsho*, which means public **documents** literally, makes situations more confused. In fact, *koubunsho* means public **records** in the sense it has characteristics of evidence and

legal obligations. In addition, the Public **Records** and Archives Management Act (PRAMA) is the English-translated name of Kobunsho Kanriho. Therefore, this chapter basically uses the word of (public) records rather than documents, except the case of the words used in law texts.

In addition, the difference between two types of archives mentioned below should also be noted:

Institutional archives:

> A repository that holds records created or received by its parent institution. (Pearce-Moses, 2005)

Collecting archives:

> A repository that collects materials from individuals, families, and organizations other than the parent organization. (ibid)

Interestingly, the archival community in Japan did not acknowledge the importance of this difference until recently; neither did government officials or the general public in Japan. Why, then, is the distinction important? Public records should be transferred to public archives (public archival institutions) systematically, rather than putting the onus on archives by requiring them to collect public records. The latter method would require that archives possess prior knowledge of existing records in order to adequately collect them. PRAMA was enacted in 2009 based on the former method, i.e. institutional archives.

3. Japan in Global Perspective

The field of archives and records management in Japan is largely behind the global trend, particularly Western democracies, both in terms of development of archives and records institutions as well as their legal management. As a vital aspect of democratic governance,

understanding the nature of this lag is an important first step toward addressing it. Table 1 illustrates Japan's place.

Table 1. Archival Legislations and Institutions in Japan and around the World

		(Notes)
Japan		
1971	National Archives of Japan established	
1987	Public Archives Act enacted	
1999	Act on Access to Information Held by Administrative Organs (Freedom of Information Act in Japan) enacted	Articles on public records management included
1999	National Archives Act enacted	
2009	Public Records and Archives Management Act enacted	

United States		
1934	National Archives established	
1949	National Archives reorganized into the National Archives and Records Service (NARS)	NARS under control of General Service Administration
1950	Federal Records Act enacted	
1966	Freedom of Information Act enacted	
1985	NARS reorganized into the National Archives and Records Administration (NARA)	NARA becomes an independent federal agency

United Kingdom		
1838	Public Record Office Act enacted; Public Records Office (PRO) established	
1958	Public Records Act enacted	
2000	Freedom of Information Act enacted	
2003	PRO merged with the Historical Manuscripts Commission to form the National Archives (TNA)	

France		
1790	Archives Nationales (AN) established	First modern public archives in the world
1978	Freedom of Information Act enacted	
1979	Archiving Records Act enacted	
2004	Archiving Records Act became a part of Cultural Heritage Act	

Germany		
1919	Reichsarchiv (Central Archives) established	
1946	Central Archives (GDR) established	
1952	Bundesarchiv (West Germany) established	
1988	Bundesarchivgesetz (Bundesarchiv Act) enacted	Functions as the act of public records management
1990	Two National Archives merged after German reunification	
2005	Freedom of Information Act enacted	

China (P.R.)		
1954	The State Archives Administration established	
1959	Central Archives established	
1966-	Cultural Revolution corrupted PRC's archival system	
1979	The State Archives Administration and Central Archives reestablished	
1987	State Archives and Records Act enacted	
2008	Freedom of Information Act enacted	

South Korea		
1969	Government Archives and Records Service (GARS) established	
1996	Freedom of Information Act enacted	
1999	Public Records Management Act enacted	
2004	GARS renamed as the National Archives and Records Service (NARS)	
2007	NARS renamed as the National Archives of Korea (NAK)	

In terms of development, France falls at the top of the countries shown in Table 1. It is said that the Archives Nationales of France is the pioneer of modern archives in the world, i.e. archival institutions which archive government records and provide impartial access of the records to any persons. For example, the Archives Nationales of France was originally established as a parliamentary archives office of the Assemblé Nationale (National Parliament), so both the archival institutions and the records were acknowledged as the properties of the nation of France. In addition, as a result of the Revolution, "the state acknowledged its responsibility respecting the care of the documentary heritage of the past," regardless of the characteristics of the past regimes (Posner 1940). In addition, many countries (except France and South Korea) enacted laws concerning management of government records prior to "freedom of information" acts, because of the internal usage of such records as evidence of government activities.

In Japan's case, both the establishment of the national archives and of laws concerning management of government records lagged significantly behind world trends. The National Archives of Japan (NAJ) was established in 1971, as a result of strong requests of historians rather than for internal usage. It has a history of only approximately 45 years.

With the latter in mind, let us first consider laws concerning management of government records in Japan. Early attempts in this domain, while an important step forward, lagged behind the level of management found in other democracies. For example, on May 14, 1999, Article 22 of the Act on Access to Information Held by Administrative Organs (FOIA), minimally addressed the "Management of Administrative Documents" as follows:

(1) To contribute to the proper and smooth operation of this Act, the heads of Administrative Organs shall properly manage Administrative Documents.

(2) The heads of Administrative Organs shall establish rules regarding the management of Administrative Documents by taking into consideration the provisions of a Cabinet Order, and make the rules available for public inspection.

(3) The Cabinet Order set forth in the preceding paragraph shall provide standards for the classification, preparation, preservation and disposal of Administrative Documents, and other necessary matters concerning the management of Administrative Documents.

This "Management of Administrative Documents" Article set a guideline for public records (administrative documents) management that was enacted later in 2000. However, the actual implementation in terms of records management was weak and caused several problems for the Japanese FOIA. For example, access to public records was neither consistent nor comprehensive; requests for access to the records were often rejected, not on the grounds of validity, but because the requested records were missing. In 2009, Article 22 of the FOIA was superseded by the enactment of the aforementioned PRAMA with the intent, in part, to address some of these shortcomings.

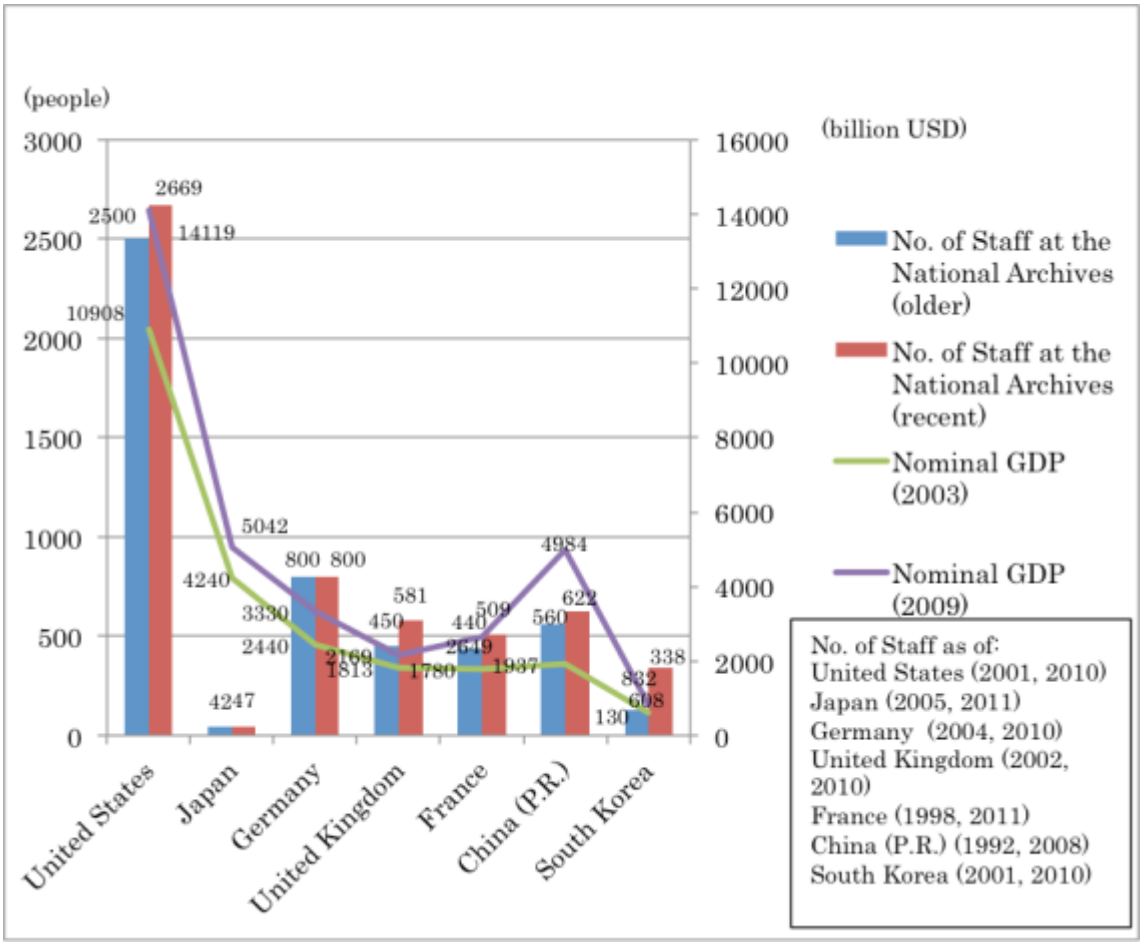
In addition to the shortcomings of archival management found in the FOIA, the status and power of the National Archives of Japan (NAJ) was similarly weak. In January 2001, as a result of an overall administrative reform, the status of NAJ changed from that of an organization under the Management and Coordination Agency (currently the Ministry of Internal Affairs and Communications), to an independent administrative agency (under supervision of the Cabinet Office). This reform curtailed the power of the NAJ; it formally lost the status of a government agency. The reform also limited its autonomy. For example, NAJ's activity plan is set by the Cabinet Office, not by the NAJ itself. The NAJ also comparatively lacked the necessary manpower to effectively manage records and archives. Figure 1 shows the relationship between the number of staff at the national Archives and nominal GDPs in selected countries,

highlighting an additional shortcoming in Japan.[60]

In conclusion, in this arena of information governance, Japan has lagged behind western democracies in both the creation of national archives and in the development of laws to manage said archives and record depositories. While, prior to PRAMA, Japan had taken steps to create the necessary infrastructure and begin to develop institutions and rules for their management, these early efforts still fall short of those found in the West. Article 22 of the FOIA struggled to provide complete and consistent access to governmental records for the public and the NAJ lacked autonomy, government agency status, and the necessary manpower for the tasks laid before it.

[60] The original graph was created in 2004 in order to show the gap of development between the country's economy and the national archives in Japan. Prof. Masaya Takayama, former president of the NAJ (2009-2013), added the data and displayed Figure 1, which reveals minimal development since the original issue-raising graph.

Figure 1. Comparison of Manpower at the National Archives and Nominal GDP (Source: Takayama (2012))



4. The Road to PRAMA: Information Governance Reform in Japan

In light of the relationship between record and archive governance and democratic government as well as Japan's comparative lag in this arena, further reform was needed. It came in the form of a watershed Act in July 2009, the Public Records and Archives Management Act (PRAMA). This section details the policy steps ultimately leading to PRAMA's enactment from 1987 to 2009 and its implementation beginning in 2011 (a timeline is shown in Table 2).[61] This

[61] The author described the policy steps intermittently in his previous articles (Koga 2005, 2007, 2010). In Japanese, the works of Aoyama (2004) and Sebata (2011) are useful for understanding the history of archival issues in Japan. The description in this section is based on these works.

process was initiated and fueled not by government officials, but rather by a grassroots movement stemming from archivists and historians in Japan as well as key individual leadership by members of government with a personal interest in public archives and records. This section illustrates that in Japan, unlike Western democracies, there has been a critical lack of concentrated or sustained policy interest in promulgating strong measures in this arena, which has resulted in the aforementioned lag.

Table 2. The Process of Legislation of PRAMA in Japan

Date	Events, Committees, etc.	Notes
2003.5	The Blue-Ribbon Commission on Improving and Consolidating Public Archives System (-2003.11)	Yasuo Fukuda was then the Chief Cabinet Secretary (2000.10-2004.5)
2003.12	The Panel Advising Chief Cabinet Secretary on Reviewing a System for Management, Preservation, and Use of Archives and Records of the Government (-2006.6, "the Panel")	
2004.6	First Report by the Panel	
2005.7	The Research Panel for Planning Public Records and Archives Management Act (-2006.7, "the Research Panel")	Organized by the Japan Institute of Business Law (Shoji-Homu Kenkyukai), sponsored by the National Institute for Research
2006.6	Second (Final) Report by the Panel	
2007.2	The Research Report by the Research Panel	Including two legislation plans by the Research Panel
2007.9	Yasuo Fukuda became the 91st Prime Minister	
2008.2	Prime Minister Fukuda appointed Yoko Kamikawa as the first-ever Minister in charge of Public Records Management (-2008.8)	
2008.2	The Advisory Panel for Public Records Management and Other Related Issues (-2008.11)	

2008.9	Prime Minister Fukuda resigned	
2008.11	The Final Report of the Advisory Panel	
2009.3	Public Records and Archives Management Bill (the Bill) was approved by the Cabinet and submitted to the Diet	
2009.6	The Bill was approved by the Diet with some revisions	
2009.7	Public Records and Archives Management Act (PRAMA) was enacted	
2009.9	The governing party changed from LDP to DPJ (-2012.12)	
2011.4	PRAMA came in effect	

4.1. Iwakami and the Public Archives Act

The first law concerning public archives in Japan was the Public Archives Act (Law No. 115 of 1987), which consisted of abstract provisions rather than concrete procedures (total number of provisions in this law is only 7). Significantly, government officials showed little interest in this Act or its provisions and did not initiate the legislation. Instead, it was lawmaker-initiated and enacted thanks to the efforts of Niro Iwakami (1913-1989), then an Upper House member of the Liberal Democratic Party (LDP) and former Governor of Ibaraki Prefecture. Iwakami's personal interest in public archives was boosted by the archival and historian community in Japan. Together, they provided the impetus for and contributed to the establishment of the Act despite the government's lack of interest.

The Public Archives Act of 1987 was an important first step in establishing archive and record governance in Japan. For the first time, it issued provisions concerning the management of public records and related documents as "historical materials" and public archives at both the national and local level. This law also mandated, under Article 4, that public archives hire

"professional personnel" to perform investigations and research into such official documents.

However, Supplementary Provision 2 states: "For the time being, Public Archives to be established by local public entities may operate without appointing professional personnel..." This clause led to a lack of an accreditation system for professional archivists, as well as a lack of effective education and training for archivists in Japan. Worse still, the law did not effectively encourage the establishment and management of public archives by local governments, such as subsidies by the central government. While an important first step, this 1987 law had crucial shortcomings.

These shortcomings were not immediately addressed. After the death of Iwakami in 1989 while in office, no politician adopted his personal wish for public archives. The topic of public archives and records management continued to be largely ignored as a national policy issue by government officials, even at the time of enactment of Japanese FOIA in 1999.

4.2. Leadership after Iwakami: the Blue-Ribbon Commission and the Panel

Like the 1987 Public Archives Act, the next steps in this evolution toward PRAMA benefited from strong individual leadership largely outside the realm of traditional government officials. Yasuo Fukuda, a hereditary Diet member (1990-2012) belonging to the LDP and later the 91st Prime Minister (2007.9-2008.9), played a strong leadership role similar to Iwakami's almost 15 years earlier. The first step in the enactment process began in May 2003 with the creation of the Blue-Ribbon Commission on Improving and Consolidating Public Archives Systems. Fukuda, not coincidentally, was the Chief Cabinet Secretary during this period. This Blue-Ribbon Commission was organized as an advisory body for the Director General of the Cabinet Office.

This Blue-Ribbon Commission was tasked with the management of public archives, i.e.,

historical public records. It soon acknowledged, however, that improvement and consolidation of the public archival system in Japan required more than simply consideration of historical public records. Therefore, the Commission was reorganized into the Panel Advising Chief Cabinet Secretary on Reviewing a System for Management, Preservation, and Use of Archives and Records of the Government (hereafter "the Panel") in December 2003. The Panel sought to address historical, current, and future public records. Despite this reorganization, the members of the Commission and the Panel retained their places (as shown in Table 3).

The Panel was led by two key policy makers. Masaya Takayama, a researcher of library science and records management, served as the first chairman of the Panel. After he resigned his position upon taking a position at the NAJ in April 2007, Mamoru Ozaki, former Administrative Vice-Minister of Finance, succeeded him. Ozaki later became the chairman of the Advisory Panel for Public Records Management and Other Related Issues, a catalyst for the enactment of the PRAMA. Both Takayama and Ozaki remain among the key persons in public archives and records management.

Another key leader was Mitsuoki Kikuchi, who joined the Commission and Panel as an observer. Kikuchi was the president of the NAJ at the time (2001-2009) and the former Administrative Vice-Minister of the Management and Coordination Agency (currently the Ministry of Internal Affairs and Communications). According to Kikuchi's memoir, Fukuda acknowledged that archives in Japan were behind those of China and South Korea and actively sought Kikuchi's advice for rectifying the situation (Kikuchi 2009). Ultimately, the Blue-Ribbon Commission, and later the Panel, was established based on these ongoing discussions between Fukuda and Kikuchi.

It should be noted that in addition to key political leadership and a strong movement for public archives stemming from the archivist and historian community in Japan, public awareness

of the issue was also on the rise. Tadaaki Matsuoka, a senior editor of the Nihon Keizai Shimbun (Nikkei), began to extensively publish articles on archival issues, including ongoing discussions at the Commission and the Panel (e.g. Matsuoka, 2008). His prominence as a journalist on these issues created further pressure for information governance reform in this arena.

By June 2004, the Panel published its interim report, which described the overall issues and challenges of public records management in Japan. The report later became the basis for future policy discussions concerning public records management and archives. Two years later in June 2006, the Panel finished its activities by issuing a final report focused on plans for a public records center and management of the records in an electronic format.

Table 3. Deliberative Bodies and their Members Concerning Archives and Records Management Policy in Japan

Name	Position	Blue-ribbon Commission (2003.5-2003.12)	Panel (2003.12-2006.6)	Research Panel (2005.7-2006.7)	Advisory Panel (2008.2-2008.11)	Research Panel for the new NAJ (2014.5-)
Masaya Takayama (Mr.)	Researcher on library science and records management / President of the NAJ (2009-2013)	Chairman	Chairman (1st)			
Hitoshi Goto (Mr.)	Researcher on local governance / former director of prefectural archives	Vice Chairman	Vice Chairman		Member	
Katsuya Uga (Mr.)	Researcher on administrative law	Member	Member		Vice Chairman	
Mamoru Ozaki (Mr.)	Former Administrative Vice-Minister (Finance)	Member	Member / Chairman (2nd)		Chairman	Observer
Sachiko Kagami (Ms.)	Announcer / Journalist	Member	Member			
Yoko Kato (Ms.)	Researcher on Japanese history	Member	Member		Member	Member

Kozo Kotani (Mr.)	Researcher on administrative law / former senior administrator (Internal Affairs and Communication)	Member	Member			
Hiroshi Miyake (Mr.)	Lawyer	Member	Member			
Hiroshi Yamada (Mr.)	Researcher on administrative law	Member	Member			
Mitsuoki Kikuchi (Mr.)	President of the NAJ (2001-2009) / Former Administrative Vice-Minister (Internal Affairs and Communication)	Observer	Observer			Observer
(Ex officio member)	Senior administrator (Internal Affairs and Communication)		Observer			
Shigeru Takahashi (Mr.)	Researcher on administrative law			Chairman	Member	

Koichiro Agata (Mr.)	Researcher on public administration			Member		
Jun Iio (Mr.)	Researcher on politics			Member		
Chiyoko Ogawa (Ms.)	Consultant on archives			Member		
Shigeru Kifuji (Mr.)	Researcher on administrative law / former administrator			Member		
Makoto Saito (Mr.)	Researcher on administrative law			Member		
Fumito Tomooka (Mr.)	Researcher on administrative law			Member		
Takehisa Nakagawa (Mr.)	Researcher on administrative law			Member		
Kikumi Noguchi (Ms.)	Researcher on administrative law			Member	Member	
Izuru Makihara (Mr.)	Researcher on public administration			Member		
Shohei Muta (Mr.)	Senior staff of the NAJ			Observer		

Toshio Asakura (Mr.)	Journalist				Member	
Takeo Kato (Mr.)	Senior businessman / President of the NAJ (2013-)				Member	
Nobuko Takahashi (Ms.)	Journalist				Member	
Yuriko Inoue (Ms.)	Researcher on intellectual property law					Member
Shunichi Uchida (Mr.)	Former Administrative Vice-Minister / Former Director of the Consumer Affairs Agency					Member
Shoichi Oikawa (Mr.)	Journalist					Chairman
Noriko Kando (Ms.)	Researcher on information science					Member
Katsutoshi Saito (Mr.)	Senior businessman					Member
Kazuo Nagano (Mr.)	Researcher on educational information					Member

Tadaaki Matsuoka (Mr.)	Journalist					Member

4.3. The Research Panel: A Private Group with Suggested Legal Plans

In addition to the Commission and Panel at the Cabinet Secretariat, from July 2005 to July 2006, a private research panel for legal plans concerning public records management and archives was underway. The panel, titled "The Research Panel for Public Records Management Act" (hereafter "the Research Panel"), was established by the National Institute for Research Advancement (NIRA), an influential policy think tank in Japan, and cosigned by the *Shoji-Homu Kenkyukai* (Japan Institute of Business Law), another influential body for lawmaking in Japan. Interestingly, and unlike the Panel and the Cabinet Secretariat, the Research Panel was established as a private body. It can be presumed, however, that the central government was still reluctant to engage in concrete legal plans concerning public records management and archives, and that the Research Panel was established as an alternative body to the public one.

The majority of the members were from academic fields of administrative law and public administration (see Table 3). It should be noted, however, that two members were from the field of archives. One was Chiyoko Ogawa, an archival consultant (very rare in Japan), who later became the president of the Records Management Society of Japan in May 2013. Another was Shohei Muta, a senior staff member and archivist of the NAJ. Muta contributed to the management of the NAJ at this turning point, as well as to the growing international appeal of archival issues in Japan. He sadly passed away in September 2009, just after the enactment of the PRAMA. As discussed later, this Research Panel functioned as a rare opportunity where several members of the archival field actively contributed to the policy process.

The Research Panel's work culminated in a report published in February 2007 (National Institute for Research Advancement and Takahashi, 2007). This report included two legal plans. The first plan promised a more standardized records management system and more proactive involvement by the NAJ with public records management. The second plan ratified the traditional records management system, where each government can control the system by its own discretion. Ultimately, PRAMA was based more closely on the first plan rather than the second.[62]

4.4. Further Facilitation of Archival Policy by Prime Minister Fukuda

When Yasuo Fukuda became the 91st Prime Minister of Japan in September 2007, he faced a series of public record management scandals ranging from the mismanagement of pension records and government reports concerning drug-induced hepatitis, to the deliberate destruction of navigation diaries by the staff of the Maritime Self-Defense Forces. Fukuda turned to the series of previously published reports from both the private and public forums for guidance and in February 2008, he (1) set up an advisory panel for overseeing public records management policy under the Cabinet Secretariat and (2) established the first ever position of Minister of the Cabinet Office in Charge of Public Records Management.

The advisory panel, named as the "Advisory Panel for Public Records Management and Other Related Issues," consisted of former senior government officials, legal scholars, and journalists (see Table 3). Some members overlapped with the previous Council and Panel, allowing the Advisory Panel to more easily establish a policy plan building on these two previous efforts. It should be added, however, that there were no professionals or researchers on

[62] Miyake, a member of the Council and Panel at the Cabinet Secretariat, points out that the legal plans by the Research Panel became the basis for PRAMA in effect, because the Advisory Panel could not provide similar detailed legal plans. (Miyake, 2014)

record management and archives among the panel members, except Hitoshi Goto, former director of Kanagawa Prefectural Archives, although he too was not a professional archivist.

Despite Fukuda's immediate resignation from office, the Advisory Panel remained active for eight months and issued its final report in November 2008, entitled "Management of public records which document the past, present and future: it is the time to promote the management as the national initiatives." This report provided an ideal system for public records management in Japan, referred to as the "gold model," as well as providing a policy plan for improvement of public records management and archives.

At the same time, Ms. Yoko Kawakami, the first Minister in Charge of Public Records Management (Feb.-Aug. 2008), took charge of improving government records management, including a field survey of records management at each ministry. Unfortunately after Fukuda's resignation, subsequent Ministers, Ms. Kyoto Nakayama (Aug.-Sep. 2008) and Ms. Yuko Obuchi (Sep. 2008-Sep. 2009), seemed reluctant to provide such necessary leadership.

4.5. Deliberations and the Enactment of PRAMA

These previous initiatives were, however, suddenly endangered when Prime Minister Fukuda resigned in September 2008 due to the unpopularity of his Cabinet and the LDP, which had been in power over such a long period. In spite of this, Fukuda as a serving and prominent Congressman of the Lower House (*Shugiin*), continued to pursue legislation concerning public records management, through a voluntary caucus of the Diet promoting legislation for public records management and archives. Due in large part to Fukuda's sustained efforts, Prime Minister Taro Aso and his Cabinet submitted a Bill of Public Records and Archives Management (hereafter the Bill) to the National Diet (Parliament) on March 3, 2009.

Heavy criticism of the bill arose from the Democratic Party of Japan (DPJ), the

influential opposition party at that time, and organizations and bodies with closer ties to the DPJ, such as the Japan Federation of Bar Associations (JFBA, a.k.a. *Nichibenren*), and champions of FOI issues (e.g. FOI Clearing House of Japan). Their criticism focused on the bill's movement away from what the "the gold model" had offered and on the provision that each government body still had discretion over management and disposal of its own records. While the Diet members of the DPJ established a team for revising the bill, the LDP -- led by Fukuda and Kamikawa -- ultimately accepted the DPJ's request for revision.

The revised provisions included the following:

1. that public records be "available for independent use by the citizens, who have popular sovereignty, as an intellectual resource to be shared by the people in supporting the basis of sound democracy, in accordance with the principle of sovereignty of the people";
2. that government officials must prepare the records concerning policy making process, as well as "Acquisition or loss of rights and obligations of an individual or a juridical person, and the background to the same"; and
3. that measures to avoid inappropriate disposition of records would be included.

Despite these revisions, the status of the NAJ as an independent administrative agency remained the same, even though the "gold plan" recommended that the NAJ should be elevated to the status of an independent administrative agency.

In the end, the revised Bill was passed unanimously in June by both Houses in the National Diet. Despite a critical lack of concentrated or sustained policy interest in promulgating strong measures in this arena, the Public Records and Archives Management Act (PRAMA) was finally enacted on July 1, 2009 and came into effect on April 1, 2011.

4.6. PRAMA: A Shift in Public Records and Archival Management

PRAMA, for the following six reasons, represented a watershed moment in Japan's record and archive governance. First, the Act covered almost the entire lifecycle of the management of records, from creation of records, current record management to selection and preservation of archival records. Second, it regulated management of records from all national government agencies, whereas previously the management policy was overseen independently by each agency. PRAMA also regulated the management of records of quasi-government agencies, including national universities. Third, it further clarified that citizens have the right of access to both current and archival records, with some exceptions (e.g. national security, foreign affairs, privacy of ordinary people). Fourth, PRAMA established that the Prime Minister, not the President of NAJ, is ultimately in charge of the disposition of national government records. Fifth, it empowered the NAJ to support government agencies' proper records management, including a field survey of the agencies, and advice and training programs for government officials. Sixth, and finally, PRAMA established a Board of Public Records Management, which includes experts in the management of records and archival issues, to supervise management of government records and handle public claims concerning access to the records.

It should be noted, however, that the Act encourages but does not mandate compliance by local government bodies. In addition, the supplementary provisions of the PRAMA order the central government to consider revisions of the Act, including the definition and scope of government records, five years after it came in effect, i.e. around 2016. While it represented an important step, PRAMA did not, nor did it intend, to address the full extent of Japan's comparative lack of archive and record governance.

4.7. After PRAMA: Policy Developments and Future Reforms

The effectiveness of PRAMA was undermined directly after its enactment. The first Minister of Public Records Kawakami, a key leader in reform, lost her seat in the Lower House election in August 2009. The DPJ took control of the Japanese central government from the LDP. It was expected that despite this change in leadership, the DPJ would continue to facilitate the policy of public records management and archives in accordance with PRAMA. Previously, the DJP had been the greater supporter of the FOIA. Such expectations, however, were not met. Compared to Kawakami, the new Minister in Charge of Public Records Management under the DPJ failed to take strong leadership. Worse, several government bodies in charge of issues concerning the 2011 Tohoku earthquake disaster failed to make or maintain minutes of the proceedings, which was a clear and public violation of PRAMA.

However, another transition in power occurred in December 2012, this time from the DPJ to the LDP. Now back in power, the LDP led by Shinzo Abe, has facilitated further legislation for information control, such as the contentious State Secrets Bill enacted in December 2013. Additionally, several party members, including Kawakami, have appealed for new NAJ buildings, citing the limited capacity of the current building and the previously mentioned need for more staff. Reform once again began to move slowly forward.

Finally, in May 2014, the Research Panel for the Functions and Facilities of the NAJ was set up under the Cabinet Office. Shoichi Oiwaka, a Vice Chief Editor of the Yomiuri Newspaper, is the chairman of the panel, and several researchers, business leaders, and another journalist, -- Tadaaki Matsuoka at Nikkei -- were appointed as members. Since its creation, the panel has conducted research on archive facilities in Japan and other countries, as well as on the needs of the archival users. It planned to publish a research paper in spring 2015, and continue research on the abovementioned topics -- mainly the issues relating to facilities -- though it will

not touch on the topics concerning revision of PRAMA.

In addition to reform efforts on the part of the government post-PRAMA, a network of several non-governmental organizations is planning to submit a proposal for the scheduled revision of PRAMA. The organizations include the Japan Society for Archival Science, the Records Management Society of Japan, Tokyo Chapter of ARMA International (a group of records management companies and consultants), and a research group led by the researchers of the Graduate Course of Archival Science at Gakushuin University. While the government has continued to pursue reforms, once again the initiative for substantive governance reform, this time in shape of proposed revisions for PRAMA, has occurred without significant interest from government officials.

5. Lessons Learned from PRAMA: Top-Down Policy Making and its Limitations

Ultimately, the most important point concerning the legislation process for PRAMA is its unique top-down policy characteristics. In fact, personal interests of prominent politicians, especially Fukuda, and support by former senior administrators, especially Kikuchi and Ozaki, were indispensable. As discussed previously, the issues of archive and record management received very little attention from policy makers or bureaucrats, failing to become a prominent policy issue. Japan's particular brand of top-down policy making has several important limitations in this domain, however. We will briefly discuss four of them in this section of the chapter.

First, this top-down policy process reflects the weakness of grassroots policymaking on issues of archives and records management addressed in PRAMA. The process leading to the enactment of the FOIA, in fact, differs in important ways from the process that led to PRAMA. First, in the wake of the Lockheed bribery scandal in 1976, after the US aerospace company

bribed governments in the process of aircraft sales negotiations, a number of Japanese lawyers, legal scholars, citizen groups, etc., strongly requested enactment of a Japanese FOIA that would bring greater accountability and transparency. In contrast, grassroot advocacy for the enactment of the PRAMA was weak, with a few exceptions (e.g. Jiyu Jinken Kyokai (Japan Civil Liberties Union)). Second, local governments took the lead in developing and advocating for the FOIA system, though only a few local governments established their archival institutions officially with the FOIA. With PRAMA, only a small number of local governments established local ordinances concerning archives and/or records management (discussed later). Third, the political power transition from the LDP to a coalition government in 1993 further facilitated the shift towards a Japanese FOIA, even though the coalition regime retained power only briefly. In comparison, the LDP and its coalition (Komei Party) took the lead in the enactment of PRAMA, before they lost the Lower-House election in 2009. The transition in power to the DPJ was accompanied by a lack of implementation rather than further reform.

Why then do we see two very different processes -- one with a diversity of pressure and leadership, and another defined solely by key leaders at the top? In Japan, there is a significant gap in understanding between how to run and manage archives and whether information should be freely accessible (covered by the FOIA). There is an important relationship between means for accessing and the right to access information. However, the former requires more detailed administrative and governance expertise than the latter. While advocacy groups for FOIA have requested more substantial FOIA legislation, especially a provision of "right to know," it is doubtful to what extent those same groups understand the real process of records management and archives administration.

Second, this top-down approach has not corresponded with interest from voters or a place for public archives in election campaigns. Archives, records management, and freedom of

information have had only little effect on voters' preferences in Japanese elections. This is particularly the case when it comes to candidates that are members of the LDP. The result is that officials who have contributed the most to reform are not rewarded for those efforts on Election Day. In fact, Kawakami, a major contributor to PRAMA, lost the Lower House election in 2009 only to win in 2012. Kawakami's contribution to policy on archives and records management had little impact on election results. As leaders are not rewarded with electoral results for these policies, they have little incentive other than personal preference or passion to fuel these necessary reforms.

It is very disappointing but not surprising that the DPJ, which had taken a pro-FOIA position and was crucial to the passage of the original bill, failed to take a lead in implementing PRAMA throughout the administrative sector. What accounts for this neglect? Perhaps the DJP paid little attention to implementation because its support groups, such as the Japan Federation of Bar Associations, were more eager for revision of FOIA than implementation of PRAMA. Without clear pressure from the electorate, political parties generally pursue the interests of such affiliated groups, further hindering ongoing and substantive reform in this arena.

Third, lack of broad support has led to less qualified and/or engaged staff and administration in this sector. There has been significant turnover in the position of Minister in Charge of Public Records Management (see Table 4). The term for a Minister of Records has generally been shorter than that for other ministerial posts, raising concerns that public record management as a policy issue has not been given substantial or consistent attention. In fact, the minister's appointment is often made at the same time as more public or highly desired positions that oversee such issues as gender equality and recovery from the Tohoku earthquake disaster. It is thus dubious whether the issue of public records management has been the first policy priority of appointed Ministers.

Table 4. List of Ministers in Charge of Public Records Management (until Dec. 2014)

Name	Period	Congress	Party	Cabinet
Yoko Kamikawa (Ms.)	2008/02 ～ 2008/08	Shugiin	LDP	Fukuda
Kyoto Nakayama (Ms.)	2008/08 ～ 2008/09	Sangiin	LDP	Fukuda (rev.)
Yuko Obuchi (Ms.)	2008/09 ～ 2009/09	Shugiin	LDP	Aso
Yoshito Sengoku (Mr.)	2009/09 ～ 2010/02	Shugiin	DPJ	Hatoyama
Yukuo Edano (Mr.)	2010/02 ～ 2010/06	Shugiin	DPJ	Hatoyama
Renho Murata (Ms.)	2010/06 ～ 2011/06	Sangiin	DPJ	Kan (original, 1st rev., 2nd rev.)
Yukuo Edano (Mr.)	2011/06 ～ 2011/09	Shugiin	DPJ	Kan (2nd rev.)
Renho Murata (Ms.)	2011/09 ～ 2012/01	Sangiin	DPJ	Noda
Katsuya Okada (Mr.)	2012/01 ～ 2012/12	Shugiin	DPJ	Noda (1st rev., 2nd rev., 3rd rev.)
Tomomi Inada (Ms.)	2012/12 ～ 2014/09	Shugiin	LDP	2nd Abe
Haruko Arimura (Ms.)	2014/09～	Sangiin	LDP	2nd Abe (1st rev.)

Fourth, this top-down approach lacks important buy-in and expertise present in other sectors. The content of PRAMA was determined by five main deliberative bodies (see Table 3 for

a list of the members of the five bodies): (1) former senior administrators, including those who served as Administrative Vice-Minister; (2) researchers on administrative law and public administration; (3) researchers in other fields, such as Japanese history, library science, and records management; (4) journalists; and (5) others. While at first glance, this deliberative model would seem to represent a diversity of interests and tap into a diversity of expertise, it is safe to say that former administrators and researchers on law have taken the lead on policy issues; i.e. these members understand actual policy process, interests of bureaucrats, and legal procedures and wording and therefore were at an advantage when it came to PRAMA. In fact some members of these two groups were involved in two or more of the five bodies giving them even greater voice.

This imbalance is a concern because researchers in other fields are often individuals involved in management and/or use of government archives and records. Their influence, however, is weak compared to those of former administrators and law researchers, though some, like Prof. Kato (historian), join several deliberative bodies. In general, those with the most experience with the content of interest in PRAMA do not have the largest or even a substantial voice at the table. As such, their experience is not brought to bear on the management of public archives. This is compounded by the fact that the Cabinet Office, in charge of management of the deliberative bodies as well as the NAJ, pays little attention to the issues of archives and records management, and that the values and voices of the community in this field are ignored in these arenas as well.

In conclusion, while PRAMA does represent a significant step toward greater public record and archival management in Japan, the top-down process through which it was drafted and implemented brings with it significant cause for concern and raises ongoing challenges for this arena of information governance in Japan for the future.

6. Current Challenges for Promoting Archives and Records Management

The largest barrier for development of public archives and records management is the aforementioned lack of knowledge regarding archives as well as the absence of (professional) archivists in broader Japanese society, needless to say among policy makers. This point relates to the (incomplete) role of archives and public records management for (information) governance in Japan, and recognition of the field of archives and public records management as a policy issue at the grassroots level. A key challenge facing Japan today will be the development of this field at all levels: (1) local governments and (2) professional archivists.

6.1. Archives and Records Management in Local Governments

The need for a system of archives and records management at the local level is reflective of the degree to which the people's lives are affected and their needs addressed at the local level. Article 34 of PRAMA does require that "a local public entity shall endeavor to formulate and implement measures necessary for the proper management of documents in its possession" but it does not go so far as to require it. In fact, the extent to which the local system of archives, archival institutions and records management is developed depends on the motivation of each local government.

While PRAMA has had some influence on local governments, that influence has been limited. As of December 2014, the number of public archives at the local government level was 70 (Prefectural level: 36, city and town level: 34). After the enactment of PRAMA in July 2009, 15 new local public archives were established (Mie Pref., Fukuoka Pref., Saga Pref., Sapporo City, Sagamihara City (Kanagawa), Hitachi-Omiya City (Ibaraki), Nakanojo Town (Gunma), Fuchu City (Tokyo), Musashino City (Tokyo), Joetsu City (Niigata), Toyama City, Obuse Town

(Nagano), Takayama City (Gifu), Mitoyo City (Kagawa), Dazaifu City (Fukuoka)); these share 20% of current local archives. In this sense, PRAMA has positively motivated local governments. However, there are 47 prefectures and 1741 cities and towns in Japan. The number of local public archives remains small compared to the total number of local governments in Japan.

In order to strengthen information governance, Japan would need to address lack of engagement at the local level. One possible model for local governance is the Fukuoka Communal Archives, which opened in 2012 and covers public records of Fukuoka Prefecture and 58 cities, towns, and villages belonging to the Prefecture (except Fukuoka and Kitakyushu cities, both of which have established their own archives already). Whether such a style of communal archives would be applicable to other local governments is yet to be seen, but this archive demonstrates the possibility of an efficient and effective archival system housed in the local governments in Japan, which face limited resources both in terms of budget and manpower.

6.2. Issues Regarding Professional Archivists

The system of educating and training professional archivists remains undeveloped in Japan, though this trend may be reversed. Neither of the two leading bodies (JSAI and JSAS) concerned with education and training, nor the universities, currently have the power or the programs to sustain the expertise and power necessary to influence policy decisions concerning public archival and record management in Japan.

One of the leading bodies concerning archival issues is the Japan Society of Archives Institutions (JSAI), established in 1976. It consists of institutional members from both public and private archives, with a number of individual members. JSAI was influential in the process of establishing the Public Archives Act in 1987.

However, the management of the JSAI, which largely relies on institutional members,

faces a serious obstacle: many staff members at archival institutions in Japan are "accidental archivists," that is, they have been accidentally forced to accept positions at archival institutions as the result of personnel shift at their parent organizations (e.g. local government, university, or corporation). After several years, many of them will leave the archival institutions for another office due to another personnel shift. While there are a number of specialized staff members at the archives, many are classified as temporary, and face the risk of casual unemployment.

Such issues of personnel shift and temporary employment affect the management of national subject-oriented organizations such as the JSAI, where institutional members of the national organizations are forced to curtail manpower and budget. In fact, a number of institutional members, especially local government archives, have withdrawn from the JSAI in recent years. Thus, the JSAI can no longer exercise enough political power in the field of public records management and archives to effectively impact policy.

Another body is the Japan Society for Archival Science (JSAS) established in 2004. In contrast to the JSAI, the JSAS largely consists of scholars and students of archival science, as well as those who have interests in academic fields. The JSAS established its own accreditation system for archivists in 2012, which gives accreditation for prospective archivists based on learning and/or working experiences. While there has been discussion of whether the JSAS, an academic body rather than a professional one, is appropriate for granting accreditation, 50 people received accreditation as archivists in 2013 and 2014. The effectiveness of this accreditation system will be monitored by the archives, government and other bodies and the society in following years. This newly minted organization may represent an important first step in rectifying the lack of qualified archival specialists in Japan.

Finally, only a small number of universities conduct research and education in archival science. Gakushuin University, which established the Graduate Course of Archival Science in

2008, was the first to do so, followed by only a few universities (Univ. of Tsukuba, Kyushu Univ., Beppu Univ.). While the introduction of archival studies at universities has been a slow and somewhat limited process, universities are key for the education of professional archivists, for development of academic and professional fields, and for deeper understanding of archives and records management by policy makers and the society overall.

7. Conclusion

Japan was late to establish national archives and, once established, centralized governance was relatively weak, both in terms of the legal framework and in the size of personnel. This put Japan soundly behind Western democracies in the development of this key component for democratic governance. Why? Historically in Japan, unlike in Western democracies, there has been a critical lack of concentrated or sustained policy interest in promulgating strong measures in this arena. By walking through the policy process from 1987 to present, this chapter has highlighted the ebb and flow of interest culminating in the top-down leadership resulting in PRAMA in 2009. While PRAMA does represent an important landmark for the development of national record and archival governance in Japan, this top-down process brings with it many challenges and raises future concerns for information governance in Japan. Further attention needs to be paid to developing expertise beyond the top, in the local governments and the archival profession itself. In short, this field is in the beginning stages of information governance. It is hoped that not only will there be an increasing number of archival institutions and professional archivists but also a deeper understanding of these issues by policy makers and the society overall.

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Part II: Economy

5. Does Mandatory Quarterly Financial Reporting Affect Corporate Investment Behavior?

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Abstract

This chapter examines the economic motives and effects of adopting regulations requiring quarterly financial statements. The U.S. and Japan have similar histories of regulations on quarterly financial reporting. In both countries, firms had been required to disclose quarterly financial statements, first due to rules imposed by stock exchanges, and then due to financial regulations. In both cases, the driver of the changes that led to the introduction of quarterly reporting were pressures from actors in stock markets. There are contrasts between the US and Japan, however, in the process and position in which the rules were adopted. The first difference is the composition of main actors promoting the adoption of quarterly financial reporting. In the US, securities analysts are the main players to promote setting the regulations on quarterly financial statements. In Japan, it is the global investors and the actors who believe that they need to make Japanese stock markets more global. The second difference between the US and Japan is the position of the accountants. Accountants initially objected to the adoption of regulations on quarterly financial statements in the U.S., but in Japan they were neutral or supported to adopt it because of business opportunities and easy learning from the previous adopters. I predict that these differences between the US and Japan affect the speed and effects of adopting the regulations on quarterly financial reporting.

1. Introduction

This study examines whether introduction of mandatory quarterly financial reporting affects corporate investment behavior. I have three reasons to focus on the theme.

First, there are a variety of methods to regulate quarterly financial reporting. For example, financial regulators have required mandatory disclosure of quarterly financial statements from all listed firms in Finland, Italy, South Korea, Japan, Portugal, Spain, and the U.S. Stock exchanges have required all or some listed firms to disclose quarterly financial statements in Austria,

Germany and Sweden. On the other hand, listed firms have not been required to disclose quarterly financial statements in Belgium, France, Denmark, Great Britain, Ireland, Luxemburg, and the Netherlands, where firms need only to issue quarterly business reports to investors. The diversity of regulations on quarterly financial reporting suggests that expectations concerning quarterly financial reporting differ around the world; therefore it is of interest to examine the effects of regulations on quarterly financial reporting.

Second, some researchers, economists, and practitioners are keenly interested in short-termism of capital market or corporate management (Kay 2012). Some critics insist that quarterly financial reporting is a cause or source of short-termism behavior by corporate management. They explain that frequent disclosure makes top management focus more on nearer bottom line results and discourages long-term investment. However, we cannot identify current situations of short-termism because we have not accumulated enough evidence for evaluation. Therefore we need to examine how regulations on quarterly financial reporting affect long-term investment.

Third, there are several studies that examine economic effects of regulating quarterly financial reporting from management perspectives. There is a long history of quarterly financial reporting in the US, but most researchers shed more light on economic effects only from investors, not top management. Recently some stakeholders charge that information-overload on financial reports gives few benefits to investors, and is costly to firms. For example, at the Leadership Conference of the National Association of Corporate Directors in October 2013, the Chair of the US Securities and Exchange Commission (SEC), Mary Jo White, pointed out the necessity of examining whether shorter timeframes impose an undue burden on companies and whether requiring more frequent updates may lead to a decrease in the quality of the information. She recognized, however, that investors do need timely information. Most regulators or

accounting standards setters wonder whether corporate disclosures, including quarterly financial reports, place more reliance on compliance issues rather than communication issues. Therefore, it is important for us to identify economic effects from a variety of perspectives.

This paper focuses on the relation between introduction of mandatory quarterly financial reporting and corporate investment behavior. First, I analyze the differences in corporate investment behavior among European countries and Japan after the introduction of quarterly financial reporting. I focus particularly on 15 countries in Europe and Japan, because details are available concerning the methods of quarterly financial reporting. This paper examines whether the method of regulating quarterly financial reporting affects corporate investment behavior among mandatory disclosing firms, voluntary disclosing firms, and non-disclosing firms in the European countries and Japan. If mandatory quarterly financial reporting creates pressure on top managers, firms may decrease their investment. Second, I examine whether introduction of mandatory quarterly financial reporting decreases the long-term investment of Japanese listed firms. Third, I investigate which firms change their investment behavior and what consequences result from new quarterly financial information after instigation of stock exchange rules or disclosure regulation of quarterly financial reporting. In particular, I focus on the consequences on corporate investment behavior in the firms that disclose information on losses in the first and third quarter.

The results of this examination show that firms with mandatory quarterly financial reporting invest in long-term capital less than do firms with non-disclosures and voluntary disclosures. Japanese listed firms do not necessarily decrease their long-term investment after the introduction of mandatory quarterly financial reporting, but firms with certain characteristics decrease their investment. In particular, firms with more profitable and higher foreign shareholders' ratios decrease their long-term investment, while firms with more investment

opportunities and larger market capitalization increase their long-term investment. In addition, firms making losses in the first and third quarter and profits in the interim and annual period decrease their long-term investment after the introduction of mandatory quarterly financial reporting. These results suggest that for some firms, mandatory quarterly financial reporting promotes long-term investment, depending on the extent of necessity of accountability for their shareholders.

The remainder of my paper is organized as follows. Section 2 presents the institutional and theoretical background and proposes the hypotheses in this study. Section 3 shows the data sample and research design. Section 4 presents the results and implications. Section 5 concludes.

2. Institutional, Theoretical Background, and Conceptual Underpinnings

2.1. History of Regulations on Quarterly Financial Reporting

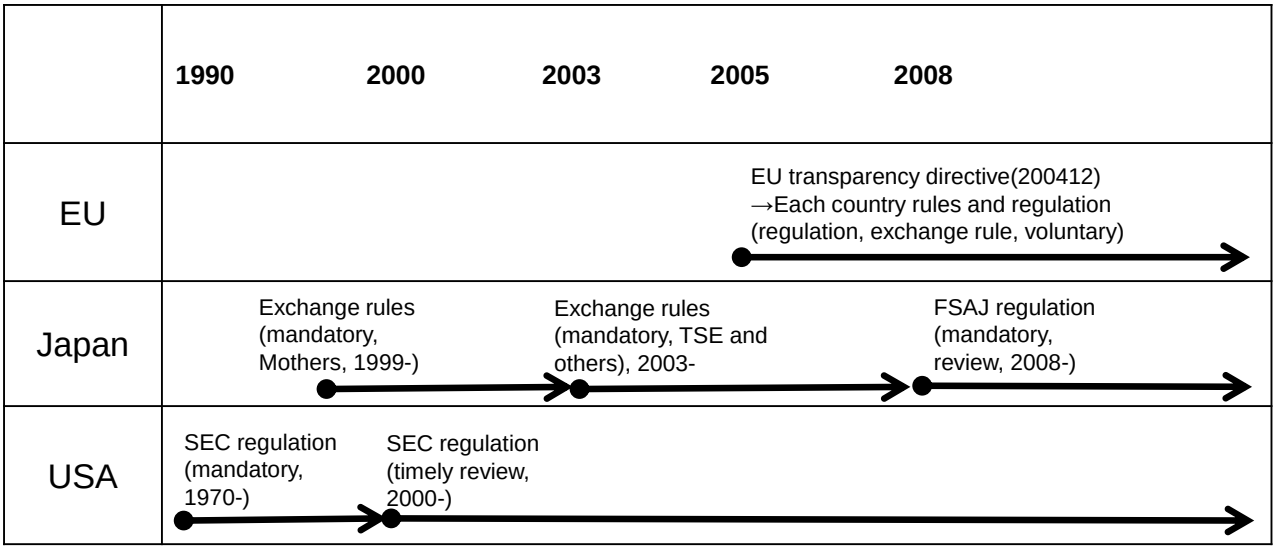
There is a long history of quarterly financial reporting in the U.S. Firms have been recommended to disclose quarterly financial reporting since 1910, and the Securities and Exchange Commission has required such disclosure since 1970. In addition, the American Institute of Certificated Public Accountants announced the Statement of Auditing Standards No.71 (SAS No.71) in 1971. It requires that firms be reviewed by auditors, based on questionnaires and analytical procedures. The Blue Ribbon Committee announced the reports and recommendation on Improving the Effectiveness of the Corporate Audit Committee in 1999 and the SEC has required firms timely review on quarterly financial reporting, not retroactive review, since March 2000.

Meanwhile, the Financial Services Action Plan of the European Commission of May 1999 recommended the disclosure of quarterly financial reports; then the European Commission announced the Transparency Directive and required listed firms in the EU financial markets to

disclose annual audited financial statements and intern financial statements. Also it required them to disclose management presentation in the first and third quarter. Management presentation includes material facts, transactions, financial position and financial performance. Although the European Commission has a policy that requires all listed firms in the EU to disclose quarterly financial reports, preparers of financial statements protested the introduction of mandatory quarterly financial reports. Thus the European Commission relegated to each EU country establishment of its own method of incorporating quarterly financial statements into the financial accounting and reporting system. Regulators in Finnish, Italian, Portuguese, and Spanish required the listed firms to disclose quarterly financial statements; meanwhile stock exchanges in Austria, Germany, and Sweden required listed firms in all or some of segments to disclose them. Listed firms are not subject to mandatory disclosure in Belgium, Denmark, France, Great Britain, Ireland, Luxemburg, and the Netherlands.

In Japan, listed firms in Tokyo Stock Exchange Mothers Market have been required to disclose quarterly financial statements since April 1999. Also those in the Tokyo Stock Exchange have been required to disclose them since April 2003. The Financial Service Agency of Japan has required listed firms to disclose quarterly financial statements with quarterly reviews by auditors since April 2008.

Figure 1. Quarterly Financial Reporting System around the World



2.2. Prior Literature on Economic Consequences of Mandatory Quarterly Financial Reporting

Many studies point out that the existence of benefits to voluntary disclosures is not sufficient to justify mandatory disclosure, because firms can voluntarily disclose their information if the benefits exceed the costs (Ross 1979). Why do regulators or stock exchanges require firms to disclose quarterly financial statements and what are the consequences of mandatory quarterly financial reporting? To answer these questions, one must examine the theoretical motivations for regulators or stock exchanges to regulate disclosure activities on quarterly financial statements.

Leuz and Wyoscki (2008) survey the theoretical and empirical literature on the economic consequences of financial reporting and disclosure regulation. They show a framework that identifies firm-specific (micro-level) and market-wide (macro-level) costs and benefits of firms' reporting and disclosure activity, and then use the framework to discuss potential costs and benefits of regulating activities. They show that firm-specific benefits include improvement of

market liquidity, decrease of bid-ask spreads and cost of capital, while firm-specific costs include the direct costs (preparation, certification, dissemination) and indirect costs (proprietary information to competitors, costly to existing financial relationships). In addition, they also explain that there are market-wide costs and benefits of disclosure beyond firms via information transfers and liquidity spillovers. They explain that potential costs and benefits of disclosure regulation are numerous and complicated, and net effects of disclosure regulation on markets or the economy is largely an empirical question.

In focusing on quarterly financial reporting, some available studies examine economic consequences of its introduction. The sample of empirical studies on quarterly financial reporting is primarily U.S. firms, because the U.S. has a long history of quarterly financial reporting.

Prior literature on capital markets effects is two-fold. One is studies that examine the predictive ability of quarterly earnings to forecast future earnings (e.g., Brown and Niederhoffer 1968, Brown and Rozeff 1978), and the other is studies that investigate the evaluation of quarterly earnings in capital markets (e.g., Brown and Kennelly 1972, Kiger 1972, Abdel-Khalik and Espejo 1978). These studies show that quarterly financial information is more effective to predict future earnings or cash flows.

Prior studies from the late 1960s to the beginning of the 1980s focused on U.S. firms that voluntarily disclose quarterly financial statements and examined the usefulness of their information for investors. However, these studies have been criticized because capital market effects from the results are based on the top management's attitudes of voluntarily disclosing quarterly financial reports, rather than on their information contents. They were also criticized for the fact that the data sample included only U.S. firms. To differentiate the effects between top management attitudes toward voluntary disclosure, and information contents of quarterly financial reporting, Butler, Kraft, and Weiss (2007) analyze the changes in earnings timeliness

after introduction of quarterly financial reporting, based on Basu (1997), between the firms that voluntarily disclosed quarterly financial reporting before mandatory regulations and the firms that did not. The study shows that firms with voluntary disclosure of quarterly financial reporting improved the timeliness of earnings more than firms with previous policies of non disclosure[63].

Most studies on quarterly financial reporting show positive effects for investors. On the other hand, Ball and Shivakumar(2008) show that information contents of quarterly earnings are only about 1 to 2 % in the yearly total. Mensah and Werner(2008) show that shareholders' return in the U.S. and Canada where adopted mandatory quarterly financial reporting is more volatile than that in the UK and Australia where such reporting has not yet been adopted. Ball and Shivakumar(2008) suggest that quarterly financial reporting has a limited role as an information source for investors. They suggest that it has some role in contracting or confirming expected financial performance[64].

If quarterly financial information has some role in contracting or confirmation, we need to understand what motivations firms have in disclosing quarterly financial information. For example, Sengupta(2004) shows that firms with more volatile volumes of shareholder transactions, a larger number of shareholders, and higher ratio of institutional investors in total, and a higher ratio of outside directors disclose quarterly financial reports earlier, and firms with a higher ratio of blockholder ownership in total disclose more delayed reports. Rahman, Tay, Ong, and Cai (2007) examine the voluntary disclosure of quarterly financial reports in the Singaporean firms, and present findings that firms with higher potential of future growth, larger scale, and more use of technology disclose quarterly financial reports voluntarily, and that mandatory

[63] Outside the U.S., DeFond, Hung, and Trezevant (2007) examines information contents on quarterly financial reports around the world. Otogawa(2003) and Kubota, Suda, and Takehara(2010) examines information contents and economic effects on quarterly financial reports in Japan.

[64] Gigler and Hammer(1998) show the confirmation roles of frequent financial information.

enforcement of quarterly financial reporting increases both the coverage of analysts and volatility of shareholders' return.

In addition, many studies show that we can reveal earnings management by analyzing quarterly financial information. For example, Givoly and Ronen (1981) show that top managers recognize the profits or losses which offset financial performance before the fourth quarter to smooth their earnings. Mendenhall and Nicholes (1988) explain that firms disclose bad news in the fourth quarter more frequently than in other quarters, because firms don't need audits or reviews for quarterly financial reporting. Jeter and Shivakumar (1999) show that abnormal accruals, based on Jones (1991) and Dechow, Sloan, and Sweeney (1995), in the fourth quarter are larger than those in other quarters. Dhaliwal, Gleason, and Mills (2004) show that firms would attain earnings targets by changing effective tax rates from the third to the fourth quarter. Kerstein and Rai(2007) show that firms with earnings slightly less than zero until the third quarter make profits in the annual income statement. Fan, Baura, Cready, and Thomas (2010) show that firms increase their earnings in the fourth quarter via classification shifting of extraordinary items. Das, Shroff, and Zhang (2009) present the evidence of earnings reversal which means the losses reverse profits in the fourth quarter.

On the other hand, Brown and Pinello (2007) demonstrate that it is difficult for firms to manage earnings by recognizing additional profits in the fourth quarter because annual financial statements are strictly audited by auditors; therefore firms tend to manage earnings forecasts which arenot subject to audits or reviews. These results suggest that quarterly financial information makes clear earnings management, and whether quarterly financial information clarifies the extent to and method of earnings management depends on the audit, enforcement

and other financial systems[65].

To clarify the economic consequences of adopting regulations on quarterly financial reporting, we need to make clear micro-level and macro-level costs and benefits of reporting and disclosure activities. Prior literature on economic consequences of quarterly financial reporting sheds more light on micro-level benefits of reporting and disclosure activities, such as the information contents in the capital markets, market liquidity, cost of capital, or corporate transparency. On the other hand, it does not focus on micro-level and macro-level costs of reporting and disclosure activities. This paper examines micro-level and macro-level costs of regulating reporting and disclosure activities on quarterly financial reporting.

2.3. Theoretical and Empirical Background on the Relation Between Investment Behavior and Mandatory Quarterly Financial Reporting

In terms of costs of regulating quarterly financial reporting, a focus of attention is short-termism or myopia. At the end of the 1980s and beginning of the 1990s, some professors in the U.S. alleged that short-termism harmed the competitive advantage of U.S. firms, compared with Japanese and German firms (e.g., Drucker 1986, Jacob 1991, Porter 1992). They explained that management opportunism, stock market myopia, and fluid and impatient capital promote the myopia of management and cause negative impacts to competitive advantage in the U.S.firms and economy. After the U.S. firms and economy recovered in the 1990s, the criticisms gradually decreased.

Following the accounting frauds in the beginning of the 2000s, notably Enron and Worldcom, and the financial crisis at the end of the 2000s, some institutions and scholars have insisted that short-termism in capital markets causes negative impacts to firms and to the

[65] Ettredge, Simon, Smith, and Stone(2000a)(2000b), Mantry, Tiras, and Wheatley(2003), Krishnan and Zhang(2005), Boritz and Liu(2006) , Bedard and Courteau(2008), Alves ande Dos Santos(2008) examine the relation between quarterly financial reporting and audits or reviews system.

economy (Aspen Institutes 2007, BIS 2010, Kay 2012). Prior literature points out that more frequent reporting may be one of signigicant reasons to fall into short-termism or myopia of corporate managers.

Why does frequent reporting, like quarterly financial reporting, affect short-termism or myopia in the firms? Gigler and Hammer (1998) show a model for analyzing mandatory reporting in the presence of multiple market imperfection. They present one potential cost due to increased reporting frequency. They argue that moral hazard problems arising from the unobservable effort of a firm's manager become more severe if reporting frequency is increased. They explain that impatient shareholders price firms based on observed current cash flows of the firm and, under pressure from impatient investors, top managers tend to select the projects that have higher cash-flows in the early period and lower value in the total. Gigler, Kanodia, Sapra, and Venugoparan (2014) also examine the cost of frequent reporting activities which increase the probability of inducing managerial short-termism. They explain that price pressures brought about by frequent reporting results are analogous to the pressure caused by premature evaluation of any action whose value is probabilistically manifested only over the long run. These premature evaluations are tempered by subsequent evaluations, but the damage caused by early evaluations cannot be overcome when shareholders are sufficiently impatient. Thus, frequent reports magnify the attraction of managerial actions that are more likely to produce quick bottom line results. Such pressures disappear when the reporting frequency is decreased.

Many empirical studies examine whether financial reporting and its related system affect short-termism in firms. For example, some studies show that firms tend to decrease research and development expenditures to attain the analysts' earnings forecasts or earnings guidances (e.g., Bushee 1998, Bange and De Bondt 1998). In addition, other studies examine whether managers stop or decrease long-term investment in order to beat the short-term earnings targets by using

the survey and experimental research (e.g.,Bhojraj and Libby 2005, Graham, Harvey, and Rajgopal 2005). Meanwhile, Houston, Lev, and Tucker (2010) show that cancellation of earnings guidance does not necesarily promote long-term investment.

Ernstberger, Link, and Vogler (2011) examine the relation between mandatory quarterly financial reporting and real earnings management. They show that mandatory quarterly reporting leads managers to focus on short-term goals and promote real earnings management to attain it. Much literature shows evidence that quarterly financial performance is closely related to the short-termism or myopia of the firms[66].

These studies put more emphasis on the relation between short-termism behavior and quarterly financial reporting under limited situations, such as attaining earnings targets or cancellation of earnings guidance. Meanwhile, few studies focus directly on the relation between long-term investment and mandatory quarterly reporting.

2.4. Hypotheses Development

Based on Gigler, Kanodia, Sapra, and Venugoparan (2014), more frequent reporting may affect corporate investment behavior. If more frequent reporting enhances the information that is impounded in stock prices by providing more timely and more disaggregate information on a firm's performance, more informed prices provide better market discipline in the sense of discouraging investment in negative present value projects. Meanwhile, they explain that more frequent reporting magnifies the attraction of managerial actions that are more likely to produce quick bottom line results. If mandatory quarterly financial reporting either promotes market discipline via stock prices or leads the mindset of top managers to short-termism or myopia,

[66] Baber, Fairfield, and Haggard(1991), Bhojraj and Libby(2005), Roychowdhury(2006), Bhojraj, Hribar, Picconi, and McInnis(2009) show that firms decrease their research and development expenditures and other costs to attain the earnings guidance or targets.

mandatory quarterly financial reporting would cause a negative impact on long-term investment.

Some EU countries and Japan required listed firms to disclose quarterly financial statement after the end of the 1990s. However, there are various ways of regulating quarterly financial reporting activities among those counties. Some countries required listed firms to disclose quarterly financial statements by financial regulations or stock exchange rules, and other countries have not endorsed disclosure of quarterly financial statements and some firms in those countries disclose quarterly financial statements voluntarily. If mandatory quarterly financial reporting causes a negative impact, it is because listed firms that are required to disclose quarterly financial statements by financial regulations or exchange rules, invest in long-term capital less actively than non-disclosing listed firms or voluntarily disclosing firms.

H1: Firms with mandatory disclosure of quarterly earnings invest in long-term capital less actively than non-disclosing firms or voluntarily disclosing firms, ceteris paribus.

Next, I analyze changes in investment behavior before and after introduction of financial regulation or stock exchange rules on quarterly financial reporting. In particular, I analyze the differences of changes in investment behavior between financial regulation and stock exchange rules on quarterly financial reporting. I focus on the listed firms in Japan, because they experienced both changes. If financial regulation or stock exchange rules affect the consciousness of top management in relation to the time horizon of investment, it causes a negative impact to long-term investment after introduction of such rules.

H2: Firms decrease long-term investment after disclosure regulation or stock exchange rules of quarterly financial reporting, ceteris paribus.

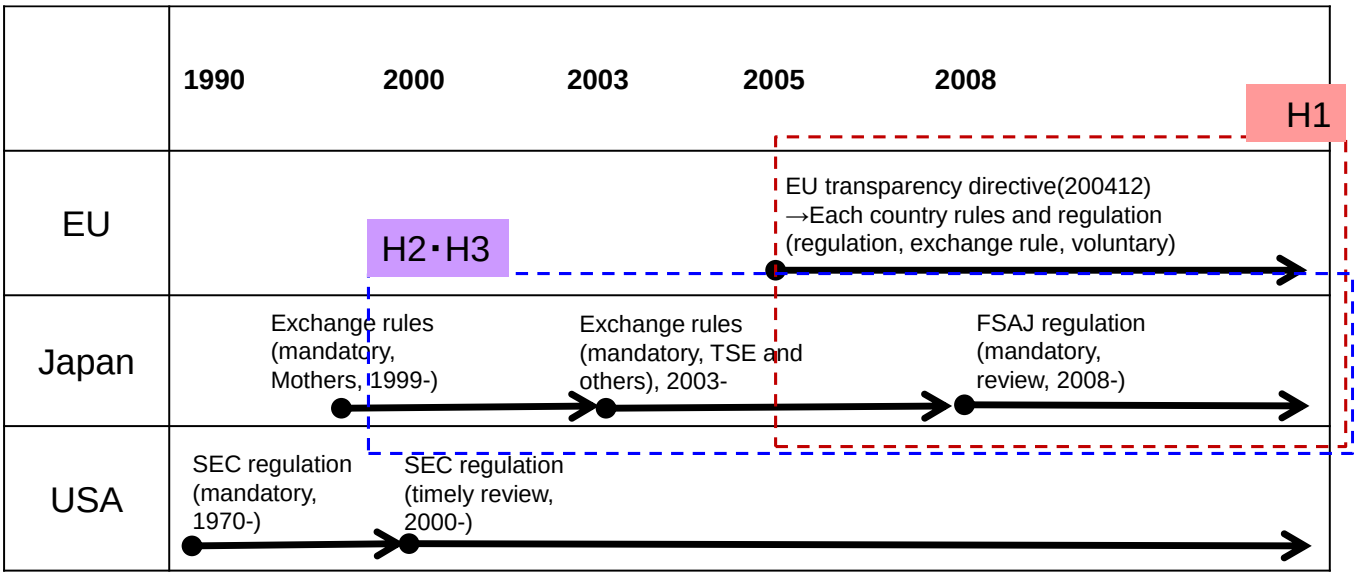
Finally, this study focuses on the relation between economic situations in each firm and

mandatory quarterly financial reporting. Gigler, Kanodia, Sapra, and Venugparan(2014) explain that frequent disclosure affects investment behavior via market disciplines and management attention. If frequent disclosure can mitigate information asymmetry and improve market disciplines, firms with higher agency costs, like higher business opportunities and larger scale, may increase long-term investment more because they can get more benefit from decrease of information asymmetry and agency costs. On the other hand, firms with higher proprietary costs, like higher profitability, may decrease long-term investment because frequent disclosure increases the possibility of leaks of proprietary information. In addition, firms with more vocal investors, like higher foreign ownership ratio, decrease their long-term investment because frequent disclosure increases the opportunities of communication among stakeholders and makes top management focus more on nearer bottom line results for accountability to their investors.

In addition, the firms disclosing new important information for investment must change their investment behavior. I focus on the firms that disclose losses in the first or third quarter, although they make profits on the interim and annual income statements.

H3: Firms with more information asymmetry, higher agency costs and proprietary costs decrease their long-term investment more than other firms after disclosure regulation or stock exchange rules.

Figure 2. The Relation Between Disclosure Regulation or Rules and Hypothesis



3. Research Design and Sample Data

3.1. Research Design

First, I compare the amounts of firms' long-term investment in mandatory disclosure countries with those in non-disclosing or voluntary disclosure countries. European and Asian countries introduced quarterly financial reporting in the late 1990s and the beginning of the 2000s. If mandatory quarterly reporting causes a negative impact, listed firms that are required to disclose quarterly financial statements by financial regulations or exchange rules invest in long-term capital less actively than do non-disclosing listed firms or voluntarily disclosing firms.

I focus on Austria, Belgium, Denmark, Finland, France, Germany, Great Britain, Greece, Ireland, Italy, Luxemburg, the Netherland, Portugal, Spain, Sweden, and Japan, for which I can get information on how and when quarterly financial reporting was introduced[67], classify the

[67] Regulators require listed firms to disclose quarterly financial statements in Finland, Greece, Italy, Portugal, and Spain. Stock exchanges require listed firms to disclose them in Austria, Germany, and Sweden. Other EU countries do not require listed firms to disclose quarterly statements mandatorily. In Japan, the stock exchange first required it,

firms in those countries into three groups (Mandatory disclosing firms, voluntary disclosing firms, and non-disclosing firms), and make two dummy variables (MD is the one if firms are required to disclose quarterly earnings mandatorily, otherwise zero. VD is the one if firms disclose quarterly earnings voluntarily, otherwise zero.).

I set the equation (1) to examine the relation between long-term investment and the method of disclosing quarterly earnings in each country. I set the level of long-term investment (capital expenditures + research and development expenditures) as a dependent variable, and q ratio, profitability, leverage, scale, external capital, MD, and VD. We shed more light on MD and VD which show the disclosure effects under controlling investment opportunities and firms' fundamentals. I control investment opportunities, the level of cash flows, financial position, firm scale, because prior literature shows that investment behavior is affected by business opportunities (Tobin 1969、Hayashi 1982), the level of cash flows or earnings (Meyur and Kuh 1957, Gilchrist and Himmelberg 1995), and financial position and firms scale (Jensen 1986, Fazzari, Huddard, and Peterson 1988). I analyze the model by using a general linear model. I control country and industry factors to examine it.

$$Investment_{t\_t+1} = \alpha + \beta_1 Q\_ratio_t + \beta_2 Profitability_t + \beta_3 Leverage_t + \beta_4 Scale_t +$$

$$\beta_5 Cash_t + \beta_6 ExternalCapital_t + \beta_7 MD_t + \beta_8 VD_t + \varepsilon \cdots\cdots (1)$$

where

$Investment_{t\_t+1}$ is average of the sum of capital expenditures and research and development expenditures in period t and t+1, divided by total assets at the end of the fiscal year t.

Q_ratio_t is the sum of market capitalization at the end of the fiscal year t and total liabilities at the end of the fiscal year t, divided by total assets at the end of the fiscal year t.

$Profitability_t$ is earnings in period t, divided by total assets at the end of the fiscal year t.

$Leverage_t$ is total liabilities at the end of the fiscal year t, divided by total assets at the end of the fiscal year t.

$Scale_t$ is the log of market capitalization at the end of the fiscal year t.

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and financial regulators later followed the requirement

$Cash_t$ is the sum of cash, cash equivalents, and trading securities at the end of the fiscal year t., divided by total assets at the end of the fiscal year t.

$External\ Capital_t$ is the net cash outflows from investing in period t minus net cash inflows from operating in period t, divided by the net cash outflows from investing in period t

MD_t is a dummy variable that takes the one if firms are required to disclose quarterly earnings mandatorily in period t, otherwise zero.

Second, I analyze changes in investment behavior after disclosure regulation and stock exchange rules of quarterly financial reporting. I shed more light on the listed firms in Japan, because Japanese firms commit to long-term investment and we can see economic consequences of introducing quarterly financial information on long-term investment more clearly. In Japan, listed firms in Mothers Market of Tokyo Stock Exchange have been required to disclose quarterly financial statements since April 1999. Also those in Tokyo Stock Exchange have been required to disclose them since April 2003. Financial Service Agency of Japan has required listed firms to disclose quarterly financial statements with quarterly reviews by auditors since April 2008. I can identify the differences of changes in investment behavior between disclosure regulation by financial agency and the rules by stock exchanges. I make two dummy variables. First variable is QR_E which takes the one if listed firms are required to disclose quarterly earnings by stock exchange rules and otherwise zero. Second variable is QR_R which takes the one if listed firms are required to disclose quarterly earnings by disclosure regulation and otherwise zero.

I set the equation (2) to examine what changes in investment behavior come after stock exchange rules and disclosure regulation of quarterly financial reporting. I include the level of investment as a dependent variable, and q ratio, profitability, leverage, scale, external capital, stability of employees, foreign ownership ratio, QR_E, and QR_R. I examine the model by using the general linear model. We shed more light on QR_E and QR_R which show the disclosure

effects under controlling investment opportunities and firms' fundamentals. I add some variables to the equation (1), because they are important for analyzing the effects of disciplining top managers in Japan (Employee Stability and Foreign Ownership). I control industry and year factors to examine it.

$$Investment_{t_t+1} = \alpha + \beta_1 Q\_Ratio_t + \beta_2 Profitability_t + \beta_3 Leverage_t + \beta_4 Scale_t + \beta_5 Cash_t + \beta_6 ExternalCapital_t + \beta_7 \text{StabilityEmployee}_t + \beta_8 ForeignOwnership_t + \beta_9 QR\_E_t + \beta_{10} QR\_R_t + \varepsilon \cdots\cdots (2)$$

where

Stability Employee $_t$ is the standard deviation of numbers of employee from the period t-4 to t, divided by the mean of them from the period t-4 to t .

Foreign Ownership $_t$ is the ratio of foreign ownership in the total at the end of the fiscal year t.

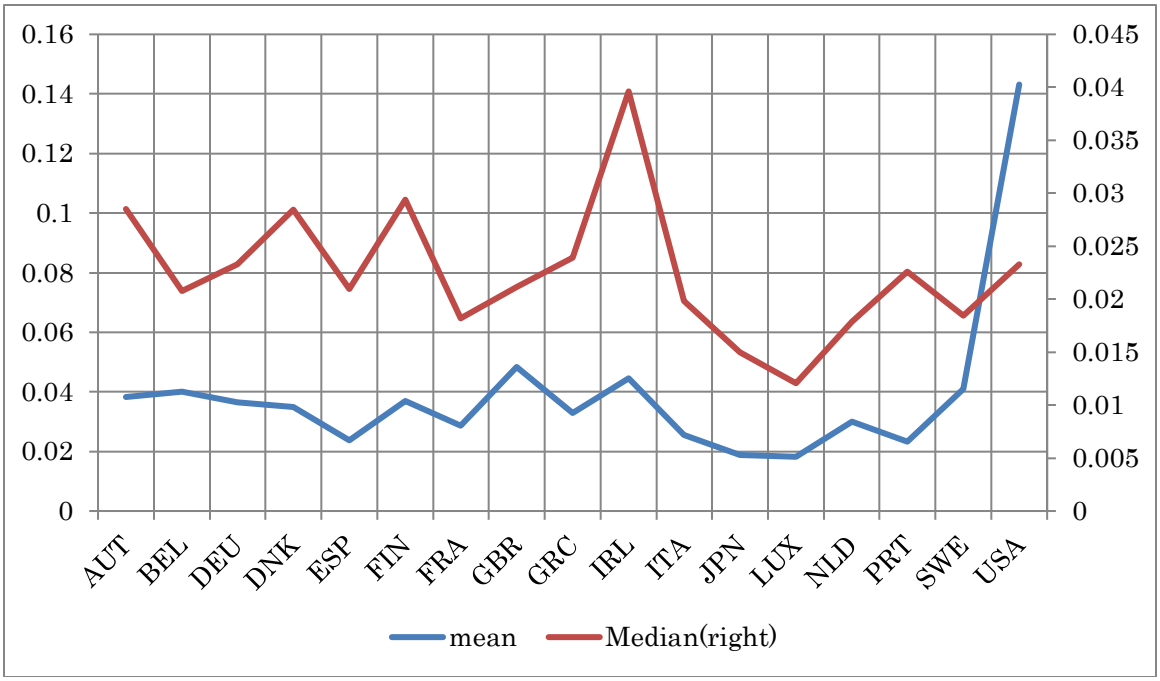
QR_E $_t$ is a dummy variable that takes the one if firms are required to disclose quarterly earnings by stock exchanges rules in period t, otherwise zero.

QR_R $_t$ is a dummy variable that takes the one if firms are required to disclose quarterly earnings by disclosure regulation in period t, otherwise zero.

※Other variables in equation (2) are the same as equation (1).

Third, I examine what types of firms change their investment decisions more dramatically after introduction of quarterly financial reporting. I focus on the listed firms in Japan, because we can collect the information on related data comprehensively and analyze the method and the reason for changes in investment behavior more easily. In addition, Japanese firms prefer long-term investment to keep the long-term relationship with their stakeholders; thus I can examine economic consequences of investment behavior with the increase in frequency of reporting made clearer. For example, I calculate the standard deviation of long-term capital in the past 10 years in each firm. I show the mean and median in each country. I show the data in Figure 3. It demonstrates that Japan is one of most stable investment countries around the world.

Figure 3. Investment Stability



I analyze the investment opportunities, profitability, scale, and foreign ownership ratio, because they are closely related to information asymmetry, agency costs and proprietary cost which affect the strength of stock price pressures. If quarterly financial reporting increases stock price or short-term performance pressures to top managers, top managers become more conservative about investing in long-term capital for the future. I analyze whether those factors affect corporate investment behavior by analyzing the cross term variables with the dummy variable which takes one if firms are required to disclose quarterly earnings, and otherwise zero. In addition, I examine economic effects of new information from mandatory quarterly financial statements on investment behavior.

I set the equation (3) to examine what changes in investment behavior are after stock exchange rules and disclosure regulation of quarterly financial reporting. I include the level of

investment as a dependent variable, and q ratio, profitability, leverage, scale, external capital, stability of employees, foreign ownership ratio, QR_M, some cross-terms, like QR_M×Q_ratio, QR_M×profitability, QR_M×scale, and QR_M×ForeignOwnership, and some variables which are based on quarterly financial information, like QE_Q1Q3N and QE_Volatility. I examine the model by using the general linear model. We shed more light on cross terms variable and some variables which are newly disclosed in quarterly financial reporting. I control industry and year factors to examine it.

$$Investment_{t_t+1} = \alpha + \beta_1 Q\_ratio_{t_1} + \beta_2 Profitability_t + \beta_3 Leverage_t + \beta_4 Scale_t +$$
$$\beta_5 Cash_t + \beta_6 ExternalCapital_t + \beta_7 \text{StabilityEmployee}_t + \beta_8 ForeignOwnership_t +$$
$$\beta_9 QR_{M_t} + \beta_{10} QR_{M_t} \cdot Q_{ratio_t} + \beta_{11} QR_{M_t} \cdot Profitability_t + \beta_{12} QR_{M_t} \cdot Scale_t +$$
$$\beta_{13} QR\_M_t \cdot ForeignOwnership_t + \beta_{14} QE\_Q1Q3N_t + \beta_{15} QE\_Volatility_t + \varepsilon \cdots (3)$$

where

Stability Employee $_t$ is the standard deviation of numbers of employee from the period t-4 to t, divided by the mean of them from the period t-4 to t .

Foreign Ownership $_t$ is the ratio of foreign ownership in the total at the end of the fiscal year t.

QR_M $_t$ is a dummy variable that takes the one if firms are required to disclose quarterly earnings by stock exchanges rules or disclosure regulation in period t, otherwise zero.

QE_Q1Q3N $_t$ is a dummy variable that takes the one if firms make losses in the first or third quarter and make profits in the interim and annual financial results in period t, otherwise zero.

QE_Volatility $_t$ is a standard deviation of quarterly earnings in period t, divided by total assets at the end of the fiscal year t.

※Other variables in equation (3) are the same as equation (1).

3.2. Sample and Data

This paper examines the relation between mandatory quarterly financial reporting and corporate investment behavior. I have three tests to analyze it.

First, I examine whether firms with mandatory quarterly financial reporting decrease their

long-term investment. I focus on the firms' investment behavior in Austria, Belgium, Denmark, Finland, France, Germany, Greece, Great Britain, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, Sweden, and Japan in which changes in more frequent reporting are conducted and I can obtain information about disclosure regulation or stock exchange rules. I collect the data of European countries from Compustat Global Vantage and Capital IQ and the data of Japan from NEEDS Financial Quest. I set the criteria below. I pick up 7,945 firm-years in the European countries and 12,502 firm-years in Japan. I calculate basic statistics and correlation variables in hypothesis 1.

1. I can get the financial information from 2005 to 2012 sequentially.
2. The firms belong to non-financial industry on the database
3. I can get the market capitalization at the end of fiscal year from 2005 to 2012.
4. The accounting period of the firms is 12 months in the fiscal year.

Table 1. Basic Statistics and Correlation of Hypothesis 1

Panel A. country

country	number	country	number
Austria	140	Greece	490
Belgium	189	Ireland	112
Germany	1393	Italy	315
Denmark	217	JPN	12,502
Spain	56	LUX	56
Finland	560	NLD	441
France	1449	PRT	105
Great Britain	1547	SWE	875

Panel B. basic statistics

	1Q	2Q	3Q	mean	standard deviation	skewness	kurtosis
Investment	0.023	0.047	0.080	0.063	0.066	4.803	51.455
Q_ratio	0.849	1.027	1.362	1.280	1.081	11.518	291.435
Profitability	0.017	0.041	0.071	0.038	0.089	-4.523	50.707
Leverage	0.378	0.539	0.671	0.522	0.198	-0.184	-0.501
Scale	6.620	8.684	10.263	8.350	2.859	-0.338	-0.121
Cash	0.061	0.116	0.199	0.149	0.127	1.917	5.333
ExternalCapital	0.000	0.000	0.347	1.892	33.623	60.022	4662.636
MD	1	1	1	0.77	0.422	-1.271	-0.384
VD	0	0	0	0.03	0.157	6.036	34.432

Panel C. correlation

	Investment	Q_ratio	Profitability	Leverage	Scale	Cash	External Capital	MD	VD
Investment	1	0.288	-0.177	-0.173	-0.04	0.188	0.064	-0.158	0.088
Q_ratio	0.256	1	0.148	-0.064	-0.043	0.212	0.106	-0.228	0.112
Profitability	0.163	0.407	1	-0.098	0.264	-0.033	-0.116	0.088	0.025
Leverage	-0.154	0.131	-0.231	1	-0.021	-0.451	0.006	-0.02	-0.009
Scale	0.098	-0.008	0.242	-0.042	1	-0.037	-0.02	0.531	-0.055
Cash	0	-0.003	0.123	-0.416	0.027	1	0.031	-0.003	-0.001
ExternalCapital	0.074	-0.053	-0.342	0.095	-0.145	-0.119	1	-0.019	-0.006
MD	-0.072	-0.289	0.019	-0.027	0.512	0.075	-0.038	1	-0.294
VD	0.072	0.115	0.035	-0.009	-0.063	-0.02	-0.007	-0.294	1

Second, I investigate changes in investment behavior after disclosure regulation and stock exchange rules of quarterly financial reporting. I shed more light on the listed firms in Japan, because Japanese listed firms put more emphasis on persistent investment than do firms in other countries, and have been required to introduce more frequent reporting and other market related systems. I can make the changes in economic consequences more saliently. In addition, I can analyze the differences of changes in investment behavior between stock exchange rules and disclosure regulation of quarterly financial reporting activities. Thus I collect the data of Japan from NEEDS Financial Quest. I set the criteria below. I pick up 21,671 firm-years.

1. I can get the financial information from 1999 to 2012 sequentially.

2. The firms belong to non-financial industry on the database

3. I can get the market capitalization at the end of fiscal year from 1999 to 2012.

4. The accounting period of the firms is 12 months in the fiscal year.

Third, I examine what types of firms change their investment decisions after introduction of quarterly financial reporting more saliently. I use the same sample with hypothesis 2.

Table 2. Basic Statistics and Correlation of Hypothesis 2 and 3

Panel A. Industry

Industry	Numbers	Industry	Numbers	Industry	Numbers
Fishery, Agriculture, and Forestry	7	Steel	40	Air Transportation	2
Mining	2	Non-ferrous Metal	24	Warehouse	32
Construction	117	Metal Product	55	Information Communication	73
Food	74	Machine	158	Wholesale	186
Textile Product	39	Electronics	175	Retail	79
Pulp and Paper	15	Transport Equipment	81	Securities and Commodities future transaction	6
Chemical	146	Precision Equipment	25	Other monetary	11
Pharmaceutical	32	Other Product	54	Real Estate	19
Petroleum and Coal	3	Electric Power and Gas	17	Services	72
Rubber Product	13	Land Transportation	54		
Ceramic Product	44	Marine Transportation	12		

Panel B. basic statistics

	1Q	2Q	3Q	mean	standard deviation	skewness	kurtosis
Investment	0.021	0.043	0.073	0.053	0.044	1.651	4.937
Q_ratio	0.803	0.943	1.116	1.067	2.463	120.926	16415.993
Profitability	0.020	0.039	0.067	0.047	0.051	1.758	22.275
Leverage	0.377	0.544	0.693	0.534	0.212	0.232	4.368
Scale	9.838	10.703	11.790	10.934	1.569	0.763	0.600
Cash	0.124	0.188	0.274	0.213	0.126	1.288	2.339
ExternalCapital	0.000	0.000	0.260	1.579	19.036	36.280	1616.085
StabilityEmployee	0.033	0.063	0.117	0.093	0.101	3.211	16.768
ForeignOwnership	0.006	0.035	0.121	0.081	0.104	1.926	4.760
QR_E	0	1	1	0.620	0.486	-0.483	-1.766
QR_R	0	0	1	0.310	0.462	0.823	-1.323
OP_Q1Q3N	0	0	0	0.090	0.280	2.952	6.716
OP_SD	0	0.140	0.341	0.249	0.528	22.463	1153.261
PI_Q1Q3N	0	0	0	0.080	0.272	3.087	7.530
PI_SD	0	0.159	0.424	0.407	1.407	26.463	1330.357
NI_Q1Q3N	0	0	0	0.080	0.279	2.979	6.872
NI_SD	0	0.108	0.309	0.316	1.259	34.248	2066.282

Panel C. correlation

	Investment	Q_ratio	Profitability	Leverage	Scale	Cash	External Capital	Stability Employee	Foreignownership	QR_E	QR_R	OP_Q1Q3N	OP_SD	PI_Q1Q3N	PI_SD	NI_Q1Q3N	NI_SD
Investment	1	0.086	0.258	-0.132	0.197	-0.093	-0.059	0.05	0.269	0.027	-0.045	-0.064	0.075	-0.052	0.055	-0.042	0.044
Q_ratio	0.254	1	0.207	-0.009	0.023	0.052	0.001	0.047	0.103	-0.021	-0.044	-0.017	0.002	-0.014	0.003	-0.014	0.003
Profitability	0.292	0.398	1	-0.26	0.086	0.151	-0.047	0.072	0.302	0.025	-0.111	-0.083	0.029	-0.054	-0.035	-0.041	-0.063
Leverage	-0.171	0.256	-0.288	1	0.182	-0.523	0.04	0.052	-0.183	-0.108	-0.08	0.031	-0.089	0.018	-0.033	0.013	-0.02
Scale	0.201	0.271	0.105	0.159	1	-0.117	-0.025	-0.066	0.574	0.018	-0.001	-0.043	0.071	-0.034	0.014	-0.031	-0.004
Cash	-0.074	-0.07	0.116	-0.504	-0.107	1	-0.003	-0.007	0.157	0.039	0.025	-0.005	0.046	-0.004	0.02	0.001	0.017
External Capital	0.033	-0.069	-0.305	0.13	-0.065	-0.133	1	0.043	-0.019	0.001	-0.01	0.005	0.005	0.011	0.157	0.008	0.178
Stability Employee	-0.001	0.117	0.034	0.031	-0.058	-0.019	0.031	1	0.048	-0.012	-0.039	-0.031	0	-0.032	0.055	-0.026	0.06
Foreignownership	0.282	0.302	0.318	-0.223	0.657	0.148	-0.089	0.028	1	0.172	0.053	-0.031	0.124	-0.03	0.063	-0.022	0.046
QR_E	0.031	0.024	0.056	-0.104	0.019	0.041	0.001	0.034	0.183	1	0.527	0.219	0.326	0.211	0.201	0.218	0.176
QR_R	-0.037	-0.223	-0.107	-0.077	0	0.027	-0.026	-0.017	0.047	0.527	1	0.196	0.21	0.188	0.108	0.195	0.103
OP_Q1Q3N	-0.069	-0.068	-0.117	0.033	-0.04	0.007	0.02	-0.022	-0.019	0.219	0.196	1	0.047	0.685	0.002	0.608	0.004
OP_SD	0.161	0.064	0.116	-0.196	0.036	0.071	-0.048	0.011	0.213	0.759	0.48	0.193	1	0.042	0.557	0.049	0.519
PI_Q1Q3N	-0.054	-0.05	-0.066	0.02	-0.03	0.008	0.012	-0.023	-0.013	0.211	0.188	0.685	0.184	1	0.017	0.821	0.014
PI_SD	0.152	0.063	0.089	-0.171	0.046	0.058	-0.029	0.021	0.214	0.759	0.469	0.163	0.953	0.166	1	0.017	0.956
NI_Q1Q3N	-0.044	-0.046	-0.046	0.015	-0.025	0.011	0.006	-0.023	-0.006	0.218	0.195	0.608	0.19	0.821	0.171	1	0.017
NI_SD	0.145	0.053	0.054	-0.152	0.034	0.055	-0.017	0.03	0.2	0.762	0.484	0.173	0.938	0.172	0.981	0.18	1

4. Research results

4.1. Results of H1

In hypothesis 1, I examine the relation between the types of more frequent reporting and investment behavior in table 3. I classify the sample into three groups. The first group is composed of 36,728 firms that are required to disclose quarterly financial reports by disclosure regulation or stock exchange rules (MD firms). The second group is composed of 519 firms that voluntarily disclose them (VD firms). The third group is composed of 4221 firms that don't disclose them (ND firms). I examine whether MD firms invest in long-term capital less than VD firms and ND firms, if I control other factors which affect the level of investment. Table 3 Panel A shows that MD firms statistically significantly increase their long-term investment in the European countries and Japan. I also examine the relation only in the European countries (Panel B).

Table 3. Results of Hypothesis 1

Panel A. 15 European countries and Japan

	coefficient	t value	p value
Intercept	0.019	1.334	0.182
Q_ratio	0.012	27.590	0.000
Profitability	-0.155	-32.138	0.000
Leverage	-0.033	-13.719	0.000
Scale	0.004	16.761	0.000
Cash	0.039	10.265	0.000
ExternalCapital	-0.000	-0.858	0.391
MD	-0.011	-5.356	0.000
VD	0.004	1.247	0.212
Country	included		
Industry	included		
Adjusted R2	0.362		

Panel B. 15 European countries

	coefficient	t value	p value
Intercept	0.041	2.096	0.036
Q_ratio	0.009	14.309	0.000
Profitability	-0.175	-23.638	0.000
Leverage	-0.066	-10.911	0.000
Scale	0.002	4.800	0.000
Cash	0.118	16.445	0.000
ExternalCapital	-0.000	-0.707	0.479
MD	-0.005	-1.896	0.058
VD	0.006	1.270	0.204
Country	included		
Industry	included		
Adjusted R2	0.388		

4.2. Results of H2

In hypothesis 2, I analyze changes in investment behavior after disclosure regulation and stock exchange rules of quarterly financial reporting. I show the results in table 4. The table shows that stock exchange rules of quarterly financial reporting affect long-term investment negatively, but it is not statistically significantly. The results suggest that stock exchange rules and disclosure regulation of quarterly financial reporting activities do not necessarily change investment behavior in Japan. This fact means that solely an introduction of regulating quarterly financial reporting activities does not necessarily affect the investment behavior in Japan.

Table 4. Results of Hypothesis 2

	QR_E+QR_R	QR_E	QR_R
Intercept	0.029 3.244 0.001	0.030 4.231 0.000	0.025 3.526 0.000
Q_ratio	0.001 7.099 0.000	0.001 7.100 0.000	0.001 7.100 0.000
Profitability	0.114 21.268 0.000	0.114 21.271 0.000	0.114 21.264 0.000
Leverage	-0.029 -20.422 0.000	-0.029 -20.422 0.000	-0.029 -20.426 0.000
Scale	0.003 13.309 0.000	0.003 13.307 0.000	0.003 13.335 0.000
Cash	-0.071 -31.184 0.000	-0.071 -31.185 0.000	-0.071 -31.193 0.000
External Capital	-0.000 -1.497 0.134	-0.000 -1.498 0.134	-0.000 -1.496 0.135
Employee Stability	0.020 8.386 0.000	0.020 8.384 0.000	0.020 8.388 0.000
Foreign Ownership	0.042 13.021 0.000	0.042 13.020 0.000	0.042 13.013 0.000
QR_E	-0.004 -0.717 0.473	-0.004 -0.717 0.473	
QR_R	0.001 0.223 0.823		0.001 0.224 0.823
Industry	included	included	included
Year	included	included	included
Adjusted R2	0.380	0.380	0.380

4.3. Results of H3

I show the results of hypothesis 3. In hypothesis 3, I examine what types of firms change their investment decisions after introduction of quarterly financial reporting. I focus on investment opportunities, scale, profitability and foreign ownership ratio which are closely related to the pressures from capital markets. Because quarterly financial reporting increases the opportunities to voice suggestions to the firms, I assume that firms with higher information asymmetry, agency costs, and proprietary costs experience intervention in their investment by their shareholders and other capital providers, if more frequent reporting is introduced. Top managers have more frequent opportunities to be addressed by shareholders if foreign ownership ratio is higher. In addition, firms with high profitability face more proprietary costs if more frequent reporting is introduced. Thus, firms with higher foreign ownership ratio and profitability decrease their investment after disclosure regulation or stock exchange rules of quarterly financial reporting. On the other hand, firms that are evaluated on the basis of their future opportunities and values can increase their investment, because they actively communicate with their shareholders by using quarterly financial reporting. Thus, firms with higher Q_ratio and larger market capitalization may increase their investment.

In addition, I examine what consequences newly quarterly information has on the investment behavior. I focus on firms making losses in the first or third quarter and making profits in the interim and annual income statements. In addition, I analyze how firms with more volatile quarterly earnings change their investment behavior.

I show the results of hypothesis 3 in table 5. It shows that firms with higher investment opportunities and larger market capitalization statistically significantly increase their long-term investing after introduction of mandatory quarterly financial statements, while firms with higher foreign ownership ratio and profitability decrease it. In addition, the table shows that firms making losses in the first or third quarter and making profits in the interim and annual income statements

statistically significantly decrease their long-term investment, while firms with more volatile quarterly earnings statistically significantly increase it.

Table 5. Results of Hypothesis 3

	Operating profits	Pretax Income	Net Income
Intercept	0.036 4.862 0.000	0.037 4.976 0.000	0.037 4.947 0.000
Q_ratio	0.000 4.581 0.000	0.000 4.598 0.000	0.000 4.598 0.000
Profitability	0.157 18.339 0.000	0.157 18.336 0.000	0.157 18.368 0.000
Leverage	-0.031 -21.030 0.000	-0.031 -21.203 0.000	-0.031 -21.281 0.000
Scale	0.002 6.665 0.000	0.002 6.698 0.000	0.002 6.723 0.000
Cash	-0.073 -32.113 0.000	-0.073 -32.132 0.000	-0.073 -32.105 0.000
External Capital	-0.000 -1.650 0.099	-0.000 -2.951 0.003	-0.000 -3.110 0.0002
Employee Stability	0.017 7.229 0.000	0.017 6.878 0.000	0.017 6.880 0.000
Foreign ownership	0.054 9.611 0.000	0.053 9.550 0.000	0.053 9.547 0.000
QR_M	-0.018 -2.679 0.007	-0.019 -2.812 0.005	-0.019 -2.851 0.004
QR_M * Q_ratio	0.007 9.473 0.000	0.006 9.105 0.000	0.006 9.008 0.000
QR_M * Profitability	-0.097 -8.776 0.000	-0.091 -8.223 0.000	-0.089 -8.036 0.000
QR_M * Scale	0.001 3.143 0.002	0.001 3.357 0.002	0.001 3.431 0.002
QR_M * Foreign ownership	-0.023 -3.508 0.000	-0.024 -3.357 0.000	-0.024 -3.553 0.000
QE_Q1Q3N	-0.004 -4.468 0.000	-0.004 -4.002 0.000	-0.002 -2.799 0.005
QE_SD	0.003 5.963 0.000	0.002 8.531 0.000	0.002 8.483 0.000
Industry	included	included	included
Year	included	included	included
Adjusted R2	0.386	0.380	0.380

5. Conclusions

This study examines whether introduction of mandatory quarterly financial reporting affects corporate investment behavior. There is a long history of quarterly financial reporting in the U.S. Recently, the quarterly financial reporting system has spread worldwide since the late 1990s and the beginning of the 2000s. Accounting and reporting systems become more globalized with the development of global capitalism. However, the trends have dramatically changed in the wake of the financial crisis after the Lehman shock. The loss of confidence among the players in capital markets caused criticisms of quarterly financial reporting activities, such as disclosure overload, short-termism, and the loss of analyzing cost and benefits analysis on accounting and reporting regulations. The objective of this paper is to identify economic consequences of mandatory quarterly financial reporting and to arrive at some implications for accounting and reporting standards setters and regulators.

Prior literature examines economic consequences of introducing quarterly financial reporting. However, most studies focus on capital market effects or corporate transparency effects. Some studies focus on the themes of how mandatory quarterly financial reporting affects corporate behavior by using survey and theoretical research, but there are few studies about economic effects of mandatory quarterly financial reporting on investment behavior. This paper analyzes the relation between quarterly financial reporting system and investment behavior in the countries which introduced it since the late 1990s.

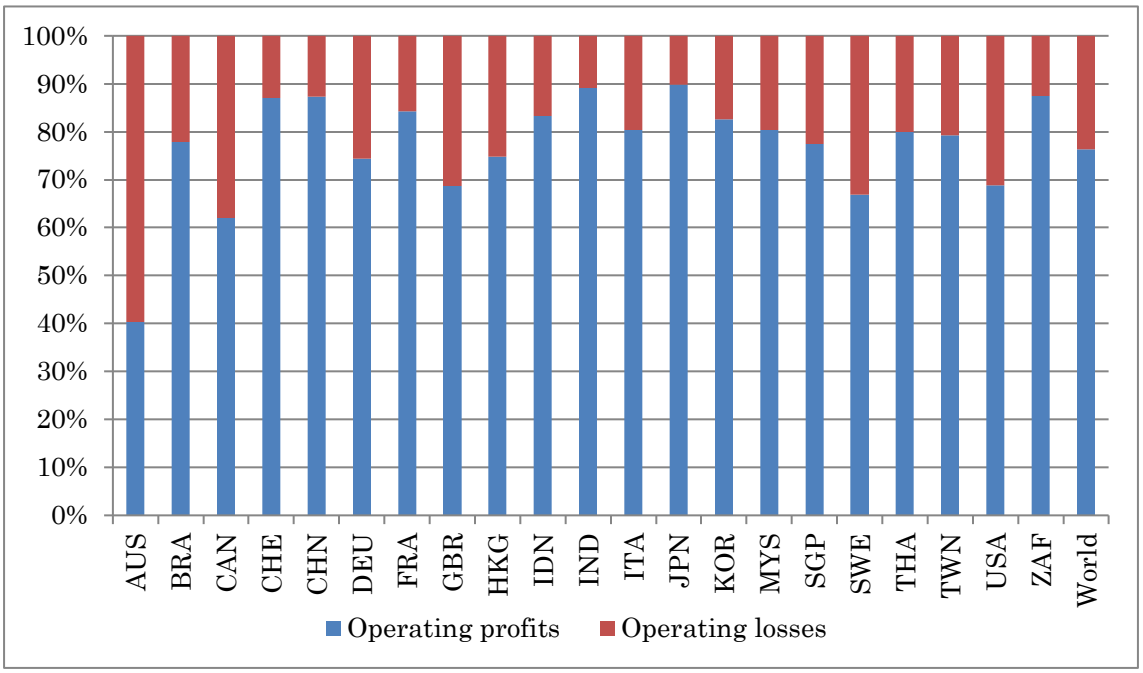
First, I analyze what differences between MD firms (mandatory quarterly financial reporting firms) and other firms appear after introduction of quarterly financial reporting in 15 European countries and Japan. The results of this paper show that MD firms invest in long-term capital less actively than VD firms (voluntary disclosing firms) and ND firms (non-disclosing firms). Mandatory quarterly financial reporting may cause a negative impact on the firms' long-term investment,

because it brings more pressure from capital markets to the firms. The results are consistent with Ernstberger, Link, and Vogler (2011).

Second, I examine whether the regulation or stock exchange rules of mandatory quarterly financial reporting activities affect the firms' long-term investment. I examine the trends of changes in long-term investment before and after market exchange rules and disclosure regulation of quarterly financial reporting. The results of this paper show that the market exchange rules and disclosure regulation do not necessarily decrease long-term investment. I conjecture that quarterly financial reporting affects the investment behavior of some firms bringing pressures from capital markets to the firms, while it does not necessarily affect the behavior of other firms.

Which firms are affected by the regulation or rules of mandatory quarterly financial reporting? I assume that firms with higher information asymmetry, agency costs, and proprietary costs experience intervention in their investment by their shareholders and other capital providers, if more frequent reporting is introduced. The results of this paper support this assumption. The results show that firms with higher foreign ownership ratio and profitability decrease their long-term investment after the introduction of mandatory quarterly financial reporting, because firms with higher foreign ownership ratio have more additional cost of communicating with their shareholders, and firms with higher profitability have higher proprietary costs and agency costs. On the other hand, firms with higher investment opportunities and larger market capitalization increase their long-term investment after the introduction. Firms that can communicate with their shareholders and whose future potential for growth and value is understood promote their investment more than other firms. In addition, firms making losses in the first or third quarter and making profits in the interim and annual income statements decrease their long-term investment. Japanese firms put more emphasis on making profits, therefore, making losses only in a quarter affects their long-term investment (Figure 4). Firms' also more volatile quarterly earnings increase their long-term investment.

Figure 4. The Ratio of Firms Making Operating Profits in the Total (1992-2008)



The results of this paper suggest that mandatory quarterly financial reporting tends to produce negative impacts on long-term investment by the firms. In particular, firms with higher information asymmetry, agency costs, and proprietary costs decrease their long-term investment more than other firms. The firms need to communicate with their stakeholders on their future potential for growth and their values to increase their long-term investment more actively.

Recently, the issues of disclosure overload and costs and benefits analysis are widely discussed in the accounting and reporting world. The “one size fits all” regulation or rules, like disclosure regulation of quarterly financial reporting activities, bring more additional costs to the firms. When we set the disclosure regulation or stock exchange rules, we need to consider such costs

This paper has some limitations. Our sample is limited to the European countries and Japan, because I have access to the information about the disclosure regulation and stock exchange rules in detail. The sample must be broadened in order to understand fully, the implications of setting regulations or

rules of quarterly financial reporting. In addition, it is difficult to assess in detail, other institutional factors that might affect investment behavior. Such issues must be addressed and considered for the future.

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6. Governing and Protecting Information in Intellectual Property Law – Information Governance and Trade Secrets

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Abstract

Intellectual Property is a term that refers to creations of the mind. Governance, circulation and management of information are highly relevant for a number of areas within intellectual property. This chapter will briefly discuss the areas within intellectual property for which information governance is relevant. It concludes that the to-date, often overlooked field of trade secret protection is the area within intellectual property law in which information governance is most crucial to be able to protect and enforce exclusive rights. Trade secret law is a body of laws and regulation that protects confidential information from misappropriation, subject to the owner of such information maintaining certain standards in governing such information. Under Japanese law, a trade secret owner has to show that he undertook certain efforts to have kept the information secret in order to enjoy protection against misappropriation. This chapter will summarize the relatively short development of trade secret law in Japan, enacted in 1991, and will discuss the socioeconomic factors that triggered such development. It will review the standard of information governance required for satisfaction of the "kept-as-secret"-factor as it has evolved under METI guidelines and Japanese case law. Finally, it will compare such Japanese standard for information governance with the standards developed under U.S. and German law, and analyze the difference and similarities between these major jurisdictions.

1. Systematic Overview: Intellectual Property and Trade Secrets

Intellectual Property law is a body of law that has enjoyed growing recognition and consideration during the last decades, as many developed countries have turned into "knowledge-based" economies, deriving a significant part of their income from innovation and reputation. Creations of mind that form the basis for the required knowledge can be protected as intellectual property. Intellectual property has been considered to include the following two areas:

- Copyrights and related rights, i.e., the rights of authors of literary and artistic works, including books and other writings, musical compositions, films, paintings, sculpture, but also computer programs; the purpose of

granting copyrights is to promote the creation of new works by giving authors control of and profit from such works, and

- Industrial property rights, which again can be divided into
  - Rights protecting distinctive signs, in particular trademarks and geographical indications, aiming to stimulate and ensure fair competition and to protect consumers; and
  - Rights primarily directed to stimulate innovation, design and the creation of technology, such as patent rights protecting inventions, or utility models, industrial designs and trade secrets.

All such categories of rights are somehow related to information. Copyrights, for example, protect the author's expression, but in principle not any underlying facts or information. The rationale for trademark protection is somewhat different, but also not unrelated to information governance: here, a trademark owner can protect its reputation by keeping a distinctive sign such as an arbitrary name or symbol exclusive, allowing the consumer to benefit by confidence in the reliability of the product source or service offered. In essence, a trademark is a specific set of regulated information provided to the customer, facilitating the selection and purchasing process. However, information governance becomes most important when it concerns industrial property rights that aim to stimulate innovation. Patents are awarded to an inventor in exchange for such inventor's disclosure of certain information, i.e., an invention, to the general public. If the receiving patent office considers the invention to be new and non-obvious, as well as in line with other formal and material requirements, it will issue a patent granting the inventor an exclusive right in practicing the patented invention for a number of years. Proper information governance in the course of conducting research and development as well as during the preparation and filing of the patent application is of utmost importance, as premature or otherwise unintended disclosure could render the invention non-patentable, e.g., by destroying its novelty. In such case it would become impossible for the inventor to obtain the desired exclusivity. Information governance is similarly important for other registered innovation-driven industrial property rights such as utility models or designs, which, among other things, also require novelty.

The one category of intellectual property for which information governance is

most crucial, however, is trade secrets. The law of trade secrets has received relatively little attention by scholars and by courts in the last decades, especially in contrast with the booming disciplines of patent and copyright law. As a matter of fact, considerable debate remains as to whether or not trade secrets should really be regarded as intellectual property. Unlike patents or utility models which are also protected to foster innovation, trade secrets do not require registration with a patent office to be protected. And unlike any other intellectual property right (with the theoretical exception of copyrights), trade secrets can even extend to the very same subject-matter area, i.e., to the same information, as long as each trade secret owner independently and lawfully acquired such information. Trade secrets have been argued to be a construct of contract law, tort law, labor law or criminal law rather than fitting into the scheme of traditional intellectual property law.[68]

In Japan, trade secrets are protected under unfair competition law; misappropriation of trade secrets can result both in criminal sanctions and civil remedies, primarily under the framework of the Unfair Competition Prevention Act (UCPA). A number of other major jurisdictions also treat trade secret misappropriation as an act of unfair competition rather than as infringement of a traditional intellectual property right. That said, there are a number of reasons why trade secrets fit better in the category of intellectual property rights than in any other area of law:

1. Trade secrets are explicitly protected under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which testifies to a broad international consensus that trade secrets are regarded at least as some form of intellectual property.
2. Inventors usually face the choice of whether they should disclose an invention and protect it as a patent, or keep it secret and seek protection under trade secret law. Whichever form of protection is chosen, the inventor attempts to obtain an exclusive right for this creation of mind under existing legal frameworks. It seems somewhat unconvincing that one form of legal protection should result in intellectual property, while the other form of legal protection does not.

[68] Mark A. Lemley, The Surprising Virtues of Treating Trade Secrets as IP Rights, 61 Stan. L. Rev. (2008-2009) 311, 312.

3. Trade secret law generally requires secrecy of the information to justify protection. By giving an information owner tools to pursue misappropriation, trade secret law at the same time enables commercial use and perhaps even limited disclosure of trade secrets under certain circumstances, reducing the need to "overprotect" information and thereby potentially render it unfit for use in a commercial context.

In any event, there is a broad consensus that trade secret misappropriation is a bad thing resulting in significant economic harm, and that protection of information through trade secret law continues to rise in significance. Proper governance of information is the core requirement for rendering any information protectable as a trade secret.

2. The Slow Rise of Trade Secret Development in Japan

Japan has been a latecomer to trade secret law. Until 1990, owners of information, who had to resort to general tort law in order to combat misappropriation of information, often found their efforts futile.[69] Japan was of course well aware of the theories and practice of international trade secret law; foreign trade partners, especially the United States, continued to request the Japanese government to enact trade secret protection, a request that was not granted until 1990. Two major reasons are usually offered for Japan's delay in introducing statutory protection of trade secrets: the desire of Japanese industry to catch up to Western competitors, and, more importantly, the loyalty of the Japanese workforce. Most trade secret misappropriation claims are filed against former employees or business partners who depart with relevant information and start competing with their former employer or partner. This situation rarely occurred in Japan until the burst of the economic bubble, ending the previously common practice of lifetime-employment that bound employees to one employer from university graduation to retirement.

The first reason for the Japanese hesitation in implementing trade secret protection was to allow Japanese companies to catch up with Western competitors

[69] The most-frequently cited case to this point was decided by the Tokyo High Court in 1966 (Deutsche Werft A.G. v. Waukesha Chūetsū Yūgen Kaisha, Decision of September 5, 1966, Case No. Showa 41 (ra) 381, 464 Hanrei Jihō 34).

throughout the 1970s and 80s. During these two decades, Japan surpassed the United States as the country with the most patenting activities, evidenced by the Japanese Patent Office becoming the patent office receiving the most applications and issuing the most patents worldwide, mostly to Japanese companies. At the same time, a significant number of such patents protected "less inventive" inventions than did patents filed at the U.S. Patent and Trademark Office by U.S. companies. In most cases, Japanese companies continued to find themselves named as defendants in intellectual property litigation despite their growing patent portfolios throughout the 1980s. Understandably, there was little interest amongst Japanese industry in providing overseas competitors with another venue for trade secret infringement litigation in their own backyard.

Towards the end of the 80s, Japanese interest in trade secret protection began to change. Competitors from neighboring Asian countries slowly started to emerge, being much more receptive to Japanese employees' know-how than U.S. companies had been until then. The lifetime employment system began to weaken, resulting in employees moving to competitors or opening their own competing businesses. And while the conclusion of the TRIPS-Agreement was still a few years away, the negotiations of the TRIPS Agreement were well underway by 1990. The United States had by that time staked out its position of requesting a minimum level of trade secret protection as part of TRIPS,[70] a request which Japan as a member of the industrialized nations could not easily deny.

In 1990, the Japanese Unfair Competition Prevention Act underwent significant revision, in the course of which misappropriation of trade secrets was for the first time explicitly recognized as an act of unfair competition in Japan.[71] The UCPA defined a trade secret as "technical or business information useful in commercial activities, such as manufacturing or marketing methods, which is kept secret and not publicly known." At the time of incorporation, such definition of trade secrets was considered as rather

[70] Minutes of the meetings of the TRIPS Negotiation Group (NG11) show that the United States had submitted detailed proposals how to include trade secret protection as part of the TRIPS Agreement in October 1987. See "Suggestion by the United States for Achieving the Negotiating Objective," 19 October 1987, MTN.GNG/NG11/W/14 (available at https://www.wto.org/gatt_docs/English/SULPDF/92030039.pdf, last access February 2015), 8; see also Sharon K. Sandeen: "The Limits of trade secret law: Article 39 of the TRIPS Agreement and the Uniform Trade Secrets Act on which it is based," in Rochelle C. Dreyfuss & Katherine J. Strandburg, *The Law and Theory of Trade Secrecy – A Handbook of Contemporary Research* (Edward Elgar: 2011) 540.

[71] Amendment of Unfair Competition Prevention Act, Law No. 66/1990.

expansive, given that it explicitly included not only technical, but also business information such as customer lists or other information regarding customers or business partners. Even in the United States, which tends to pride itself in providing the strongest protection of trade secrets, business information was not part of the statutory definition of trade secrets contained in the Uniform Trade Secret Act (UTSA).[72] The substantive requirements for protecting information as trade secrets, i.e., to keep such not publicly known information secret, also resembled the UTSA, which requires that an owner of information undertake reasonable efforts to ensure that the information remains secret. Whether or not an information owner had governed or maintained the information in a manner to have satisfied the "kept-secret" requirement under the UCPA, became the most controversial issue discussed in Japanese trade secret law over the last 25 years.

Besides providing a framework definition of trade secrets, the UCPA stipulated three groups of conduct that would be considered a misappropriation and thus an act of unfair competition: 1) acquiring trade secrets by wrongful means such as by theft, fraud, duress; 2) misusing a legitimately acquired trade secret for unfair business competition or otherwise acquiring an illicit gain; and 3) willful or gross negligence in acquiring, using or disclosing trade secrets that were originally acquired wrongfully. Finally, the UCPA went on and provided a catalogues of civil remedies against trade secret misappropriation, which included a claim for injunctive relief, a claim for destruction of unlawfully disclosed or misappropriated trade secrets, and a damages claim. Subsequent amendments of the UCPA added criminal sanctions for trade secret misappropriation, which could – at least in theory – be imposed in addition to civil remedies.

3. Information Governance – Keeping the Information Secret

During the 25 years since implementation of trade secret law in Japan, the most relevant factor in determining whether or not trade secret misappropriation occurred has been the inquiry of the court into the information governance of the information owner. In every country, trade secret litigation often involves employers who sue former employees, alleging misappropriation of trade secret due to wrongful acquisition of customer information. The first bar a plaintiff employer has to pass to prevail in such an

[72] Holly Emrick Svetz: Japan's New Trade Secret Law: We Asked for It - Now What Have We Got, 26 Geo. Wash. J. Int'l L. & Econ. (1992-1993) 413, 426.

action is to demonstrate to the court that the information at issue had been kept secret as required under the UCPA. As case law began to identify items that should be considered in deciding whether the respective information had been properly kept secret or not, it also cast light on the difficulty for Japanese employers, especially smaller companies, to restrict their employees' access to information without displaying an attitude that would be perceived as distrusting, potentially causing a harmful lack of harmony and cooperation amongst the workforce.

The Japanese Ministry of Economy, Trade and Industry (METI) published a guideline on the management of trade secrets in 2003 ("Guidelines"), in which it emphasized the need for companies to properly keep important information secret in order to not lose trade secret protection. Specifically, companies had to ensure that it would be objectively recognizable that the information had been kept secret.[73] The Guidelines provided for two specific requirements that would serve such purpose: (1) only certain designated person(s) can access the information, and (2) such person(s) who accessed the information can recognize that the information is secret.[74] To achieve such effect, the Guidelines suggested a number of measures to be adopted by information owners, ranging from classification systems and access restriction to precautions in the areas of physical, technical and HR management. It backed the suggestions with references to previous case law. For example, an information owner of information recorded on a medium was instructed to keep such medium in storage under lock and key, restrict such medium from being taken out of the storage, and burn, shred, fuse, or otherwise destroy the medium when discarding it.[75] The owner was advised to take precautions in order to prevent unauthorized personnel from entering premises where information is locked.[76] In order to properly govern electronically-stored information, the Guidelines suggest establishing an appropriate IT environment, incorporating

[73] METI Trade Secrets Management Guidelines (*Eigyō Himitsu Kanri Shishin*) of 2003 (2011 edition), at 15. The explicit requirement of information having to be "objectively recognizable as being kept secret" was removed in the 2013 revision of the Guidelines.

[74] The Guidelines cited a decision of the Tokyo District Court (Case Number Heisei 8 (wa) 15112, Decision of September 28, 2000), which had required and reviewed such two requirements.

[75] Guidelines, 40-41. The Guidelines cited two cases in which the information owner complied with such requirements, namely Tokyo District Court (Case Number Heisei 10 (wa) 15960, Decision of July 23, 1999), and Tokyo District Court (Case Number Heisei 15 (wa) 5711, Decision of May 16, 2004).

[76] Guidelines,42. Here, the Guidelines again pointed to Tokyo District Court Case Number Heisei 15 (wa) 5711 as an example of restricting access to non-authorized personnel.

safeguards such as access restriction amongst employees, e.g., through a system of user IDs and passwords,[77] storing sensitive information on password-protected computers disconnected from the company intranet and the internet, and preparing an employee manual raising appropriate awareness of the importance of data management.[78]

Other recommended measures for protection of electronically-stored information included the establishment of a firewall or other technical means preventing access to information through cyber espionage, and the proper deletion and discarding of files and storage medium in a manner ensuring that recreation of and access to information would be impossible.[79] Furthermore, the Guidelines suggested certain measures in the area of HR management including, but not limited to, raising awareness of the importance of trade secret protection through training sessions[80] and by including employee confidential and non-disclosure obligations in company work rules and employment agreements.[81] This last element of the Guidelines, specifically the conclusion of binding agreements restricting disclosure and future use of confidential information, may be considered as the most crucial one. At the same, the Guidelines also noted that such agreement may not in every case be a straightforward tool for the governance of information, given that the information owner has to maintain an appropriate balance of information protection in an employee confidentiality agreement or in work rules. Implementing overly broad protection, either by making an extensive range of information subject to confidentiality which would objectively not deserve treatment as a trade secret or by insisting on an excessively long duration of the confidentiality obligation, could severely restrict an employee's ability to find work with another employer. Courts have established safeguards here to protect employees,[82] resulting in the significant legal risk that overly broad contractual provisions may be found invalid.

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[77] The importance of effective access control to sensitive information supported by citing decision of the Osaka District Court (Case Number Heisei 14 (wa) 2833, Decision of February 27, 2003) and Tokyo District Court (Case Number Heisei 10 (wa) 15960, Decision of July 23, 1999).

[78] Guidelines,45.

[79] Guidelines, 45-46.

[80] Guidelines, 50, citing amongst others Tokyo District Court (Case Number Heisei 10 (wa) 18253, Decision of November 13, 2000)

[81] Guidelines,52.

[82] A well-known decision on the appropriateness of the restriction to use information in a non-compete agreement in Japan is the Foseco Case issued by the Nara District Court (Decision of October 23, 1970, published in Hanrei Jiho No. 624 at 78). The importance of an employee's freedom to depart from an employer and the conflict with trade secret protection was also prominently discussed in the Supreme Court decision of March 25, 2010, Decision Number Heisei 21 (uke) 1168, 64-2 Minshuu (2010), 562.

The Guidelines stress the importance of having employees conclude some form of confidentiality agreements, but warn against making the confidentiality provisions too broad or otherwise wide-reaching.[83] A few cases are cited in which the confidentiality agreements procured from employees by information owners aided the court in its ultimate finding that information was being kept secret.[84]

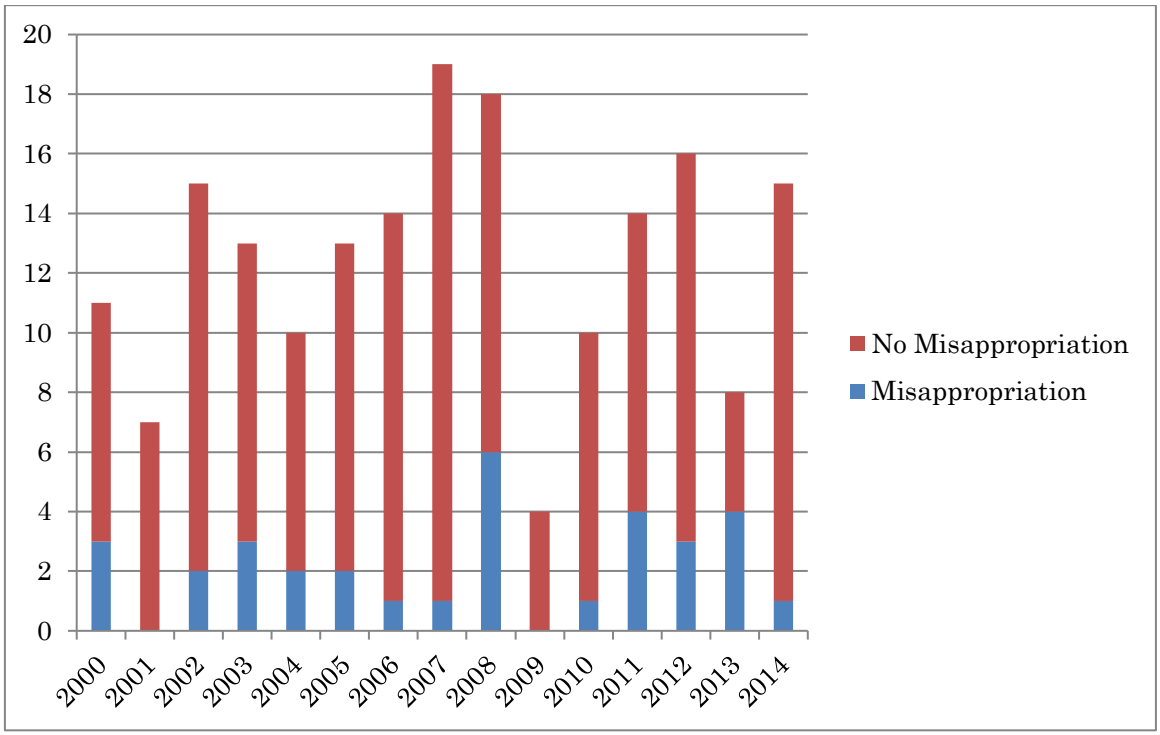
3.1. Summary of Japanese Trade Secret Case Law

Following incorporation of trade secret protection into the UCPA and the issuance of the first METI Guidelines, Japan experienced a major overhaul of its intellectual property litigation system. Through revisions of the Civil Procedure Code, the Patent Act, the UCPA and other laws, a number of procedural tools were introduced, aiming to facilitate the search of evidence, but also to protect the interest of the parties to litigation in a certain degree of confidentiality, such as by introducing a system of in-camera proceedings and document protection orders. Such systems in principle provide information owners with the possibility to litigate cases of alleged trade secret misappropriation without attendance of the public. At the same time, the socioeconomic conditions of Japan continued to change, as the lifetime tenure system continued to erode, and as major Asian competitors increased their efforts to recruit retiring Japanese engineers, often in an effort to gain access to Japanese know-how. Despite these two background factors, trade secret litigation remained relatively slow in Japan throughout the first years of the 21st century.

[83] Guidelines, at 54-56. If employers are made to sign contracts objectively limit their freedom to move to a new employer, such limitations must be reasonable in time and geographic scope, and must be compensated for reasonably.

[84] Tokyo District Court Case Number Heisei 10 (wa) 15960, Decision of July 23, 1999; Tokyo District Court Case Number Heisei 16 (wa) 24950, Decision of June 27, 2005.

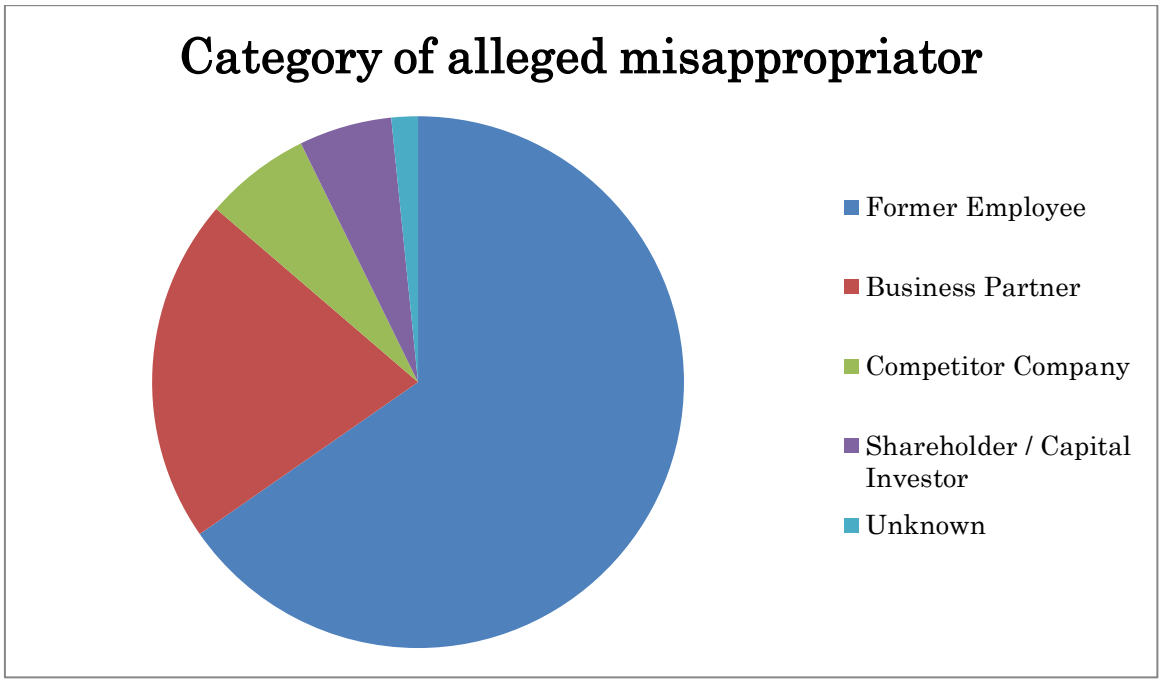
Figure 1. Japanese Trade Secret Decisions 2000-2014[85]



In the first decade of the 2000s, the years between 2000 and 20009, courts decided 124 cases. Out of these 124 cases, information owners prevailed in only 20 cases and lost 104 cases. In 96 out of 104 cases in which no misappropriation was found, the information owner was unable to demonstrate that the information at issue had satisfied the requirements to constitute a trade secret. A noticeable majority of cases concerned alleged misappropriation of business information, in many cases customer lists. Namely, 56 cases involved technical information, compared to 78 cases involving business information. A not insignificant number of cases thus concerned both technical and business information.

[85] Case law review data on file with author.

Figure 2. Identity of Accused Misappropriator 2000-2009[86]



The above graph further shows that in most cases, the alleged misappropriator was a former insider of the organization, an employee who had left and allegedly taken information with him before or during the departure. The ratio of former employees who were found to have misappropriated trade secrets was significantly higher than the ratio of accused employees. While the above chart shows that former employees were accused as misappropriator in about 65% of all cases, they were actually held guilty of misappropriation in 90% of all cases in which the information owner prevailed between 2000 and 2009.

The odds of prevailing in trade secret litigation improved only slightly in the last few years. Between 2010 and 2014, courts decided 63 trade secret cases, and found trade secret misappropriation in 13 of such cases. The win rate of information owners increased thus slightly from 19% between 2000 and 2009 to 26% in the last five years. Ninety percent of the cases lost by information owners were due to the fact that information owners couldn't prove the existence of a validly governed trade secret.[87]

[86] Case law review data on file with author.
[87] Case law review data on file with author.

3.2. Reception of Case Law and METI Guidelines

The rather low win rate amongst information owners, combined with the fact that most cases failed because the owner couldn't pass the bar for having information recognized as a trade secret by the court, indicates a substantial difficulty in implementing the required degree of information governance. One prominent commentator has argued that METI and the courts presented the average information owner with a bar too high to pass. Accordingly, METI misread the case law of the 1990s, and unduly added the various factors that were assessed in different cases to be accumulatively stipulated as being applicable in every case post issuance of the first edition of the Guidelines.[88] Ministerial guidelines and ordinances are not formally binding for courts in Japan.[89] Professor Tamura claims that courts nevertheless applied the overly demanding Guidelines in the years post 2004, resulting in an unreasonably high governance burden for information owners. He distinguishes three different "eras" within Japanese trade secret jurisprudence: a gentle era, lasting until the early 2000s, followed by a strict era in which the courts followed the "objective theory," lasting from the early 2000s through the late 2000s, and finally a "swing-back" era, in which the courts stopped strictly applying the objective theory. The term "objective theory," which gained quite some prominence in the world of Japanese IP law, relates to the courts' requiring an information owner to pass the METI standard showing that the information in question was objectively recognizable as being kept secret. Professor Tamura alleges that court decisions from the strict period lack flexibility and thereby made it too difficult, especially for small and medium sized enterprises, to govern information in a manner entitling owners to enjoy the benefit of trade secret protection.[90] Professor Tamura's classification of trade secret jurisprudence in Japan into the above-mentioned three categories is certainly not unanimously accepted.[91] Nevertheless, his reasoning has

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[88] Yoshiyuki Tamura, Eigyō Himitsu no Fusei Riyō Kōi o meguru Saiban Rei no Dōkō to Hōtekina Kadai, 66-6 Patent (2013), 80.

[89] Formally, courts in Japan only have to follow laws passed by the Parliament and Supreme Court case law.

[90] Tamura, supra note 88.

[91] For example, Judge Makiko Takabe, one of the most prominent IP judges in Japan and the presiding judge in a trade secret case referred to by Professor Tamura as a representative case for the strict era (Tokyo District Court Case Number Heisei 15 (wa) 10721, decision of April 13, 2004), argues that the courts have not followed a particular pattern or tendency in the last fifteen years, but rather try to distinguish and assess the facts applicable for each separate case. See panel discussion during RCLIP Symposium on International IP and Information Protection (Chiteki Zaisan to Jōhō no Hogo o meguru

gained significant momentum in the discussion in Japan, resulting in a number of information owners arguing for lowering the bar required for protection of information as trade secrets.

3.3. Japanese Legislative Revision 2015

In the last years, two major trade secret cases were particularly significant in bringing the topic back to the center of political discussion: a series of litigation between the Japanese steelmakers Nippon Steel and Sumitomo Metal and their Korean competitor Posco over the misappropriation of technology related to the production of grain oriented electrical steel sheets, and a dispute between the Japanese electronics company Toshiba and its Korean competitor Hynix over the misappropriation of memory chip technology. In both instances, former employees of the Japanese companies had disclosed technical information to the Korean companies, allegedly resulting in significant loss of technology lead and market share by the Japanese companies, which in turn led to billion dollar claims asserted by the two Japanese information owners and a public outcry over technology theft and trade secret infringement.[92] Compelled to take action, METI undertook a legislative reform process, reviewing its Guidelines as well as certain sections in the UCPA. During the revision process, the Guidelines were shortened significantly. References to previous case law were largely removed along with the fundamental requirement of information having to be objectively recognizable as being kept secret. The substantive section on information governance has been shortened to a mere four pages, in which METI provides recommendations on how to protect information, classified by type of embodiment of the critical information. A second and even shorter substantive section gives recommendations on information governance in case of use of information by multiple persons within one company and by different legal entities respectively. The importance of concluding appropriate non-disclosure or confidentiality agreements is slightly more prominently emphasized than in previous versions.

Kokusai-teki Dōkō) at Waseda University on December 6, 2014, on file with the author.

[92] Eventually, both disputes were settled out of court; while Hynix agreed to pay Toshiba damages in the amount of US$ 278 million in December 2014, Nippon Steel and Sumitomo Metal agreed on dropping their litigation against Posco against payment of US$ 248 million in September 2015.

In addition to the overhaul of the Guidelines, METI proposed a number of revisions to the UCPA. However, such amendments do not concern the substantive requirements of governance of information, but rather aim to facilitate enforcement of trade secrets and deter misappropriation. The UCPA and related laws will be amended until 2016 to (1) extend the scope of actions considered as misappropriation, (2) make trade secret misappropriation subject to stricter criminal sanctions, and (3) facilitate the gathering of evidence and to lower the burden of proof to show misappropriation in civil proceedings.

3.4. International Comparison – United States

Trade secrets are only partly protected by federal law in the United States. The most relevant statute for civil law protection of trade secrets is the UTSA, which provides fundamental rules regarding information governance in the context of trade secret law in Section 1(4).[93] The factor equivalent to the Japanese requirements of "having information kept secret" is the requirement to undertake efforts that are reasonable under the circumstances to maintain secrecy of the information. However, the kinds of efforts that are construed as reasonable and therefore entitling the information owner to protect information as trade secrets is, in the end, subject to the court's discretion. The major federal statute that provides for trade secret protection is the Economic Espionage Act (EEA), a statute that regulates criminal liability for trade secret misappropriation. The EEA also contains a definition of trade secret which requires, among other things, reasonable efforts to maintain secrecy of the information,[94] substantially resembling the definition under the UTSA.

Unlike in Japan, there are no guidelines or instructions issued by any federal agency or ministry which would give concise recommendations or instructions on what type of efforts would constitute "reasonable efforts" under the UTSA or the EEA. To the contrary – the U.S. Congress admitted that there is no concise rule when it stated that

[93] The UTSA is a uniform code that has been adopted by 47 states. The only states that haven't adopted the UTSA yet are New York and North Carolina; Massachusetts introduced the UTSA for enactment in 2015. However, while the UTSA provides for a significant degree of uniformity amongst adopting state, the civil protection of trade secrets ultimately remains state law, and statutes differ in certain details amongst the adopting states.

[94] 18 U.S. Code § 1839 (3).

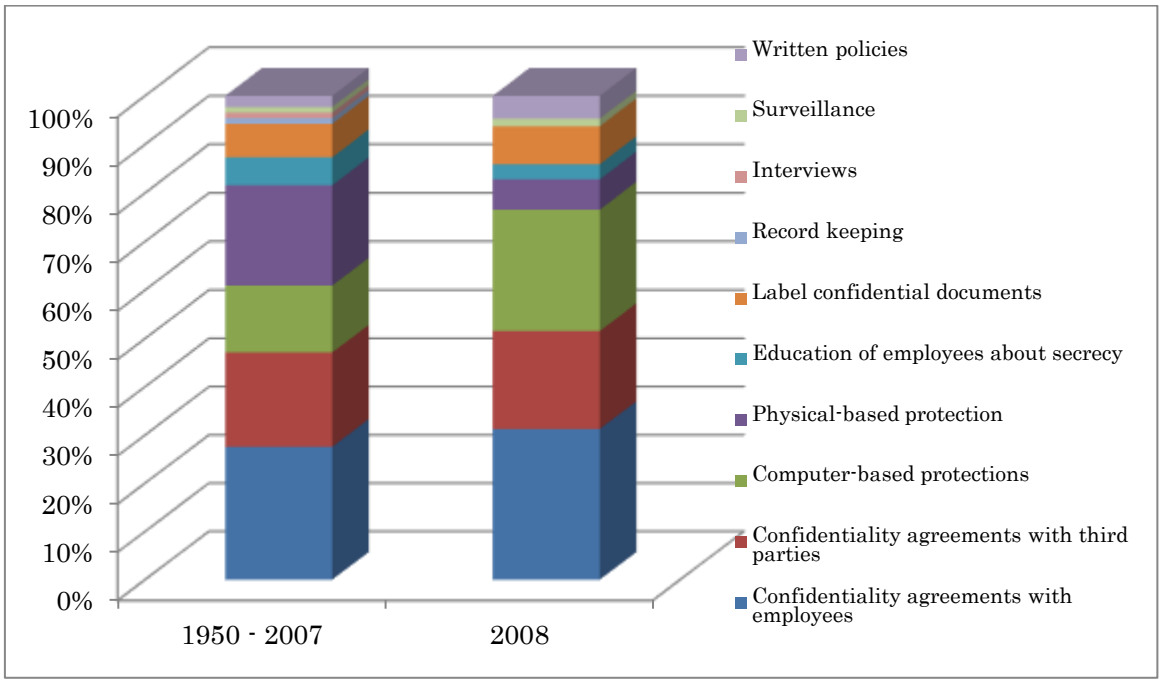
"what constitutes reasonable measures in one particular field of knowledge or industry may vary significantly from what is reasonable in another field or industry."[95] When assessing whether or not an information owner maintained secrecy of the information in question, U.S. courts would usually consider both factual and equitable factors. Thus an analysis may review not only the background and the precautions taken by the information owner, but also the conduct of the alleged misappropriator. Facts considered would include the nature and the form of the information, whether and how the information is used and shared, the scale and sophistication of the information owner, the access-restriction security precautions undertaken, the existence of written confidentiality agreements as well as the extent of notice given to employees and other persons with access to the information in question. Equitable inquiries, on the other hand, might instead look into the *mens rea* of the alleged misappropriator, i.e., whether the unlawful disclosure and use occurred with actual intent or rather by accident or mistake, the extent of actual and potential harm incurred by the information owner, and other considerations of fairness that may be applicable to the particular case. The comparatively large degree of flexibility in the U.S. approach in determining the required level of information governance for satisfaction of the reasonable efforts test means that case law is much more fragmented and diverse than in Japan. In Japan, a handful of courts are responsible for the bulk of the trade secret case law. The presiding judges cited in the Guidelines are, in most cases, well-known IP judges with similar concepts and understandings of intellectual property and procedure. By contrast, in the U.S., claims of trade secret misappropriation can be enforced in federal courts as well as in state courts, and both courts are frequently used. Civil claims rely on state law. A vast number of judges, with different backgrounds and approaches to intellectual property protection, and to trade secrets as well as labor and contract law, preside over these cases, which ultimately may be decided by juries.

While scholarship on U.S. trade secrets has increased perhaps even more than the average number of cases over the last years, there is no complete analysis of U.S. trade secret case law. The best available analysis looks at federal cases filed in certain years, and extrapolates further findings and suggestions from such restricted samples of

[95] Adoption of the EEA, 142 CONG. REC. S12213 (daily ed. Oct. 2, 1996).

cases.[96]

Figure 3. Types of Reasonable Efforts relied by Federal Courts in US Trade Secret Litigation[97]



The statistics above indicate the types of reasonable efforts discussed or mentioned in U.S. federal court decisions. The graph compares a sample of cases decided between 1950–2007[98] with all federal U.S. trade secret cases decided in 2008.[99] Accordingly, the most relevant information governance measure for information owners is entrance into confidentiality agreements with employees and third parties, in case such third parties obtain access to the information. While confidentiality agreements have been an important factor in the reasonable efforts test in previous case law, their significance has risen even more in recent years, making them a factor discussed or at

[96] David S. Almeling, Darin W. Snyder, Michael Sapoznikow, Whitney E. McCollum and Jill Weader: A Statistical Analysis of Trade Secret Litigation in Federal Courts, 45 Gonz. L. Rev. 291 (2009-2010). The same authors also published a study on trade secret litigation in state courts (46 Gonz. L. Rev. 57 (2010-2011)); however, this study was basically limited to appellate decisions, and therefore draws a much more selective and less complete picture.

[97] *Id.*, 323.

[98] The sample of the study included 273 cases decided between 1950 and 2007, which deliberately ignored about ¾ of all trade secret cases decided by federal courts during such timespan. The authors explained that they did not have enough resources to review all cases found.

[99] The study reviewed all 121 trade secret cases decided by federal courts in 2008.

least mentioned in more than 50% of all cases in which a review of the information owner's efforts to maintain secrecy became an issue. Another factor that became clearly more important over time is protection of computer systems, overtaking physical access restriction and protection in the last years. Interestingly, the study shows that information owners were increasingly successful in adopting reasonable efforts. Between 1950 and 2007, courts found that the reasonable efforts test had been satisfied in 22% and had not been satisfied in 14% of all cases analyzed. This compares with a 26% vs. 6% pass rate in 2008,[100] indicating a general tendency that U.S. information owners have increasingly learned to govern sensitive information in a manner allowing protection as trade secrets.

3.5. International Comparison – Germany

The formal source of trade secret protection in Germany is quite similar to that in Japan. As does Japan, Germany considers misappropriation of trade secrets first and foremost as an act of unfair competition that can be prohibited under the Act against Unfair Competition ("UWG"). However, Germany, having recognized trade secrets misappropriation as an act of unfair competition as early as 1896,[101] can look back on a much longer history of protecting trade secrets through competition law than can Japan. Therefore, it may not be surprising that Germany developed its own test for recognizing information as trade secrets, rather than relying on the U.S. standard that evolved into the international norm in the 1980s and 90s. Unlike the United States and Japan, Germany has no statutory definition of trade secret, nor does German law provide explicit guidance on the information governance requirements that an information owner needs to satisfy in order to have information recognized as a trade secret. Rather, German courts rely on a four-factor test that was first laid out by the Supreme Court of the German Reich in 1935.[102] Accordingly, information constitutes a trade secret as long as it

1. is connected to the business of the information owner;
2. is not public knowledge;

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[100] *Id*., 324.
[101] Ohly/Sosnitza, UWG Commentary, 6th Edition (2014), Section 17 UWG, marginal note 3.
[102] Supreme Court of the German Reich (Reichsgericht), RGZ 149, 334.

3. has been intended by the owner to be kept secret; and
4. as long as there is a legitimate economic interest of the business owner to keep the information secret.

This quite old test has been confirmed in multiple decisions by the post-war Federal Court of Justice over the decades, and is still valid and relied upon as the standard test. Just reviewing the four factors, one may understand the third factor, i.e., the intention of the information owner to keep the information secret, to be similar to the reasonable effort test in the United States or the objectively kept secret test in Japan. However, German courts have to date shown relatively little interest in a strict and independent review of such third factor. Rather, courts conduct a rather thorough review of the second factor, i.e., an inquiry as to whether or not the information has become public knowledge. If the information has not become public, courts usually infer that the information owner intended to keep the information secret. That said, certain elements that German courts rely on in their analysis of the second test factor closely resemble elements of the "kept secret" test in Japan and the reasonable efforts test in the United States. One directly comparable element is the extent of contractual provisions entered into for the purpose of preventing disclosure of information. If an information owner discloses information to a recipient who is under no duty to maintain confidentiality, the information may be considered as publicly known, and would therefore no longer be considered as a trade secret. An information owner can, however, disclose information to one or multiple recipients without losing trade secret protection as long as such recipients are specified and thereby limited, and are under an obligation to not disclose the information.[103]

Anecdotal evidence reveals that also in Germany, the vast majority of trade secret misappropriations are conducted by former employees or business partners of information owners. As the guiding precedents from the Federal Courts of Justice do not highlight a particular duty to govern information in a particular fashion other than to achieve the result of preventing random disclosure to the general public, even very experienced competition law judges report that they are unaware of the issue of information governance becoming central or at least somewhat significant to the

[103] For example see Federal Court of Justice [BGH] GRUR 1964, 32 – "Petromax II"

outcome of trade secret cases.[104]

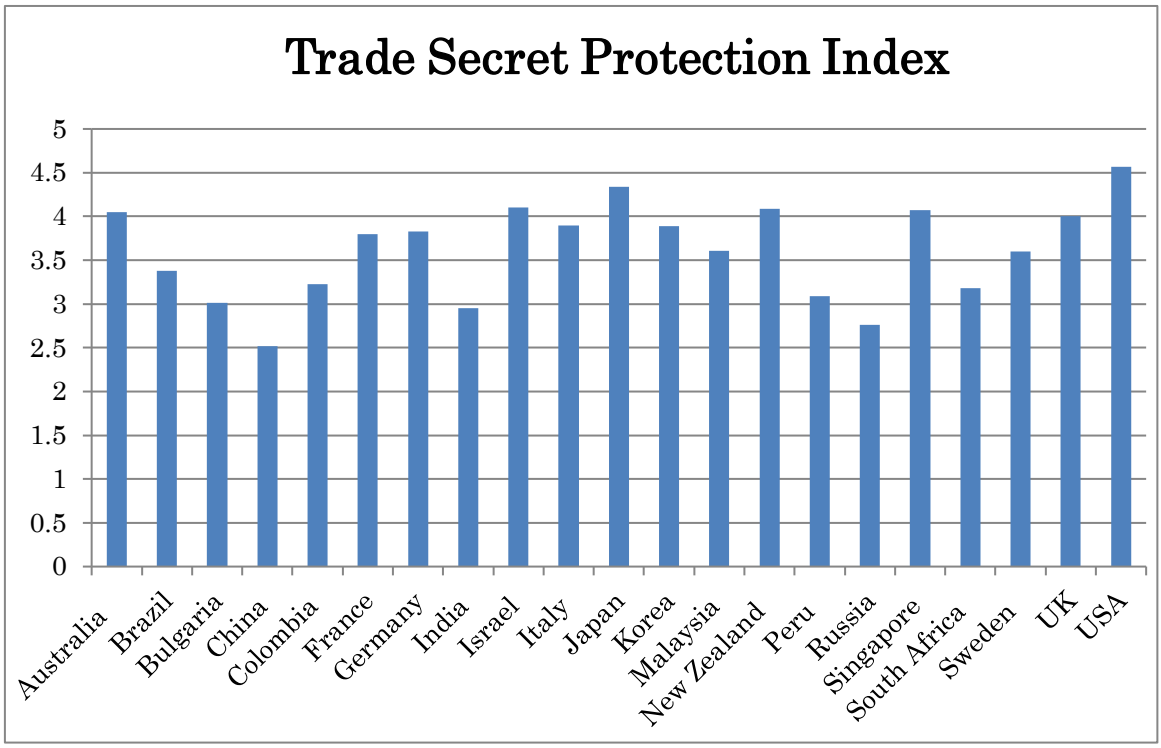
4. Formal Comparison

In recent years, misappropriation and protection of sensitive information has become an area of significant relevance not only for intellectual property lawyers, but also for business leaders and economists. Laws and regulations surrounding trade secrets, which had never received a great deal of attention from business leaders, lawyers or academics alike, are in the process of rapidly gaining prominence. To help business leaders and policymakers understand the degree to which trade secrets are protected, the OECD entrusted a study on global trade secret protection in 21 major economies, which was published in 2014.[105] According to this study, the United States and Japan provide the strongest trade secret protection system of the surveyed countries.

[104] Interview with Rt. Presiding Judge Wilhelm Berneke, Trademark and Competition Law Senate, Düsseldorf High Court, July 4, 2014, on file with author. It should be noted that a comprehensive analysis of trade secret case law in order to distinguish a commonly-applied standard or a minimum standard in information governance is much more difficult to undertake than in Japan or in the United States. Unlike the latter jurisdictions, there is no comprehensive database of case law in any subject-matter area available; traditionally, only cases that judges specifically designate for publication due to their legal significance are published in academic journals. In some areas such as patent law in which proceedings are concentrated on a handful of courts all over Germany commercial databases have started to exist. There is no particular concentration in trade secret litigation, which is heard by regular courts as well as by labor courts all over the Germany. Also as a result of this lack of concentration, few courts seem hear more than one or two trade secret cases per year, making it more difficult than in Japan or the United States to distinguish case law patterns applicable for information governance.

[105] M. F. Schultz and D. Lippoldt (2014), "Approaches to Protection of Undisclosed Information (Trade Secrets):
Background Paper", OECD Trade Policy Papers, No. 162, OECD Publishing; available at http://dx.doi.org/10.1787/5jz9z43w0jnw-en

Figure 4. Trade Secret Protection Index

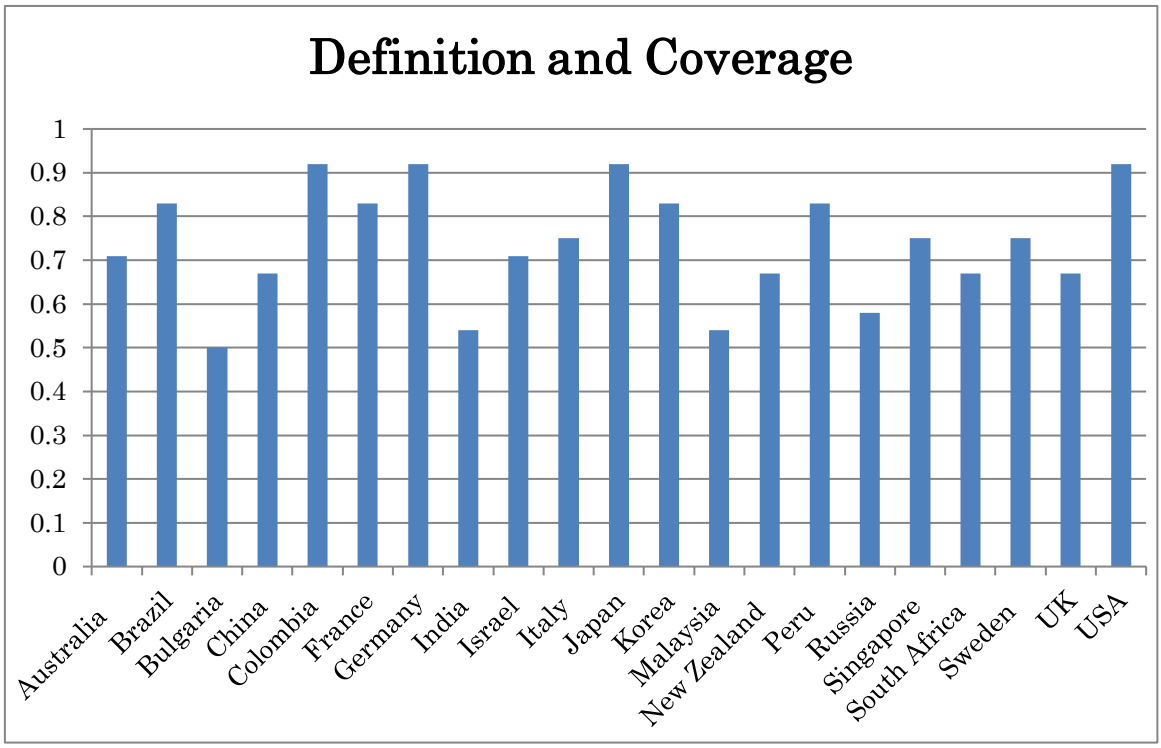


This OECD trade secret protection index was computed considering five categories: (1) definition and coverage of trade secrets, (2) specific duties and misappropriation, (3) remedies and restrictions on liability, (4) enforcement, investigation & discovery; data exclusivity, and (5) system functioning and related regulation. Each category was further distinguished into subcategories,[106] investigating whether the jurisdiction makes it easier or harder to protect information as trade secrets. The above index is an equal composition index, i.e., a jurisdiction can obtain a maximum score of "1" in each category; a country providing for maximum protection in every category could earn a maximum score of "5".

Whether or not it is easy for information owners to govern information in such a way as to meet the trade secret requirements is part of the first category, i.e., definition and coverage, for which the study provided the following index figures:[107]

[106] *Id*., 27-29.
[107] *Id*., 34.

Figure 5. Trade Secret Protection Index – Part 1: Definition and Coverage



The highest index figure of 0.92 is reached by four countries: Colombia, Germany, Japan and the United States. So at first glance, one might believe that Japan has a strong trade secret protection system, providing for rules on information governance that should be comparatively easy to satisfy. However, one must not forget that the cited OECD review has been subject to certain limitations: the authors based their review on available sources of information, mostly statutory laws and anecdotal reports, which of course only provide a partial picture of the status of trade secret protection in any given country.

5. Comparative View on Information Governance in Japan

As explained, the requirements on information governance in the area of trade secrets differ fundamentally between the three jurisdictions introduced. Review of case law in Germany shows that German practice puts the lowest burden on information governance systems of the information owner. In terms of statutory provisions, the requirements on information governance in Japan and in the United States seem very similar. To protect information as a trade secret, it is insufficient to simply show that the

information is not generally known and thereby has economic value. In addition, information owners have to demonstrate that they undertook sufficient efforts to maintain secrecy of the information. However, recent experience with such requirements of reasonable effort has been very different in Japan and in the United States. While U.S. studies show that successfully passing the test of reasonable effort became increasingly frequent in the past year, this could indicate that courts have a low expectation of information owners' reasonable effort, or it may mean that information owners have become increasingly savvy in properly governing their information, or a combination of both. At the same time, Japanese statistics show no such development. Here, information owners face significant difficulties in enforcing their trade secrets, which is primarily caused by the fact that courts often deem the information owners' governance of information insufficient. Again, this outcome could derive either or both from a strict and somewhat inflexible application of the "kept secret" test, or a continued lack of sophistication on the part of information owners in properly managing and governing sensitive information.

One central element amongst the owners' efforts to maintain secrecy is the conclusion of appropriate confidentiality agreements with persons who have access to information. This may be the area in which the gap between Japan and the United States has historically been the most apparent. Even small companies in the United States regard it as common practice to conclude non-disclosure agreements with employees and business partners. On the other hand, at least small companies in Japan have in the past often been hesitant to conclude similar types of agreements, and have rather relied on established trust and confidence in their counterparts' loyalty and discretion. It is primarily small companies of this kind that became parties to trade secret litigation over the last decades. Their business practice of avoiding, or at least not insisting on, routine non-disclosure agreements turned out to be particularly harmful in their attempts at post-fact trade secret enforcement, when information governance is only reviewed after, for example, an employee has departed with critical information and started using such information in a way that harms the information owner's business. One tangible result of information owners' traditional weak protection measures was the low win rates for information owners in trade secret litigation in Japan. The recent calls for lowering the bar to trade secret enforcement have also been an attempt to enable information owners

to protect sensitive information without having to drastically depart from traditional information governance. At the same time, it is important to remember that trade secret protection should be sufficiently well balanced, and that an overprotection of information would detrimentally affect other important elements of a modern society such as employee mobility. Making the requirements for information governance subject to certain flexibility and providing a workable enforcement environment seem necessary steps in Japan. However, even in Japan a prudent information owner should take safeguards and measures to ensure that critical information is properly governed.

7. Governing ICT Networks Versus Governing the Information Economy: How Japan Discovered the Dilemma of Winning in the ICT Infrastructure Race

Kenji Kushida

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Abstract:

In our current "information age," advanced industrial economies everywhere face the challenge of using information effectively for innovation. For governments, a prerequisite for fostering innovation was getting the physical infrastructure for transmitting information and fostering industrial competitive dynamics that enabled low-cost broadband and high-speed wireless networks and services. Governments around the world were engaged in a race to buildout broadband, and Japan won this race, sparked by its neighbor, Korea becoming a leader. However, despite its world-leading status in fostering high speed broadband and wireless networks and services, Japan did not become a world-leader in Information Technology (IT)-related services. Why? This chapter contends that Japan discovered that fostering innovation required a separate set of dynamics: an entrepreneurial ecosystem to enable fast-growth companies to apply IT in new ways; high levels of competition among large firms allowing them to become "lead users" of IT by investing heavily in IT and experimenting and innovating with IT tools; building competencies in internationalizing services rather than selling goods; and quickly removing unexpected regulatory roadblocks.

1. Introduction

Our current era is often referred to as the “information age.” Over the past decades, humanity’s access to information, and the potential to use it in a variety of ways, has transformed fundamentally.

For most of human history, computing power and information storage has been a scarce, and therefore expensive, resource. We are now, however, entering an era of computing abundance, in which anyone with an Internet connection can make use of the most powerful datacenters in all of human history, at far lower prices than ever before (Kushida, Murray et al. 2015). The advent of global-scale cloud computing allows powerful analytical tools, once only available to a handful of highly specialized government or global-scale company research labs, to now be readily available to anyone. We are also dramatically more connected than ever before, with wireless coverage across developed and developing countries and over a billion smartphones in circulation.

The question for countries, firms, and societal actors is how to best utilize the new possibilities created by information flows to pursue their goals: for example, pursuing economic growth and lowering inequity for countries, and finding sustained profitability and adapting to waves of industry disruption for firms.

In this context, Japan has experienced a number of unexpected dynamics that are useful when considering issues of governing information flows and information industries more generally. Japan discovered the hard way that *facilitating the creation of market dynamics to build information transmission capabilities, in the form of high speed broadband and mobile networks, does not automatically yield activities that can create economic value* by using information, or generating new uses for information that drive innovation.

The puzzle is that despite successfully orchestrating what are arguably the world's most highly developed landline and mobile broadband networks, Japan has not been a global leader in IT-related innovations using this infrastructure. Or, posed as a question, why has Japan has been exceptionally good at building networks to carry information, but notably less good in using the potential of these networks to produce vast new areas of innovation?

These are striking questions because advanced industrialized countries around the world—both governments and firms—were engaged in a race to deploy high-speed broadband and wireless networks since the late 1990s (Fransman 2006). The assumption was that successfully deploying "ubiquitous" broadband networks would unleash waves of innovation in the new "information era"; those left behind would struggle to add value in an increasingly global, digital world.

Japan won the race. It started with virtually no broadband in 1999, and was deeply invested in a costly network known as ISDN, which had become obsolete. By 2002, however, it had not only the fastest, but also the cheapest, consumer broadband services. In mobile, Japanese firms succeeded where European and American firms failed, creating commercially viable mobile Internet platforms since the late 1990s. Moreover, Japan successfully deployed high speed third generation (3G) mobile networks beginning in 2001, several years ahead of its European and American counterparts. In the new "information era," Japan seemed perfectly poised to unlock the waves of innovation and global disruptions enabled by its fast networks.

However, the global economy was not disrupted by Japanese information technology firms, nor overridden by services that took advantage of Japan's domestic ICT networks. While a robust mobile content ecosystem did develop, it was isolated within Japan, since the platforms were not available elsewhere. Services requiring extremely high speed Internet connections offered within Japan could not be offered abroad because the same levels of connectivity were not available. More fundamentally, even within Japan, a variety of areas that observers both inside and outside Japan expected to be revolutionized by ubiquitous high speed ICT networks—such as healthcare, education, transportation, agriculture, and energy—were slow to implement and experiment with ICT technologies. Put simply, the innovations in using the ICT infrastructure did not occur in the places that seemed the most amenable to their adoption. Why was this the case?

At an intermediate level, how was Japan able to successfully build its ICT networks in the first place? What were the industry structures, regulatory frameworks, and political dynamics that facilitated these rapid information infrastructure buildouts?

More fundamentally, what are the lessons we can learn from Japan's experiences?

1.1. Analytical Approach

Telecommunications networks around the world are fundamentally shaped by both political and economic processes, and are therefore best analyzed through a political economy vantage: how politics shaped regulatory structures, which influence market architectures and dynamics of competition. Most telecommunications networks began as national monopolies, often government-owned, and later subject to a process of privatization and liberalization. These were inherently political processes, since they involved large vested interests, the creation of new industries, and opportunities for new private actors, business models and technologies—in short, a market in need of governance. Some governments, such as that of Great Britain, decided to step back, and others took liberalization as an opportunity to enhance their regulatory powers, most notably Japan's Ministry of Posts and Telecommunications. The issue of whether to break up former monopolies was also inherently political, ranging from Department of

Justice involvement in the US to decades of political compromises in Japan. The governance of new entrants—the scope of their business, the terms by which they connected to incumbents' networks, price structures, and terms of universal service—necessarily entailed sustained government involvement, even in the most laissez-faire of government approaches.

2. Japan's ICT Industry in Global Context

In international comparison, Japan's ICT industry is particularly notable for its rapid landline broadband development starting in the early 2000s, and its innovations and developments in mobile communications since the late 1990s. In and of themselves, each was a resounding success based on the trajectories of competition between nations and firms at the time. [108]

2.1. Japan's Broadband Development: Unexpected Leader in Performance and Price

From the late 1990s through the early 2000s, as governments and firms around the world recognized the potential value of broadband services, a race began among advanced industrialized nations to deploy broadband services and networks to their populations. Japan started as a latecomer to the broadband race in the late 1990s, but in the span of a few years, it experienced a transformation of industry dynamics that led to Japanese consumers enjoying not only the world's fastest, but also the lowest priced broadband in the world.

As late as 1999, even as landline broadband markets in other advanced industrial countries began to grow rapidly, Japan had no broadband services. Landline Internet access was expensive as well, with fees charged per minute for local dial-up use on top of Internet Service Provider fees. As a result, Internet diffusion lagged.[109]

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[108] This section draws heavily from Kushida, K. E. (2012). "Entrepreneurship in Japan's ICT Sector: Opportunities and Protection from Japan's Telecommunications Regulatory Regime Shift." Social Science Japan Journal **15**(1): 3-30.; Kushida, K. E. (2011). "Leading Without Followers: How Politics and Market Dynamics Trapped Innovations in Japan's Domestic "Galapagos" Telecommunications Sector." Journal of Industry, Competition and Trade **11**(3): 279-307.

[109] In 1999, by population percentage, Internet subscriptions were: 8% for Japan, 18% for the US, 13% in the UK, 10% Germany, and 5% France. The Organization for Economic Co-operation and Development (OECD) average was 9%. Other high diffusion countries included Denmark and Sweden (21%),

Japan's broadband services grew abruptly in the early 2000s. Digital Subscriber Line (DSL), introduced by a variety of competitors to the national incumbent carrier, NTT, exploded in popularity: from virtually nonexistent at the end of 1999 to almost 14 million by March 2003 (ITU 2004) (See Figure 1). By March 2003, four of the world's ten fastest broadband providers were actually Japanese (See Figure 2). Three of the cheapest broadband providers among the world's fastest broadband providers were Japanese (See Figure 3). In 2003, the ITU ranked Japan as having the lowest broadband prices (See Figure 4), as well as the best price-performance (price per unit of data transmission) (ITU 2003).

I have argued elsewhere that this was a result of a particular set of industry dynamics in which new entrants challenged the powerful incumbent, which forced the latter to adjust and adapt—and that adjustment process drove the price decreases, widespread availability, and high speeds of landline broadband. I argued that this was the result of a "regulatory regime shift" in Japan's ICT sector (Kushida 2012).

Specifically, Tokyo Metallic Communications (TMC) pioneered commercial DSL services in late 1999, joined shortly by eAccess and several other start-ups. NTT responded in the spring of 2001 with its own DSL service. A price shock was then delivered by Softbank, a new company founded in the early 1980s that entered ICT services for the first time at this juncture, which halved DSL prices in 2001. All other players were then forced to quickly lower their DSL prices.

Consumer Fiber-To-The-Home (FTTH) was pioneered by Usen, a company that formerly specialized in delivering piped music to cafes and entertainment establishments, which began offering high-speed broadband services in 2001 to a limited area. Astonishingly, Usen's FTTH prices were comparable to the prevailing DSL prices until Softbank's price shock—remarkable since FTTH could deliver over ten times the throughput of early DSL. As major telecom providers began offering FTTH at price levels similar to that of Usen, and given the low prices of DSL after the Softbank price shock, NTT was again forced to offer FTTH at similarly low rates. Once NTT and the other major telecom firms offered FTTH, it grew quickly to overtake DSL in popularity (See Figure 5)—especially since NTT's competitors began bundling FTTH with Voice

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Netherlands (19%), Norway and Switzerland (14%), and Australia (13%) (Source: OECD).

Over IP (VoIP) services that acted as a substitute for conventional telephone services during a time in which Japan's conventional telephone services were relatively expensive among industrialized countries.

Figure 1. Japan's Broadband Service Subscriptions, 1999-2005 (millions)

	1999	2000	2001	2002	2003	2004	2005
Total broadband	-	0.63	2.83	7.81	13.64	18.66	22.37
Cable Internet	0.15	0.63	1.3	1.95	2.48	2.87	3.23
DSL Lines	<.01	0.01	1.52	5.65	10.27	13.33	14.48
FTTH	-	-	0.07	0.42	1.45	2.43	4.64

Note: for FTTH, 2001-2003 indicate end of FY rather than calendar year
Sources: 1999-2003: OECD 2005, 2004-2005: MIC

Figure 2. Fastest Broadband Service Providers Worldwide, 2003

Country	Company	Access Type	Download Speed (Mbps)	Monthly Charge	
				USD	PPP
Japan	NTT East	FTTH	100	52.45	42.46
Japan	Usen	FTTH	100	35.38	28.84
Japan	eAccess	ADSL	40	38.46	31.35
Japan	Yahoo!BB	ADSL	26	25.19	20.54
Sweden	Bostream	vDSL	26	48.04	41.33
Korea	Hanaro	DSL	20	41.25	66.38
Korea	KT	DSL	13	42.01	67.61
Canada	Gulf Islands	Fixed wireless	11	23.00	27.06
Korea	Thrunet	DSL	10	31.74	51.08
Sweden	Bredbands Bolaget	Ethernet LAN	10	38.63	33.23

Source: Adapted from Fransman 2006: 11, 12

Figure 3. Average Monthly Prices of Broadband Subscriptions (USD), G8 Countries minus Russia, plus Australia, South Korea, and Singapore, 2003

Country	Price
Australia	91.8
Italy	73.6
Singapore	53.0
Canada	51.6
South Korea	49.2
UK	44.6
Hong Kong	38.2
US	33.2
Japan	24.2

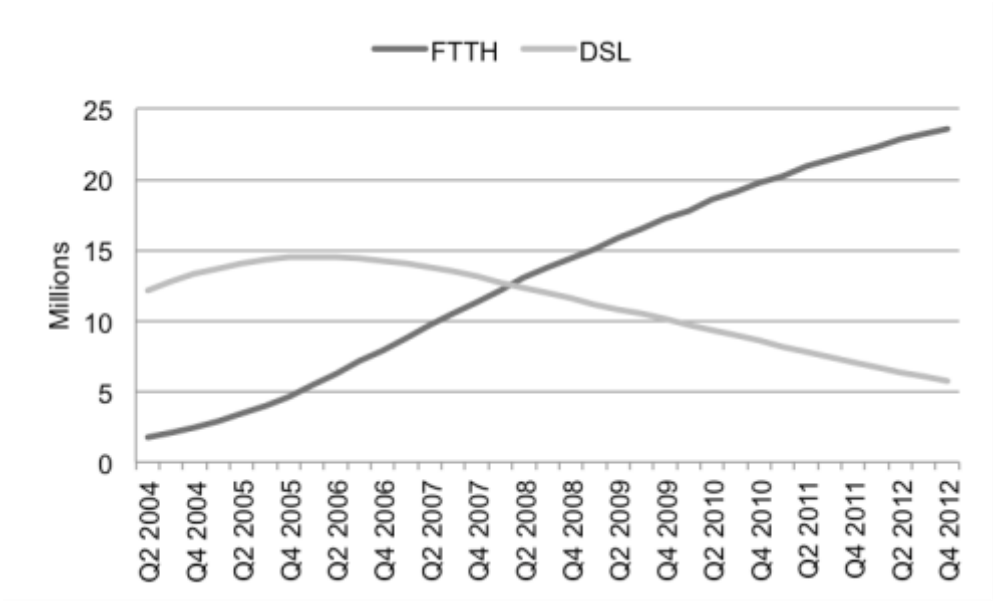
Source: ITU Asia-Pacific Telecommunications Indicators (2004)

Figure 4. Price-Performance, as Measured by Price per 100kbps, as of July 2003 among Major OECD Countries and Select Others

Country	US$
Japan	0.09
Korea	0.25
Belgium	1.15
Hong Kong	1.27
Singapore	2.21
New Zealand	2.71
China	3.07
Canada	3.25
Netherlands	3.36
US	3.53
Germany	4.42

Source: MIC 2004

Figure 5. Japan's FTTH and DSL Subscribers, 2004-2012



Source: MIC

Japan also succeeded in deploying broadband nationwide. By mid-2012, it had virtually 100% of households covered by broadband, defined as FTTH, DSL, Cable Internet, fixed wireless access, satellite, and 3.5G wireless. More notably, over 97% of households had access to broadband services with 30Mbps minimum downlink speeds, mostly through FTTH (See Figure 6). As early as in 2009, approximately 90% of Japan's households had access to least 100Mbps downlink FTTH.

Figure 6. Japan's Prefectural Household Broadband Accessibility, March 2012

Prefecture	Broadband accessible households (%)	Ultra high-speed broadband accessible households (%)*	Prefecture	Broadband accessible households (%)	Ultra high-speed broadband accessible households (%)*
Aichi	100	100	Miyazaki	100	89.8
Akita	100	92.5	Nagano	100	97.4
Aomori	100	90	Nagasaki	100	84.8
Chiba	100	99.1	Nara	100	99.7
Ehime	100	94.9	Niigata	100	97
Fukui	100	95.5	Oita	100	97.4
Fukuoka	100	98.1	Okayama	100	91.9
Fukushima	100	97.7	Okinawa	100	92.6
Gifu	100	97.4	Osaka	100	100
Gunma	100	99.9	Saga	100	99.5
Hiroshima	100	93.6	Saitama	100	99.9
Hokkaido	100	94.9	Shiga	100	99.9
Hyogo	100	98.6	Shimane	100	93.3
Ibaraki	100	96.5	Shizuoka	100	94.6
Ishikawa	100	99.2	Tochigi	100	99.7
Iwate	99.9	89.4	Tokushima	100	98.7
Kagawa	100	92.8	Tokyo	100	100
Kagoshima	100	83.1	Tottori	100	93.4
Kanagawa	100	100	Toyama	100	96.1
Kochi	100	84.5	Wakayama	100	98.8
Kumamoto	100	87.7	Yamagata	100	95.8
Kyoto	100	99.7	Yamaguchi	100	94.4
Mie	100	100	Yamanashi	100	97
Miyagi	100	98.5	**National**	100**	97.3

* note: Broadband includes: FTTH, DSL, Cable Internet, Satellite, Broadband wireless access, 3.5G wireless. Ultra broadband includes FTTH, and any other broadband exceeding 30Mbps downlink.
** rounded to nearest thousandth
Source: MIC

Thus, without a shred of doubt, Japan succeeded in building out broadband network services through a mix of public policy and industry dynamics—with some strategic policy leading to unexpected industry dynamics (Kushida 2013).

2.2. Japan's Mobile Development: Innovative Services, Robust Content Ecosystem

Japan's other unexpected development in ICT was its pioneering mobile Internet platform services and vibrant content ecosystem. In the late 1990s, Japanese carriers succeeded in commercializing profitable cellular Internet platforms, in contrast to their European and American counterparts who struggled and eventually failed.

Although it was unsurprising for Japanese carriers to invest heavily in infrastructure or to enjoy the highest average revenue per user, a result of charging high prices, few would have predicted that the relatively conservative Japanese carriers would innovate new business models. Nor did many expect the appearance of a vibrant business ecosystem of mobile Internet content populated by entrepreneurs and start-up firms. By 2002, however, just over two years after the platform services were introduced, Japan's mobile content market was estimated at 286 billion yen. By 2009, it grew to 1.5 trillion yen (DCAJ 2010:203). Content categories with the highest revenue are shown in Figure 7. Many categories, such as games and social networking, were led by new firms.

Figure 7. Composition of Japan's Mobile Content and Services Markets 2006–2009 (billions yen, ranked by 2009 values).

	2006	2007	2008	2009
Ring tones	150.2	163.3	166.3	160.3
Games	74.8	84.8	86.9	88.4
Electronic Books	6.9	22.1	39.5	50.0
Social networking	0.5	6.0	15.7	44.7
Email enhancements	5.5	11.6	17.1	22.8
Celebrity/entertainment	18.7	19.5	20.6	24.1
Transportation	12.5	16.4	22.9	24.1
Waiting tones	24.8	22.7	20	22.6
Horoscopes	15.8	18.2	20	19.1
Reference	4.5	5.4	7.7	12.1
Ring back tones	2.9	8.7	11	11.5
Video	2.4	3.6	6.2	11.2
News and weather	6.3	7.3	7.8	9.7
Media	7.4	7.7	6.6	6.6
Others	33.4	29.9	35.1	45.3
	266.6	527.2	483.5	552.5

Source: Mobile Content Forum

Japan's successful mobile Internet platform services grew out of intense competition between the three major cellular carriers. I have described the industry dynamics in detail elsewhere, but put simply, they were a product of intense competition between the three major cellular carriers in an industry dominated by the incumbent carrier, and a carrier-led industry in which integration services and hardware could be offered, directed by the carriers (Kushida 2011, Kushida 2015).

The wealth of services available through Japan's mobile Internet platform services was ahead of much of the world by almost a decade. Internet-based email, music downloads, information such as GPS (Global Positioning Satellite) enabled maps, transit information, downloadable programs, and others were all offered in Japan since the late 1990s and early 2000s. However, this content ended up being trapped in the domestic market as Japan's mobile platform services did not spread abroad at any significant scale. Japan became a "leader without followers" in its mobile content and services ecosystem (Kushida 2011). The country's standout success ended in the late 2000s, when Apple introduced its iPhone and App store in 2008, followed by Google with its Android operating system and App Store. Apple and Google disrupted the entire global mobile industry with what is commonly called the "smartphone revolution," and Japanese service providers' platforms became obsolete, while most handset manufacturers ended up exiting the market over the following few years.

2.3. The Challenge: IT-Enabled Innovation and Entrepreneurship

Despite becoming a world broadband leader in terms of speed, price, and accessibility for almost a decade, and pioneering high mobile Internet service platforms almost ten years ahead of the rest of the world, Japan has not become a global leader in value-added IT services. By contrast, US firms have moved from strength to strength, with new waves of innovative online services, such as Google, Amazon, Youtube, Salesforce.com, and more, *despite relatively poor consumer broadband and mobile access*.

While there are severe limitations to various indices that attempt to measure national competitiveness, innovation, and entrepreneurial environments to make cross-national comparisons, Japan's position is nonetheless noteworthy for not being in

the top echelon in most categories. According to the Global Innovation Index, produced by Cornell University, Japan was ranked 21st out of 143 nations in 2014.[110] For the percentage of workforce engaged in knowledge-intensive services, Japan ranked 55th out of 110—although as the world's third largest economy, its diverse composition is understandable.[111] In the IT sector, a simple measure of IT transaction-related trademarks put Japan at 17th out of 20 nations for the time period from 2004-07 and 2009-12.[112]

Another area in which IT networks were expected to contribute was to facilitate an environment for vibrant startups and new entrants. Yet in the 2015 Global Entrepreneurship Index, which rates countries by considering startup skills, risk acceptance, human capital, production innovation, risk capital, and other factors, Japan was 33rd out of 130 countries. Japan ranked well behind most OECD nations as well as many less developed nations such as Slovenia, Qatar, and Estonia.[113] The Global Entrepreneurial Monitor's 2013 Global Report ranked Japan as second-to-last in their measurement of Total Early-Stage Entrepreneurial Activity (TEA), among innovation driven economies.[114] In 2014, the World Bank ranked Japan 78th out of 143 in terms of ease of doing business.[115]

These are not the only relevant measures for Japan's performance in IT-related sectors, but the contrast with its ranking in ICT infrastructure is surprising. Thus, despite having top rank in the Cloud Readiness Index of 2014 among Asian countries, according to the Asia Cloud Computing Association, it is not clear whether Japan is poised to translate its ICT readiness into innovative activities.[116]

Clearly, a different set of factors is required to take advantage of the widespread high-speed broadband diffusion than to create it.

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[110] Cornell University, Global Innovation Index Rankings, *The Global Innovation Index 2014*

[111] International Labour Organization, LABORSTA Database of Labor Statistics (2004–08), and ILOSTAT Database of Labour Statistics Beta version (2004–12)

[112] US Patent and Trademark Office Bulk Downloads: Trademark Application Text hosted by Google; OHIM Community Trademark Database, CTM Download, May 2013.

[113] The Global Entrepreneurship and Development Institute, The Global Entrepreneurship Index Rank of all Countries 2015, *The 2015 Global Entrepreneurship Index*

[114] Global Entrepreneurship Research Association, Total Early-Stage Entrepreneurial Activity (TEA) 2013, By Phase of Economic Development, Global Entrepreneurship Monitor, *GEM 2013 Global Report*

[115] World Bank, Ease of Doing Business Index 2014, *Doing Business 2014*

[116] http://asiacloudcomputing.org/research/cri2014

3. Explaining Japan's Surprising Situation

This leads us to the core question: why is Japan a leader in ICT infrastructure and connectivity, but not a world-leading innovator? To answer this we should apply what we know about how IT has been used in innovation. We should then examine the various areas in which Japan encountered unexpected challenges in taking advantage of its ICT infrastructure, ranging from policy to corporate organization and skills.

3.1. The Role of Lead Users and Experimentation

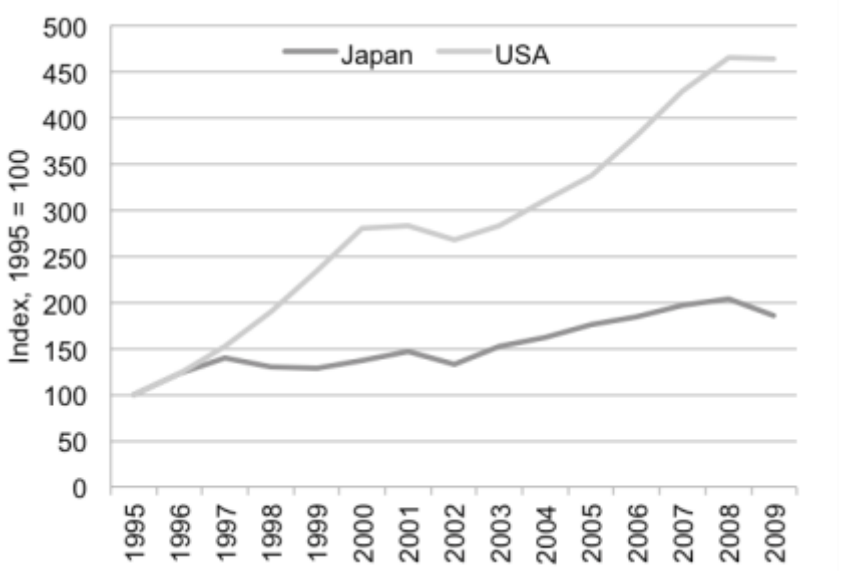
First, it is useful to understand the role of "lead users" in IT-intensive innovation that the world has seen so far. The first phase of the IT revolution was spearheaded by the US, which transformed computers from essentially calculators, into "tools for thought" opening up vast new areas in which computing power could be applied—areas ranging from manufacturing to service activities, and touching almost every industry that deals with information in any way (Cohen, DeLong et al. 2000). The process of the IT revolution was one of adoption, experimentation, and innovation by lead users of IT tools, which were large corporations. These large corporations first implemented computers to solve particular problems, then discovered new uses and new problems to which computers could be applied; the result transformed computers into "what-if" machines. For example, airlines that implemented computer systems in the 1980s for record-keeping discovered they could utilize the data to completely reorganize their supply-demand management of routes and prices. Likewise, banks discovered that IT tools implemented into their back-end operations enabled the business processes themselves to be unbundled and moved all over the world, as well as many portions automated. The key driving force behind lead users' development of new uses for IT tools was competition; lead users faced newly deregulated environments in the 1980s and 1990s, pressuring them into intense competition (Cohen, DeLong et al. 2000).

From this process, it is clear that one important component of innovation utilizing IT tools should be large enterprises that face intense competition. What is the situation in Japan? There is anecdotal evidence that firms which are succeeding in fierce global competition, such as automobiles and precision equipment, are in fact utilizing IT

tools to provide core functionality and competitiveness to their offerings. Toyota's gasoline-electric hybrid engines depend heavily on software, and Komatsu's IT system and partially automated heavy construction and mining equipment are good examples.

However, overall, Japanese large firms have not invested intensively in ICT compared to US firms. The widening gap between the US and Japan investment in ICT from the late 1990s onwards is stark (see Figure 8). It suggests that there is an interesting irony to Japan's highly advanced and ubiquitous nationwide mobile and landline broadband networks: *while Japan's IT network availability is world leading for consumers, Japanese firms are not leading in investing (and therefore experimenting with, or utilizing) ICT*. In fact, inefficiencies of corporations' internal IT networks are sometimes astonishing, with limited email and storage capabilities, and vertically integrated proprietary solutions precluding major deployments of flexible and rapidly scalable applications.

Figure 8. Enterprise Investments in ICT



Source: MIC

Why is this the case? Cole and Nakata put forth several important arguments. They compile various survey data and case studies to suggest that large Japanese firms tend to prioritize hardware over software, to the detriment of making software into strategic assets. They point to surveys revealing that a majority of Japanese firms consider the primary purpose

of IT to increase operational efficiency rather than to drive revenue growth, cultivate new customers, or to explore new business models—the latter being precisely the types of innovation that drove the US-led IT innovation. Other data they present points to the very low proportion of large Japanese firms with the position of Chief Information Officer (CIO). The presence of a CIO, of course, does not guarantee that they have the organizational prerogative or skills to enable them to effectively discover and implement IT as competitive weapons or innovative tools, but the absence of a CIO position likely precludes the possibility itself. Cole and Nakata also point to more fundamental problems with software engineers assigned low status in corporate hierarchies, and computer science skills taught in universities as far behind theoretical cutting edge research or the pragmatic application frontier due to historical and institutional legacies with university organization and the relatively new discipline of computer science (Cole and Nakata 2014).

3.2. New Entrants and Startups

Advanced ICT networks were also expected to contribute to entrepreneurship and new startups. To a degree, they did in Japan, but the level was far lower than many had hoped for.

While the mobile Internet platform services did enable an array of new startups and new entrants to offer services, the entire Japanese mobile content industry was largely trapped in the domestic market. This will be discussed more in the next section.

Overall, however, although the number and quality of startups in the ICT and related sectors have risen substantially since the late 1990s, it became clear that the limitations were in the lack of political economic environmental factors surrounding new firms and entrepreneurship, rather than in ICT networks.

In many ways, the traditional Japanese political economic model made the barriers particularly high for creating new startups. While a simple comparison lining up the characteristics of Silicon Valley against those of traditional Japan is too primitive an analysis, it is a useful starting point that illuminates some of the most obvious challenges and hurdles. Drawing upon existing work on Silicon Valley (Kenney 2000, Lee, Miller et al. 2000, Kenney and Mowery 2014), we can say that in Silicon Valley, the following are among the primary factors allowing it to host the world's most vibrant center of

innovation and entrepreneurship: venture capital funding provides potentially disruptive startups with capital to take risks while also providing value-added factors such as being the hub of human capital talent pools to facilitate startups' businesses; entrepreneurs from all over the world flock to Silicon Valley in search of the next big idea; tight and valuable university ties provide human capital, science and technology, and ideas in a variety of forms to the startup ecosystem; labor markets are deep for various functions and stages of startups; a supportive ecosystem of firms such as law firms and accounting firms play a variety of roles to support startups beyond providing traditional services; large firms aggressively purchase startups, while spinning out divisions and people to populate the Silicon Valley ecosystem; and the social prestige of starting or working at new firms is high, with low risk for entrepreneurs of becoming personally bankrupt or reputation irrecoverably damaged by failing at a particular startup.

By contrast, in Japan, particularly until recently: Venture funding was limited and did not include other value-added advisory functions; the supply of potential entrepreneurs was lower than the actual number of entrepreneurs, due to high risk of firm failure leading to personal bankruptcy; labor markets to manage various stages of startup growth were relatively thin; professional services to support startup activities were limited and did not act as dealmakers or provide advisory functions beyond their core business; critically, large firms were relatively unwilling to purchase startups or their services and products; finding high quality employees for startups was a challenge due to issues such as pension portability and social reputational risk; and universities were not set up to produce or spin out science and technology-based firms or act as central human capital hubs for entrepreneurial activities (Imai 1998, Kushida 2001).

In the decade since these initial observations, a wide variety of regulations surrounding corporate law, bankruptcy law, and labor law have shifted to create a more favorable environment for startups in Japan. Japan is producing more high profile startups than ever before, and with the advent of Cloud computing, more startups are gaining global reach with relative ease. Indeed, the advent of Cloud computing has radically lowered the barriers to starting new businesses, since startups no longer need large capital outlays to build their own datacenters. Cloud also provides powerful tools for use by anyone with an Internet connection and a credit card. It also provides global marketplace access for Japanese services and tools without the traditional hurdles of

cross-national distribution logistics (Kushida, Murray et al. 2012).

However, overall, Japan still faces a variety of challenges to foster a more vibrant ecosystem of entrepreneurship and startups that can take advantage of the advanced domestic ICT networks—a far different more difficult proposition than that of creating the networks in the first place.

3.3. Platforms: Lessons Learned

An important lesson that Japan learned, which was not obvious at all before the advent of successful mobile Internet platform services, was that the logic of *platform-based competition* would become paramount in global competition. The logic of platforms emerged with the advent of the computer industry. As personal computers shifted away from vertically integrated products into a series of markets for components comprising their constituent elements, providers of particular components began capturing value of the entire product by becoming essential platforms; Microsoft provided the platform for PC software with its MS-DOS and Windows operating systems, and Intel provided the core processor that all Windows PCs needed to use (Gawer and Cusumano 2002).

Platforms tended to be winner-take-all propositions, and their value depended on third party suppliers as well as attributes of the platform itself. The upshot for firms that became successful platform providers was that they benefitted from virtually all market activity occurring on top of the platform. For content providers, selecting the eventual winner platform became critical to reaching the most customers before competitors. This became very clear with the advent of competing smartphone platforms in the late 2000s, with Google's Android and Apple emerging as the two victorious platforms from a variety of contenders including Microsoft, HP, Blackberry, and others (Kenney and Pon 2011).

Japan's entire mobile content ecosystem was trapped in the domestic market because they depended on mobile Internet platform services provided by Japanese carriers, which failed to internationalize. Had the carriers successfully carried their platforms globally, then the content providers could have enjoyed global market presence far more easily, but they did not. I have argued elsewhere that the fundamental

industry structure difference between Japan's mobile industry, in which carriers led in R&D and providing value-added services, and those of Europe and the US, in which manufacturers rather than carriers were the industry leaders, made it difficult for Japanese carriers to diffuse their services abroad, despite repeated attempts. Japanese carriers were unable to convince European global manufacturers to adopt their mobile Internet service platforms, and US carriers were too weak to impose specifications on handset firms in the way Japanese carriers could (Kushida 2015).

Thus, the smartphone platforms that eventually took over the world were Apple's, which provided a hardware/software integrated product that included a platform, and Google's operating system, provided to manufacturers for free.

In the world of platform competition for ICT services, the underlying networks mattered far less than most had expected. Fast broadband networks simply meant that users could access the platforms more easily, with little opportunity for the network providers to offer value-added services beyond connectivity. For mobile Internet platform services, the domestic-only availability of the platform services trapped the content industry for most of the 2000s until the advent of Apple's iPhone and Google's Android provided global platforms. Now that the global platforms are available, however, Japan's content ecosystem is making inroads globally—albeit with a delay.[117]

3.4. Services and Systems More Difficult to Internationalize than Manufactured Goods

It is also worth briefly mentioning a proposition about the new dynamics of competition that work against Japanese firms in providing services that take advantage of its advanced domestic ICT infrastructure. Overall, the value from products is increasingly based on the services into which they are embedded, or the services component of the product. The value is rapidly moving to services, both as a means to differentiate the products, and to avoid commoditization (Zysman, Feldman et al. 2013).

Therefore, internationalizing products today is less about selling products abroad, but also about selling services abroad. Since services are often integrally bound to local

[117] This delay, however, may actually have helped insulate the Japanese content industry in its infancy, protecting it from domination from US and other globalized content firms. Kushida, K. E. (2012). "Entrepreneurship in Japan's ICT Sector: Opportunities and Protection from Japan's Telecommunications Regulatory Regime Shift." Social Science Japan Journal **15**(1): 3-30.

regulations, norms, and social factors, the proposition is that it is more likely to be difficult to sell products when they are parts of system and services rather than when they are stand-alone products. For example, stand-alone medical devices are less likely to be sold as products to healthcare delivery organizations that employ large-scale system. Instead, the devices must be part of a system, able to communicate effectively with the other components of the healthcare delivery system (Kushida and Zysman 2009).

At the level of firms, the types of skills required to sell services internationally are likely to be different from those useful for making high quality products that can be evaluated and sold on the basis of their quality or functionality alone. The existence of a massive private industry for English language training suggests that education in English language as a communication tool is not providing the skills desired by the population. English language skills are a baseline minimum for communication in global markets, and various studies of Japanese multinational corporations and Japanese abroad suggest that multicultural adaptability in an area where more Japanese can benefit from exposure overseas, or to non-Japanese business logics to enhance adaptability (Kushida 2006).

3.5. Policy Support Challenges

Finally, Japan discovered several factors in the policy realm that emerged as challenges in taking advantage of its ICT network environment.

First, there is the general challenge that it is difficult to articulate goals when you have achieved the easily quantifiable ones, especially when the next goals involve experimentation and innovation in conditions of high uncertainty. In Japan's "e-Japan Strategy" articulated in 2001, it was easy to establish the concrete goal of broadband diffusion and low prices; it fit comfortably within the framework of historical industrial policy initiatives. Deregulation to lower barriers to entry in a highly regulated environment, and re-regulation to strengthen industry dispute resolution mechanisms, for example, were relatively straightforward propositions. This was the "regime shift" in ICT that Japan underwent that led to the rapid ICT network service development (Kushida 2006, Kushida 2012).

After the "e-Japan" strategy was deemed a success, with Japan having achieved

high speed, low priced broadband available to much of its population, the next strategy began to struggle with articulation of concrete goals. Japan's "e-Japan II" strategy, put forth in 2003, established the aim of using the new network environment to foster high value-added economic activity. However, it was unable to articulate concrete metrics in the classic sense. Of course, articulating goals with concrete metrics that are not useful can be counterproductive, but it was clear that concrete goals for implementing ICT networks were far harder to establish than the goal of fostering the networks in the first place.

The concrete challenge that Japan discovered in articulating goals for ICT implementation was the bureaucratic issue of jurisdiction fragmentation. This issue is not unique to Japan, but Japan's case is somewhat extreme, which serves to reveal the nature of the problem clearly. Orchestrating competition in ICT network industry was under the jurisdiction of the Ministry of Internal Affairs and Communications. However, the areas in which ICT seemed to promise the most benefit in their implementation were in areas such as healthcare, electricity smart grids, transportation, and education. However, these areas were under different ministry jurisdictions: Ministry of Healthcare, Labor, and Welfare (MHLW), the Ministry of Economy, Trade and Industry (METI), the Ministry of Transportation, Agriculture, Forestry, and Fisheries, and the Ministry of Education, Culture, Sports, Science and Technologies (MEXT). These other ministries were not enthusiastic in MIC's policy initiatives such as the "u-Japan Strategy" which proposed that ICT be implemented in the areas above. With each ministry operating with its own logic and with its own prerogatives—such as for MHLW, being highly risk averse in the areas of ICT-enable remote medicine, since they would be ultimately liable if people were harmed or worsened due to policies and systems they approved. Without strong central government coordination provided by the Cabinet Office, orchestrating the regulatory changes to enable ICT usage was difficult. From 2005 until 2011, Japan experienced a new Prime Minister taking office approximately every year, making longer-term strategic policy highly difficult to articulate or implement (Kushida, Shimizu et al. 2014).

Moreover, METI and MIC were bureaucratic rivals to some degree, each trying to assert jurisdiction over IT network-enabled services. They set up somewhat parallel organizations and strategies, with METI also focused on raising the productivity of

various service-related industries.

Another example of unexpected regulatory roadblocks is illustrated by the 2006 government project to create a new, national search engine. These plans were blindsided by a conflict with Japan's copyright laws. Under national copyright laws, the act of copying web sites containing copyrighted material to "cache" them was illegal (MEXT 2007).[118] The government soon found itself in the embarrassing position of funding and promoting the development of a national search engine, then finding that such a service was illegal. The obvious solution of revising the copyright laws was not as easy as one might expect, since copyright laws fell under the jurisdiction of the Agency for Cultural Affairs within the Ministry of Education, Science and Technology (MEXT). MEXT was not primarily focused on Japan's international industrial competitiveness, and was less inclined to listen to the wishes of business and industry associations compared to METI—the Ministry promoting the development of a Japanese national search engine. It was not until January 2010 that the Copyright Act was amended to legalize storing of search engine cache results.

These examples of unexpected roadblocks illustrate the potentially complex nature of national strategies facing services. Issues can cut across previous policy jurisdictions that were historically relatively separate, bringing together different sets of regulatory actors and policy-making dynamics (Kushida and Zysman 2009). The creation of successful IT services therefore, appears to be less a product of national strategic coordination, and more a product of the broader national or regional dynamics of innovation and entrepreneurship.

4. Consequences for Japan and the world

What are the consequences for Japan and the world from its experiences in ICT? There are a number of valuable lessons to be learned that apply not only to Japan, but to countries around the world more generally.

In terms of global competition in ICT, despite its vast potential, Japan will not be a leader in ICT innovation unless it can take advantage of the capacity to carry information rapidly and apply it effectively to doing new things with those information

[118] "Fair use" interpretations of the Digital Millennium Act made these actions legal in the United States.

flows. The challenge is how to produce innovation using the ICT networks it successfully built. In understanding global competition, one must therefore look at factors beyond ICT networks. While cross-national indicators of "Internet readiness" or indications of penetration are useful in identifying the current status of various countries, these cannot easily be extrapolated into measures of competitiveness or assessments about the potential impact on global markets.

The key lesson from Japan is that *ICT infrastructure alone is insufficient to somehow "unlock" innovation*—an assumption that most of the countries engaged in the race to provide broadband services seemed to have bought into. The European Union in particular should take heed of this discovery, since it has promulgated some ambitious plans to roll out costly landline ICT infrastructure, despite the likely availability of lower cost wireless solutions available soon (Kushida 2013).

A key for ICT adoption and innovation is to foster competition among large corporations that have the potential to become "lead users," discovering new uses for ICT tools. With the new, powerful potential offered by the recent advent of Cloud Computing, this should be considered a priority. *In order to foster innovative lead user firms, competition policy becomes critical*.

Within corporations, the role of *information technology as a strategic weapon* rather than simply an efficiency-enhancing proposition should be strengthened. Chief Information Officers who understand both technology and business should have input into corporate strategy. This is especially true since Cloud Computing enables a radically higher level of flexibility and performance for experimentation and innovation.

Promoting an environment conducive to startups is also critical. Japan has been moving in the direction of making entrepreneurial activity easier, but there are always further steps to be taken. For example, the public pension fund investment allocation for so-called risk money has been revised recently, but can go further in allowing pension funds to invest in venture capital.

There is an *important potential role to be played by Japan's political leadership*. It can coordinate bureaucratic actors to facilitate regulatory change that would enable ICT adoption in areas previously unsuccessful at effective cooperation. The second Abe administration, suffering far less electoral volatility than its immediate predecessors, with the LDP in a far more dominant position than it held during the previous decade,

has more political capital invested in driving reform. ICT adoption in areas with high potential productivity increases should be part of its growth strategy, as well those of its successors.

On a technical level, *firms and policymakers should strategize about platforms early on* when building ICT-embedded systems, such as in energy, transportation, medical, and other areas. The danger is that if Japan chooses standards and develops industry dynamics that are proprietary to Japan, it could run the risk of once again becoming a "leader without followers." For example, in intelligent transportation systems, some solutions embed large portions of intelligence into proprietary networks rather than using open platforms that can later be upgraded or altered relatively easily, rather than locking them into proprietary systems.

Finally, governments and firms are facing new skill requirements as they face the need to sell services and systems abroad as a prerequisite to selling products—activities that require skillsets different from what the current education and on-the-job training currently excels in producing.

Thus, by beginning with an inquiry into the state of Japan's information governance, we arrive at numerous fundamental observations and recommendations about the challenges and opportunities facing the country. We began with an overview of Japan's spectacular performance in ICT networks, which did not yield a similar level of performance in use of those networks for innovative and productivity-enhancing activities. In analyzing a series of contributing factors, we revealed factors that are far broader than ICT or information governance in and of itself. This examination reveals the fundamental position that ICT and information governance hold in the broader economy—a research agenda that is still unfolding and well worth continuing pursuit in the future.

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Part III: Politics & Society

8. Cyber Security Governance in Japan: Two Strategies and a Basic Law

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Abstract

In November 2014, the long-awaited Cyber Security Basic Law passed the National Diet of Japan. The background to the passage was a rapid rise in cyber risks. One of the biggest cyber security problems is the so-called "attribution problem," which means it is very hard to identify who is making computer viruses, penetrating others' systems, stealing confidential, sensitive or private information, and conducting cyber attacks. Cyber attacks are, generally speaking, quite difficult to identify by their very nature. This fact lowers the entry barriers to cyber attacks. The Japanese government has developed its cyber security preparedness step by step since earlier web falsification incidents that occurred in 2000. Since then, cyber security has quickly become a non-traditional national security threat. The Japanese government heightened its preparedness by issuing two national strategies in 2010 and 2013. The most recent landmark is the passage of the Cyber Security Basic Law of November 2014. Japanese cyber security governance for 13 years could be categorized as "interactive governance" in the framework of this book. However, both state actors and societal actors are weaker. At a basic level, the weaknesses of both Japan's governmental authorities and the political power of societal actors have necessitated the need for them to cooperate towards the common goal of cyber security. However, as cyber threats and risks continue to become ever more global, the Japanese government needed to restructure its organizations to cope. One of the answers was the enactment of the Cyber Security Basic Law. The Cyber Security Basic Law might alter this interactive or collaborative approach to governance in the future. The Basic Law envisages and promotes a stronger, wider role of the government.

1. Introduction

Cyber security is universally recognized as an increasingly important dimension of national security. Laws, regulations, and organizations for securing the integrity of information from unauthorized access and manipulation are becoming ever more important as information technology continues to spread across an increasing range of social and economic activity. Japan is no exception to this trend.

This chapter poses the following questions: what is the state of cyber governance in Japan, and what was its process of development? From the early 2000s to the present,

Japan has strengthened its cyber security preparedness through step-by-step reactions to probable risk. In response to the unique nature of cyber threats, we have witnessed a shift from a less centralized form of governance featuring a plethora of weaker state and private actors toward a more centralized form of governance soundly housed within the Japanese state. As such, this evolution marks a shift from a model of Interactive Governance to one of Administrative Governance (See Chapter 1 in this book for detailed descriptions of the four cyber governance patterns).

Cyber security has characteristics that differentiate it from conventional security. This chapter first provides an overview of some of those characteristics, placing Japan in this context as a nation in which cyber security is of increasingly critical importance. It then provides an overview of state and private actors involved in cyber security and the challenges they have met and continue to face. This section will serve to highlight the history of relative weakness in both Japan's governmental authorities and in the political influence of societal actors. We ultimately argue that this deficiency brought about cooperation and coordination between public and private participants in order to achieve the common goal of cyber security. However, with the passage of the Cyber Security Basic Law in November 2014, this interactive or collaborative approach to governance has been altered in favor of a more centralized form located soundly within the state. In the final section of this chapter, we trace this shift in governance through two key national strategies and conclude with examination of the current Basic Law.[119]

2. Cyber Security and Japan: A Real and Unique Security Threat

In November 2014, the long awaited Cyber Security Basic Law passed the National Diet of Japan, marking a progressive move toward a new form of cyber governance in Japan. Its passage was fueled by a rapid, global rise in cyber risks and the unique nature of cyber security in relation to other more traditionally recognized national security threats.

Cyber threats are on the rise, both globally and in Japan. Circulating malware (i.e. computer viruses, worms and other types) was estimated to have reached 300 million in

[119] After the completion of this chapter, the Japanese government published its third cyber security strategy in September 2015. This chapter's analysis is as of March 2015.

2014 alone.[120] This overall rise in attacks did not leave Japan untouched. Cyber attacks threatened Japan's domestic infrastructure, both public and private, as well as key relations abroad. The Japanese government was the target of 5.08 million cyber attacks in a single year, 2013. Two years earlier in 2011, one of Japan's major defense industry contractors was reported to have suffered a significant attack. This particular attack shook the Japan-U.S. alliance by suggesting that critical U.S. high tech information in Japan might not be secure from leaks due to cyber espionage. The threat to Japan from cyber attacks has been real and significant.

For Japan, as for many states, a viable response to this threat has been difficult due in large part to the unique characteristics of cyber attacks. Computer viruses, similar to biological viruses, create subspecies and gain more infectious abilities as they grow and spread. However, unlike biological viruses, these computer counterparts are created by human beings. While it is possible that computer programs might evolve automatically in the future, current computer viruses are developed, modified, and deployed through the intentions and actions of human beings. As such, unlike a biological virus, a computer virus is attributable to a person or group of persons.

However, one of the biggest cyber security problems facing governments today is the so-called "attribution problem." It is increasingly difficult to identify who is making and distributing such viruses; penetrating others' systems; stealing confidential, sensitive, or private information; and conducting cyber operations or attacks.

This "attribution problem" in cyber security differs significantly from attribution in other security domains, such as terrorism and/or conventional weaponry, and is compounded by relative ease of entry in cyber domains. It is true that the perpetrators of terrorism are difficult to identify. Unlike terrorism, however, where credit for an attack is often claimed, cyber attackers often remain in the shadows. Similarly, it's almost impossible for a single individual to develop an intercontinental ballistic missile (ICBM). In contrast, as history has shown, an individual or a small group of individuals can develop and launch cyber attacks covertly with devastating impact. Compared to other security risks facing states, cyber attacks have lower entry barriers and provide greater anonymity for perpetrators.

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[120] AV-Test, "Malware," AV-Test <http://www.av-test.org/en/statistics/malware/>, March 10, 2015 (access on March 12, 2015).

In addition to the "attribution problem" and relative ease of cyber entry, lack of international governance, laws, or even consensus on cyber threats, makes prosecution of perpetrators fraught. In the cyber realm, attacks can originate from around the world, outside of a state's territorial jurisdiction. Even if the perpetrators of cyber attacks are identified, arresting them in a foreign country is not feasible without consensus on the application of international laws to cyber activities. This provides a loophole for cyber attackers and reduces the potential personal costs in staging cyber attacks abroad. The lack of international consensus also lowers barriers of entry in cyber fields.

With the number of attacks made against public and private Japanese entities on the rise, cyber security is clearly a national security issue for Japan. It is also a security issue unique that Japan, or any other state for that matter, has faced before. The unique character of cyber risks has required the development of a cyber-security strategy. For Japan, this development has been incremental, beginning in the early 2000s, and has redefined relationships between state and societal actors in unique ways. Historically, the relative weakness of Japan's governmental authorities and the lack of political power held by societal actors have necessitated cooperation towards the common goal of cyber security. However, with the recent passage of the Cyber Security Basic Law in November 2014, this interactive or collaborative approach to governance has been altered.

3. Actors Involved in Governance of Japan's Cyber Security

Before examining the two National Strategies and the Basic Law, a progression that is reshaping the relationship between the state and society in cyber matters, we must first explore the range of historical actors in cyber governance in Japan. We begin with early government responses and key challenges and then move on to early private sector actors and their challenges in cyber governance. The group of state and private actors explored below highlights the decentralized and collaborative early governance structure for cyber issues in Japan.

3.1. Early Government Responses and Challenges

There are four categories of government actors and actions present in early cyber

governance in Japan: (1) initial attempts at centralized coordination, (2) jostling between the defense and police, (3) involvement of intelligence communities, and (4) roles played by a growing range of additional agencies with disparate interests. Each of these categories underscores early governmental responses to cyber threats, while also posing significant challenges for effective cyber governance in the future.

As early as late 1999, the Japanese central government began to set up new organizations for response to cyber threats. These early governmental efforts sought to address issues of jurisdiction domestically through centralized coordination. Jurisdiction had previously been ambiguous in Japan. These early governmental developments gained urgency from ongoing cyber attacks, which highlighted the necessity of settling jurisdiction and orchestrating a coordinated, centralized approach.

What were the initial attempts at centralization in Japan? "The Act to Prohibit Illegal Access (不正アクセス禁止法)", the first law of its kind, was enacted in August 1999. The next month, "the Meeting for Ministries Related to Information Security (情報セキュリティ関係省庁局長等会議)" was set up. The Meeting published the "Action Plan for Infrastructure Development to Cope with Hackers (ハッカー対策等の基盤整備に係る行動計画)" on January 21, 2000.

These newly minted attempts at centralized coordination in response to cyber threats were tested only three days after publication of the Action Plan. On January 24, 2000, Japan's Science and Technology Agency's webpage was falsified. Five hours later, around 11 p.m., the Agency reported this incident to the Crisis Management Office of the Prime Minister's Office and the High-Tech Crime Center of the Tokyo Metropolitan Police Department. However, damage spread. Web pages of the Management and Coordination Agency, the National Institute for Research Advancement (NIRA), the Ministry of Transport, the Ministry of Education, the Ministry of Foreign Affairs (MOFA), and the Ministry of Posts and Telecommunications (MPT) were also falsified.

These early attempts at coordination did not prevent the flurry of hacks, and one month later, the Japanese government set up a new office called the "Information Technology Security Office (ITSO)." The ITSO continued to be the primary vehicle for centralized coordination for half a decade. In April 2005, it underwent a rebranding and

an upgrade, becoming the "National Information Security Center (NISC)."[121] The following month, in May 2005, the Prime Minister (also the Chief of the IT Strategic Headquarters) ordered the establishment of the National Information Security Council (ISPC).

The ISPC and the NISC were more than simply a rebranding of previous centralization efforts. They also represented a shift in the diversity of actors at the governance table. While the Chief Cabinet Secretary chaired the Council, its membership represented a varied set of interests. The ISPC's members included the Minister of Internal Affairs and Communications; the Minister of Economy, Trade, and Industry; the Chairman of the National Public Safety Commission; the Minister of Defense; and the Minister of State for Science and Technology Policy. Notably, the ISPC also brought to the table six expert members from the private sector.[122] In January 2012, the Minister of Foreign Affairs joined as well. This expansion of membership to additional government agencies and even the private sector was more than simply symbolic or divvying up the pie; the diversity of interests led to formation of several working groups that specialized in related topics, all housed under the umbrella of ISPC.

The increase in the number of players at the table in cyber security was, unfortunately, accompanied by growing ambiguity. With this abundance of governmental actors, who would be in charge? The answer was determined, in large part, by how cyber threats were framed or conceptualized. Until the coalition government led by the Liberal Democratic Party (LDP) was defeated by the Democratic Party of Japan (DPJ) in 2009, information security or cyber security policy was largely consigned to the area of technical problems. Rather than ranking cyber threat as a national security issue, leadership had focused on prevention of viruses and illegal access for the purpose of mischief. While the possibility of future large-scale shocks had been raised, concerns did not produce an awareness of any clear and present crisis. This framing as 'not a national security issue' privileged some potential actors over others.

Why did cyber risk remain solidly in the realm of crime or mischief until 2009? The answer lies in which governmental agencies held jurisdiction: in this case a

[121] As I describe later, the NISC was reorganized in January 2015. The NISC was formerly an acronym of "National Information Security Center." However the Cyber Security Basic Law of 2014 changed it to "National Center of Incident Readiness and Strategy for Cybersecurity" in 2015.
[122] The number of expert members became seven in October 2013.

jurisdictional dispute between law enforcement agencies and Self-Defense Forces (SDF). Law enforcement and police agencies constituted the frontline of cyber defense. If cyberattacks were seen as criminal acts, these authorities would arrest attackers, who would then be indicted.

However, if such acts were seen as beyond crime and regarded as threats to national security, then military forces should hold at least partial responsibility. In Japan's case, the responsibility would fall to the SDF. While the SDF would respond, the Ministry of Defense (MOD) would need to prepare legal justifications for such responses beforehand. However, since falsifying web pages is often a crime, there may be no role for the SDF. Yet, since attacks on critical infrastructure do represent national security threats, SDF involvement may be expected. The problem of whether cyber offenses should be categorized as crime or as threats to national security has resulted in ambiguous jurisdiction between two government actors: the police and the defense.

At issue here is the fact that Japan's SDF lacks the capacity to be first responder in protecting the nation against cyber attacks. This reality is not, however, widely understood in Japan. The SDF is well loved. It received high praise and evaluations for its response to the Great East Japan Earthquake, which struck the Tohoku (north east) region in March 2011, and the SDF is generally well received by the majority of the public, having overcome earlier doubts about its mission and utility that arose in the immediate post-World War II years. The nation, in general, now expects the SDF to defend Japan in times of emergency. It is therefore quite natural that citizens expect the SDF to perform a role in countering cyber attacks.

That said, what can the SDF in practice really do online? The answer is "Not much." Japan's national security policy is wholly defensive. The SDF has limited efficacy; it is mobilized only by orders of the Prime Minister or the Defense Minister. The SDF was created to counter more traditional kinetic military acts, which differ from cyber attacks in important ways. While the Prime Minister may order a mobilization in response to an imminent invasion, it is less clear how the force would defensively mobilized against the 5.08 million cyber attacks found in 2013.

Moreover, even when various military actors have attempted to engage with cyber risks, they have done so in a largely compartmentalized manner. Each cyber unit in the Ground Self-Defense Force, the Maritime Self-Defense Force, and the Air

Self-Defense Force can protect its own cyber systems. Importantly, however, they cannot protect cyber systems and assets outside the Ministry of Defense and the SDF themselves without clear orders. The procedures of regulating national security actors in Japan have not yet evolved to adequately engage with the cyber realm. Cyber security players require a different posture.

Nonetheless, with these limitations in mind, the Ministry of Defense endeavored to restructure its preparedness against advanced and sophisticated cyber attacks by establishing a new unit for cyber defense in fiscal year 2012. However, plans were suspended due to insufficient budget, and also to avoid producing a rushed and potentially ineffective unit. By the end of FY 2013 (March 2014), the Command, Control, Communication, and Computers Systems Command under the Joint Staff Office became the new Cyber Defense Unit with 90 members. Even with this new Cyber Defense Unit, debates regarding appropriate jurisdiction for cyber matters persisted.

In addition to early centralization efforts and the military/police debate, a third group of important government actors in Japan is the intelligence agencies. They must play an important role to forecast and prevent a serious large-scale attack. Cyber attacks against nuclear plants, transportation systems, or financial systems may lead to irreparable damage. Prevention requires sustained network monitoring and other capabilities that call upon resources that only intelligence agencies can provide.

But the NISC is not an integral part of Japan's intelligence community. Rather than benefiting from intelligence gathered from a variety of intelligence sources,[123] the NISC plays a role in connecting these disparate ministries and agencies following cyber incidents. In fact, intelligence agencies cannot share intelligence with the NISC in a formal way.

This lack of information symmetry between intelligence agencies and the center tasked with cyber security is compounded by a lack of hierarchical clarity between the heads of the NISC and the heads of intelligence agencies. The top manager of the NISC (the Assistant Chief Cabinet Secretary for National Security and Crisis Management) has the same rank as the Director of Cabinet Intelligence under the

[123] There are several intelligence agencies in Japan such as the Cabinet Information Research Office (CIRO), the National Police Agency (NPA), the Public Security Intelligence Agency (PSIA), the Ministry of Defense (MOD), and the Ministry of Foreign Affairs.

Deputy Chief Cabinet Secretary for Crisis Management. This lack of clearly designated seniority and authority further hinders cooperation and essential flows of information from key intelligence agencies to the core centralized governmental actors tasked with cyber security.

Why not, then, create a larger role for intelligence agencies in the cyber realm? An expanded role would unfortunately introduce other problems. Intelligence communities often find themselves opposed by societal concerns such as privacy. The Japanese government, or in this case NISC, may feel it necessary to utilize intelligence agencies for monitoring people's communications as prevention of cyber terrorism. But Japanese law allows wiretapping for law enforcement purposes only, not for preventing future crimes or attacks. The question of a more central role for intelligence agencies raises questions such as the balance between national security and citizens' right to privacy. Should Japanese law be amended, giving these agencies a larger role in cyber matters? The answer to this question hinges not solely on the technicalities of cooperation but also on the nature of relations between state and society.

The fourth and final group of government actors of note represents a range of government agencies. The Ministries of International Affairs and Communications (MIC) as well as of Economy, Trade, and Industry (METI) have begun to play important roles in protecting telecommunications, hardware, and software industries from cyber threats. They have been joined by the Ministry of Foreign Affairs (MOFA) as cyber security has become a diplomatic issue in international forums such as the G8 and the United Nations. MOFA's purview is to deal with issues related to international laws concerning cyber space. The growing number of players involved in various cyber domains intensifies the need for more coordination between agencies and raises additional concerns regarding appropriate jurisdiction.

3.2. Private Sector Actors Related to Cyber Security

As in the realm of governmental actors, the myriad of private actors participating in cyber security debate highlights key challenges to cyber governance in Japan. In terms of cyber security, it is necessary to reach out widely to more sectors of society. As in the state sector, no strong frontrunner has emerged in the private sector to spearhead cyber

governance.

In the realm of cyber security, a natural place to seek a strong private sector presence would be anti-virus software companies. While Japan has a plethora of companies that develop and produce a wide range of communication software and devices such as mobile phones and computers, there is no indigenously established anti-virus software company. Such software products available in Japan are originally foreign products, thus precluding existence of a clear domestic frontrunner in the domestic private sector.

Instead, other private actors beyond anti-virus software have tried to take the lead in cyber security. The Japan Network Security Association (JNSA), a non-profit organization and an industry association, is one such actor. For example, media frequently quote information security industry companies such as LAC, Cyber Defense Institute (CDI) and FFRI for their analyses of cyber incidents. The JNSA, LAC, CDI and FFRI do not, however, play a broader political role in cyber security policy making.

If these private actors play important roles in cyber security, which other private actors play key roles? The answer is telecommunications. In July 2012, MIC and the METI jointly organized the Cyber Attack Analysis Council to analyze the current situation of cyberattacks and share findings with government ministries and critical infrastructure operators. The Council consisted of the National Institute of Information and Communications Technology (NICT), the Information-Technology Promotion Agency (IPA), Telecom-ISAC (Information Sharing and Analysis Center) Japan, and JPCERT/CC (Japan Computer Emergency Response Team Coordination Center).[124] The NICT and the IPA were independent administrative corporations, but were largely funded by the government. JPCERT/CC was a non-profit organization, but was also partly funded by METI. It is important to note that the Council was not a political pressure group. It was designed to promote better collaboration between these organizations and the government.

The heavy focus on the telecommunications industry was not originally accompanied by a similar focus on other critical infrastructure operators, which are also

[124] Ministry of Internal Affairs and Communications, "Meeting of Cyber Attack Analysis Council," Ministry of Internal Affairs and Communications <http://www.soumu.go.jp/menu_news/s-news/01ryutsu03_02000021.html>, July 11, 2014 (access on March 12, 2015).

possible targets of cyber attack. This shortcoming was recognized in the NISC's "Third Action Plan for Information Security of Critical Infrastructures (重要インフラの情報セキュリティ対策に係る第 3 次行動計画)," published in June 2014. It identified three more sectors at risk in addition to the ten sectors that were already covered. The total 13 sectors are: telecommunications, finance, aviation, railway, electric power, gas, governmental and administrative services (including local governments), medical services, water supply, logistics, the chemicals industry, credit services, and oil.[125]

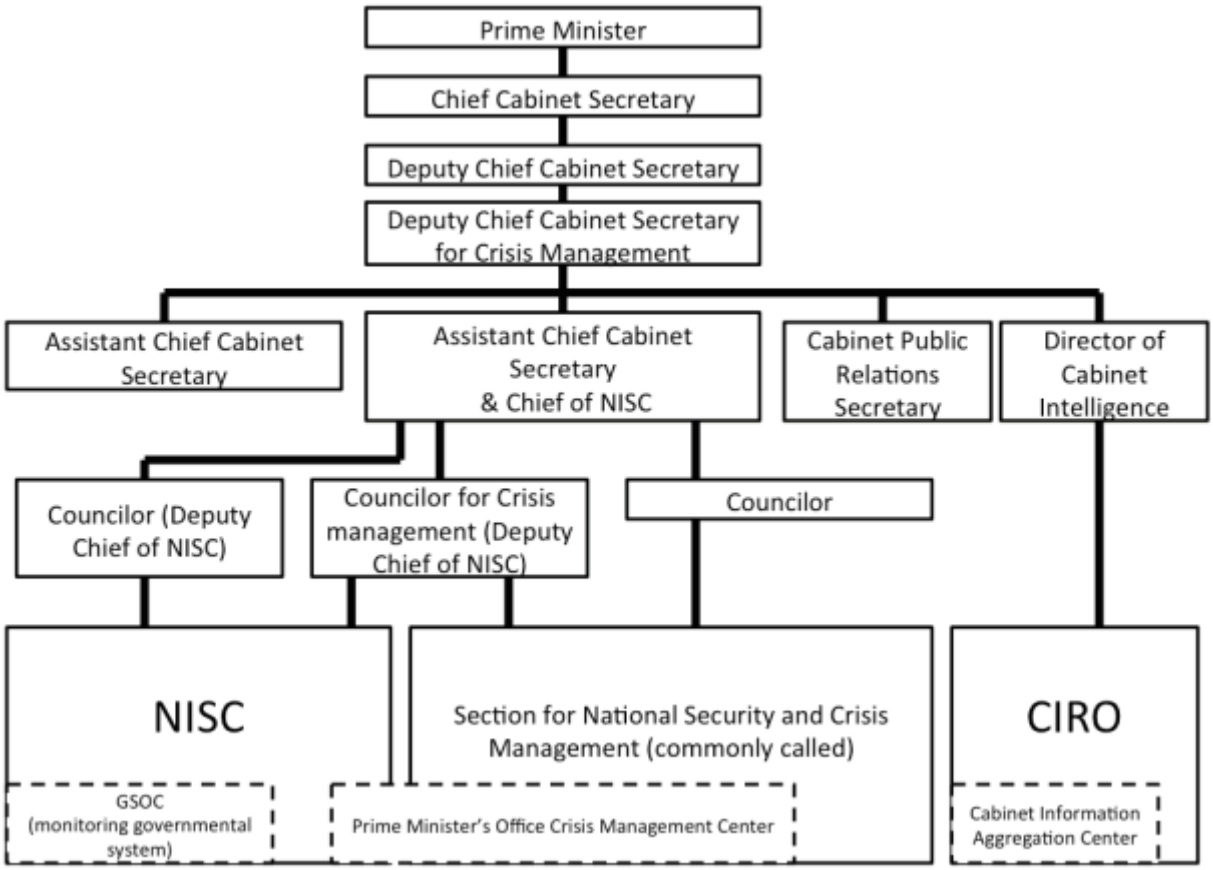
Those 13 critical infrastructure sectors overlap with the 18 CEPTOARs (Capability for Engineering of Protection, Technical Operation, Analysis and Response) identified by the CEPTOAR Council that was organized by the NISC in 2000.[126] A CEPTOAR is an information sharing and analysis procedure designed to strengthen information sharing at the time of cyber incidents in each critical infrastructure sector. The CEPTOARs assist in the prevention of accidents, rapid recovery, and prevention of recurrence. Information, which is provided by the government, is shared among related parties and helps the business continuity of those service providers.

These 13 critical infrastructure sectors are governed by five ministries and agencies: The Financial Services Agency, the MIC, METI, the Ministry of Health, Labour and Welfare, and the Ministry of Land, Infrastructure, Transport and Tourism. In total, the 13 infrastructure sectors and these government ministries and agencies then set up a collaborative institution (See Figure 1).

[125] NISC, "Outline of the Third Action Plan for Information Security Preparedness of Critical Infrastructures," NISC <http://www.nisc.go.jp/conference/seisaku/ciip/dai37/pdf/37siryou02.pdf>, June 19, 2014 (access on March 12, 2015).

[126] CEPTOAR Council Secretariat, "Establishment of CEAPTOAR Council," NISC <http://www.nisc.go.jp/press/pdf/ceptoar_council20090226_press.pdf> February 26, 2009 (access on March 12, 2015).

Figure 1: Information Sharing between Critical Infrastructures and Government Agencies



Source: http://www.nisc.go.jp/conference/seisaku/ciip/dai37/pdf/37siryou02.pdf

Examination of Figure 1, shows that the arrows connecting actors are "information contact and provision (情報連絡・提供)" and "cooperation (連携)." They are not "report (報告)," "order (命令)," "guidance (指導)," or "overlook (監督)," based on any legal authority. Nevertheless, as private sector companies are obliged to report serious incidents to their own governing ministry or agency, large-scale cyber attacks will be reported and the various state actors will seek information and issue guidance on a response. But if companies regard cyber attacks as minor and are reluctant to report them, then no information can be shared between the private and government sectors. Because publicly traded firms must avoid reputational damage that could impact their stock prices or the markets, enterprises tend to be reluctant to report or share information on cyber attacks, even to the police. Such reluctance could significantly hinder private

and public cooperation.

In conclusion, private actors in cyber security are myriad and far ranging. They are linked with other organizations through government ministries and action plans, but remain, by and large, a diverse and non-unified set of players. When combined with the varied set of actors and contested jurisdictions found on the government side, the result has left Japan with relatively weak cyber security in both government and private sectors. This vulnerability has necessarily produced significant cooperation and interactive relationships between state and society, unique to Japan.

4. Two Strategies and a Basic Law: Development of Japan's Cyber Security Procedures

In the previous section, we highlighted how, despite a shared goal, neither the government nor the private sector alone had the capability to tackle the many faceted issue of cyber security in Japan. What had emerged was a collage of relatively weak players. However this piecemeal approach, predicated upon significant cooperation and coordination, found itself plagued with serious shortcomings: ongoing jurisdictional debates, the appropriate balance between security and law, a lack of domestic anti-virus software companies, failures to communicate threats between actors, etc. This approach to cyber governance was clearly inadequate in the face of the growing cyber threat, necessitating, we argue, the government's taking a larger and more centralized role in governance.

In this section, we trace the development of the most significant, overarching articulations of Japan's cyber security strategies: the "Information Security Strategy for Protecting the Nation" of 2010, the "Cyber Security Strategy" of 2013, and the Cyber Security Basic Law passed in 2014. By outlining these developments, we illustrate the shift from piecemeal coordination toward more centralization in cyber security governance – a trend that is likely to continue.

4.1. Information Security Strategy for Protecting the Nation (2010)

The Information Security Strategy for Protecting the Nation (2010) was born of a heightened sense of urgency in Japan. Beginning in 2006, the National Information

Security Council (ISPC) with the help of the NISC published the "First Information Security Basic Plan: For the Establishment of 'Secure Japan.'" This plan set a basic goal covering fiscal (financial) years 2006 to 2008, and mandated the preparation of an annual promotion program. The "Second Information Security Basic Plan: For the Establishment of Powerful 'Individuals' and 'Society'" was published in 2009. This second plan covered FY 2009 to 2011.

However, five months after the Second Basic Plan was published in Japan, a large-scale cyber attack broke out in the United States on July 4th, Independence Day, 2009. Governmental and commercial web sites were hit by Distributed Denial of Services (DDoS) attacks, which used a number of third-party computers infected by computer viruses. Owners of those computers were not aware that their devices had been infected. Their computers began, en masse, to access targeted web sites by remote control. Those web sites were overwhelmed with the volume and were forced to shut down. As each individual access seemed legitimate in and of itself, it was impossible to identify malicious access from innocent access. More than 20 web sites including those of the White House, the State Department, the Department of Treasury, the Department of Defense, Yahoo!, and Amazon were hit.

Four days later, the same type of attacks hit web sites in the Republic of Korea (ROK), this time continuing for three days. 28 organizations including the Ministry of Defense, Congress, the National Intelligence Service (NIS), auction sites, banks, and many others were affected. In this series of attacks, infected computers were dispersed across 19 countries and the attacks took place in waves, hitting the ROK at 6 p.m. on July 7, 6 p.m. on the 8th, and the night of the 9th. One ROK government official mentioned that these attacks amounted to an attack on the South Korean state and, as such, they were acts of provocation to national security. Later analysis showed that attack methods used against the United States and the ROK were the same.

This series of attacks brought the "attribution problem" into full focus. At first, the ROK's NIS told several Congressional members about the possible involvement of the Democratic People's Republic of Korea (DPRK) without quoting clear evidence. A subsequent investigation was unable to provide the needed evidence. However, the ROK government had acquired information on June 7 that the DPRK government issued an order to "…develop a hacking program to break the ROK's communications network."

Two weeks later, the ROK government acquired new information regarding a "simulation exercise" to attack ROK's Korea Internet & Security Agency (KISA) and a university in Pusan. With this new information in mind, they doubted the DPRK's involvement in the July 7th attacks.

Since both Japan's ally (the U.S.) and neighbor (the ROK) had been hit simultaneously, the Japanese government was pressured to heighten Japan's preparedness.

However, the serial attacks abroad were coupled with a domestic administration on its last legs, delaying a Japanese response. In July 2009, the administration of Prime Minister Taro Aso was facing an election it was likely to lose and politics were in turmoil. The Democratic Party of Japan (DPJ) won the national election. In the upheaval, new political leaders and the general public showed little cognizance of the cyber attacks on the U.S. and the ROK.

Finally in December, Hirofumi Hirano, Chief Cabinet Secretary of the new DPJ government, said in a press conference that "…the government takes the position that Japan can be targeted by the same kind of attacks." He directed that cyber attacks be regarded as a national security and crisis management issue, shifting the conceptualization from crime to security. Under his direction, the ISPC and the NISC published their first national strategy, the "Information Security Strategy for Protecting the Nation" in May 2010.[127]

This 2010 Strategy covered FY 2010 to 2013 and overlapped the Second Basic Plan by two years, which was scheduled to cover FY 2009 to 2011. The first page of the 2010 strategy directly cited the U.S. and ROK cyber attacks:

> After the Second National Strategy on Information Security was resolved, a large-scale cyberattack took place in the United States and South Korea in July 2009. Also, numerous incidents of large-scale private information leaks occurred one after another.
> The large-scale cyberattack in the United States and South Korea particularly alerted Japan—where many aspects of economic activities and social life are increasingly dependent upon Information and Communication Technology (ICT)—to the fact that a threat to information security could be

[127] Motohiro Tsuchiya, "Cybersecurity in East Asia: Japan and the 2009 Attacks on South Korea and the United States," Kim Andreasson, ed., *Cybersecurity: Public Sector Threats and Responses*, Boca Raton, FL: CRC Press, 2012, p. 55-76.

a threat to national security and require effective crisis management.[128]

In light of this perceived national threat and lack of readiness, the key principles of the 2010 Strategy were (1) strengthening policies and preparing responses in case of cyber attacks, (2) establishing information security policies to adjust to new environmental changes, and (3) transforming government actions from passive information security to active information security. Cyber attacks were not disregarded in the First and Second Basic Plans, but due to these international events they were placed at the very front of the 2010 Strategy.

Growing concern for cyber threats did not end with the attacks on the U.S. and the ROK but this time, with the 2010 Strategy in hand, the Japanese government was better prepared. In September 2010, several months after the release of the 2010 Strategy, a conflict between China and Japan boiled over into the cyber realm. A Japanese Cost Guard (JCG) patrol vessel and a Chinese fishing boat collided near the Senkaku Islands in the East China Sea. The JCG arrested the Chinese captain, leading to a series of anti-Japan demonstrations in China. Those demonstrations spread into cyber space. Lists of Japanese targets were openly posted on Chinese websites. Such messages were left uncensored for considerable periods of time, even though messages against the Chinese government are often censored or erased quickly. Ultimately, a series of DDoS attacks were launched against Japanese websites. However, due in large part to increased readiness, only minimal damage was reported.

4.2. Cyber Security Strategy of 2013

Similar to the Strategy of 2010, further state centralization was pushed forward by another series of cyber attacks illustrating the shortcomings of the previous, more dispersed form of governance.

On September 19, 2011, the *Yomiuri Shinbun,* a Japanese national newspaper, reported that Mitsubishi Heavy Industries (MHI), Japan's biggest military contractor, had been subjected to cyber attacks. At least 83 of MHI's computers (45 servers and 38 personal computers) were infected and were secretly leaking data to 20 computers

[128] Information Security Policy Council, "Information Security Strategy for Protecting the Nation," NISC <http://www.nisc.go.jp/eng/pdf/New_Strategy_English.pdf>, May 11, 2009 (access on March 12, 2015).

outside the MHI's network. MHI's dockyard in Kobe builds both nuclear plants and submarines and the company's dockyard in Nagasaki is a major shipbuilding center for the Maritime Self-Defense Force. As such, MHI plays an important role in Japan's domestic defense industry. It was also revealed that IHI and Kawasaki Heavy Industries, both major defense contractors as well, had also been targeted, but fortunately had not been infected.

The *Yomiuri* article led to a series of public media reports on cyber attacks and incidents in Japan, spotlighting the inadequacy of Japan's cyber security readiness. On October 25, 2011, the *Asahi Shinbun*, another nationwide newspaper, reported that a server of the Lower House of the National Diet had been penetrated and passwords had been stolen. A report the following day revealed that passwords of all of 480 national Diet members' e-mail accounts had been stolen. The *Yomiuri* then reported that Japanese diplomatic establishments abroad were hit by similar kinds of cyberattacks. Computer viruses were found in Japan's embassies and consulate-generals in Canada, Cameroon, and the ROK to name a few.

Two and half years after the 2010 Strategy, the Liberal Democratic Party, led by former Prime Minister Shinzo Abe (who had resigned from his first administration in 2007) was swept back into power in a national election in December 2012. Abe formed his second cabinet with coalition partner New Komeito. Soon after its inauguration, the Abe administration decided to publish a new strategy for cyber security[129]. The slew of attacks and increased public attention coupled with the fact that the 2010 Strategy had been published under the DPJ government propelled Prime Minister Abe into publishing a new strategy. He ordered Yoshihiro Suga, Chief Cabinet Secretary, to take charge.

With that order, the NISC started consulting with the ISPC's expert members to revise the strategy. At first, the NISC sought to set up a new working group for drafting a new strategy, but Mr. Suga suggested that the six ISPC expert members themselves should draft it.[130] This decision further centralized cyber governance. Usually, the Chief Cabinet Secretary chairs the ISPC meetings, and other related cabinet ministers join them along with expert members from the private sector. But this time, six ISPC expert members and NISC staff members completed the drafting of a new strategy.

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[129] Ibid.

[130] In October 2013, ISPC expert member became seven, but they were six at this point.

A NISC counselor authored drafts based on information from related ministries. These drafts were discussed with six ISPC expert members individually at first. Then, several meetings were held at the Prime Minister's Office or the Cabinet Office. Regular ISPC meetings are usually 30 to 40 minutes, as it is difficult to gather the Chief Cabinet Secretary and ministers around one table for extended periods. Necessarily, discussions are time-restricted, because a cabinet meeting usually follows an ISPC meeting. But discussion and exchange of differing views at these drafting meetings exceeded 60 minutes.

This further centralization of cyber governance was accompanied by a shift in language surrounding cyber threats. Notably, the draft of the new strategy used the term "cyber security" instead of "information security." Previously, the two terms had often been used interchangeably, and there had been no consensus in Japan or abroad on how to distinguish them. The Russian government uses the term "information security" to include trustworthiness of information content and the Chinese government has started following that use of terms. Information criticizing the government or false rumors to disturb social order is regarded as a form of information attack in these countries. Japan, the U.S., and EU countries don't include censorship or regulation of content in cyber security and they support free flow of information and freedom of expression online. As U.S. and European government documents tend to use "cyber security" rather than "information security," the NISC and the ISPC adopted the term "cyber security." This language shift put Japan more in line with allies abroad.

Additionally, although the 2010 Strategy had already stressed that cyberattacks were national security and crisis management issues, the new 2013 Strategy took things further.

> The information security environment changes extremely quickly. In the 3 years since the determination of the previous strategy, risks have become increasingly serious, more diffuse and more globalized. "Cyberattacks" against government institutions and critical infrastructures have become a reality and have become both "national security" and "crisis management" issues. At present, the introduction of the best possible measures for protecting the government institutions and critical infrastructures has become essential.[131]

[131] Information Security Policy Council, "Cyber Security Strategy," NISC

This shift in language is more than just a clarification or an attempt to harmonize terminology with key allies. It also opens the door to further centralization of governance within the Japanese state; cyber threats are national security threats and, as such, should be dealt with at the national level.

Several new topics were discussed in the 2013 Strategy, but in light of the current book's focus, an important organizational change -- the centralization of functions -- should be noted. The change is described on pages 53 to 54 of the 54-page document (English version):

> The NISC is strengthening its functions as Japan's command post for constructing a world-leading, resilient and vigorous cyberspace. Specifically, in addition to drastically strengthening of the GSOC [Government Security Operation Coordination team], the organization will also strengthen its collection of information such as incidents which are related to cyberattacks, analysis and publicity related to the current situations of relevant measures of governments and actual circumstances of domestic and overseas cybersecurity related trends, and dynamic ability to respond to through organic collaboration among the various functions distributed throughout related specialist organizations such as government institutions, independent administrative agencies and others. When implementing these changes, CSIRT functions, which serve as the point of contact for international incident handling within Japan, will also be considered.
> Based on the above, the NISC will be the "Cybersecurity Center" (tentative) around FY2015 by preparing the required organizational structure, including authorities and securing of human resources through personnel management such as employment and cultivation of specialist personnel.[132]

In fact, this description did lead to the Cyber Security Basic Law the following year and a subsequent step in the evolution away from interactive governance and toward administrative governance.

4.3. Cyber Security Basic Law of 2014

The next shift in Japanese cyber governance to date occurred in 2014. Prior to the Basic Law of 2014, the organization of the NISC was relatively complicated, a fact

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<http://www.nisc.go.jp/active/kihon/pdf/cybersecuritystrategy-en.pdf>, June 10, 2013 (access on March 12, 2015).

[132] Ibid.

that significantly impeded its ability to respond to cyber threats. The legal basis of the NISC was a Prime Ministerial decision to establish the ITSO in 2000.

It was also a double-headed eagle. Its first head belonged to the IT Strategic Headquarters through the ISPC, because the Chief of the IT Strategic Headquarters established the ISPC. The NISC was serving as the secretariat of the ISPC. Article 1 of the Rule to Establish Information Security Center said:

> Article 1
>
> The Information Security Center is placed under the Cabinet Secretariat, in order to arrange, plan and comprehensively coordinate development of integrated and cross-sectional information security preparedness in the government and private sectors, which includes planning of a basic strategy for information security policy and others.

This article allowed narrower authority for the NISC. It meant NISC's role was just to "arrange, plan and coordinate (企画及び立案並びに総合調整)." The NISC could plan and arrange and coordinate, but the NISC could not implement. For example, if Japan had been subject to an attack prior to the Basic Law of 2014, the NISC's role would have been coordination. It would not have been able to formally request information and investigate attacks (even if informally possible). The NISC was "expected" to be a headquarters of cyber security inside and outside the government, but its authority was narrow and insufficient to allow a wider role.

However, the NISC had its other head. Article 2 of the Rule to Establish Information Security Center said:

> Article 2
>
> 1. Information security center has a Director-General, two Deputy Director-Generals, Counselors, and other necessary staff.
> 2. Director-General is appointed from among Assistant Chief Cabinet Secretaries (内閣官房副長官補), which are defined in the Article 10, Clause 1, of the Ordinance for the Cabinet Secretariat Organization.
> 3. Deputy Director-Generals are appointed from among Cabinet Secretariat Councilors
>
> (Clauses 4 to 7 are omitted.)[133]

[133] NISC, "What is NISC," NISC <http://www.nisc.go.jp/about/rules.html>, Publish Date Unknown (access on December 23, 2014).

This second head was immobilized, however, by complicated appointment policies. The Director-General of the NISC is one of the Chief Cabinet Secretaries, meaning that Director-General was not a fulltime position at the NISC. To understand the implications of this, we need to look at the organizational structure of the Cabinet Secretariat.

At the top of the Cabinet Secretariat is Chief Cabinet Secretary (官房長官), who is appointed by the Prime Minister from among national diet members. Under the Chief Cabinet Secretary there are three Deputy Chief Cabinet Secretaries (官房副長官). Two of these are in charge of state affairs (政務) and one each is appointed from the Upper House and the Lower House of the National Diet. The other one is in charge of administrative affairs (事務) and appointed from career bureaucrats, who have held administrative vice-minister (事務次官) positions in normal cases.

The Assistant Chief Cabinet Secretaries are in charge of "helping the Chief Cabinet Secretary, Deputy Chief Cabinet Secretaries, the Deputy Chief Cabinet Secretary for Crisis Management (内閣危機管理監) and the Chief Information Officer (内閣情報通信政策監), and deal with the administration of the Cabinet Secretariat under the order" (Cabinet Law, Article 18, Clause 2). The quorum is three, and they are political appointments by government officials. They are assigned to deal with internal affairs, foreign affairs, and national security. The person who becomes NISC's Director-General is the Assistant Chief Cabinet Secretary for National Security. Therefore, another head of the NISC was the Cabinet Secretariat, which was led by the Chief Cabinet Secretary, acting through the Assistant Chief Cabinet Secretary for National Security. The Deputy Chief Cabinet Secretary for Crisis Management was also called to attend ISPC meetings.

We might assume that the NISC was the headquarters in an emergency, since the NISC's Director-General concurrently served as Assistant Chief Cabinet Secretary. However, the NISC's Director-General did not deal with the daily administration of the NISC. The two Deputy Director-Generals administered it. In particular, one from MIC or METI was in charge of daily matters of the NISC and represented the NISC in external affairs.

When we called the NISC a "double-headed eagle," its first head was the IT

Strategic Headquarters for promotion of information society and the second was the Cabinet Secretariat for national security and crisis management. However, the organizational and legal basis of the NISC was solely the Prime Minister's directive. It was neither a law, which has to be passed in the National Diet, nor a cabinet approval, which is regarded as a quasi-law. This lack of a clear legal basis for centralization of governance in the NISC further compounded the convoluted organization of its leadership, undermining its ability to effectively respond to cyber threats.

Given the considerable increase in the seriousness of cyber threats, which grow day by day, tackling this organizational issue became a high priority. A restructuring of the NISC was initially included in the 2013 Cyber Security Strategy.

However, in order to respond to this and other problems, a bill was prepared not by the NISC, but by Mr. Takuya Hirai, elected member of the Lower House and chairperson of the LDP's IT Strategy Special Committee. He didn't want to make it a government-sponsored bill, because he thought a "basic law" to guide long-term policy goals should be sponsored by representatives of the nation, though the NISC helped him and his committee in many ways.

The bill was submitted to a regular Diet session in 2014. The Lower House passed it in June, but the Upper House didn't pass it until the end of the session. It was sent to the next Diet session in autumn 2014. Finally in November 2014, the National Diet passed the bill and it became the "Cyber Security Basic Law."

In its four chapters and 35 articles, the law anticipates five organizational and policy changes of significance for cyber governance. First, the ISPC was reorganized as the Cyber Security Strategic Headquarters (CSSH). The CSSH is responsible for drafting a cyber security strategy and can request the Prime Minister to send it to his/her cabinet for approval. Current and past strategies have been authorized at ISPC meetings only, and their legal status was obscure. Future strategies under the CSSH will receive cabinet approval and have a stronger legal basis.

Second, the law defined a new relationship with the new National Security Council (NSC), which was created in late 2013 by the Abe administration. As of November 2014, Mr. Nobushige Takamizawa, Director-General of the NISC and Assistant Chief Cabinet Secretary for national security is also one of two Deputy Secretary Generals of the NSC. He -- and his position taking three posts simultaneously

-- has a key role in cyber security in Japan, as was confirmed by an administrative order. When Japan faces serious cyber attacks in the future, this position will be critical.

Third, the ISPC was formerly placed below the IT Strategic Headquarters. But the new CSSH and the IT Strategic Headquarters stand side by side in the new system. The CSSH accepts advice from the IT Strategic Headquarters for drafting cyber security strategies and they coordinate important matters. The double-headed eagle system was dissolved. The CSSH is no longer under the IT Strategic Headquarters.

Fourth, the law articulates a vision for NISC reorganization. Articles 30 and 31 of the Basic Law define the authority of the NISC. These two articles now grant the NISC authority to officially request information and cooperation necessary to its functions -- such as document explanations -- from related ministries, agencies and local governments. Prior to the Basic Law, the NISC received information only on a voluntary basis. Now the NISC has the authority to request it. Further, Article 27, Clause 3 allows the NISC to advise executives of related government ministries and agencies when necessary. Such advice does not constitute an order, but even this advisory capacity represents progress in streamlining the workings of the NISC.

Finally, the Additional Clause 2 of the Law represents a legalization of the status of the NISC, which helps to settle jurisdictional debates. In January 2015, by virtue of this clause, the NISC was strengthened and renamed from the "National Information Security Center" to "National center of Incident readiness and Strategy for Cybersecurity."

In summary, by tracking the evolution of cyber governance in Japan through two strategies and finally a bill, we can trace its progression from a disparate and contested number of weaker actors across state and private arenas to a more centralized form of cooperation housed in an increasingly streamlined NISC. In an attempt to address the unique character of cyber threats, this more interactive and cooperative approach to cyber issues has been replaced as Japan faced increased public awareness and frequency of attacks.

5. Conclusion

Since 2000, cyber security has quickly become a national security threat for Japan. It is, however, a unique one. The non-traditional nature of this security threat has forced

a shift in cyber governance in Japan, which can be seen by examining the early actors involved and tracing the evolution of governance across two national strategies and a basic law.

Japanese cyber security governance for 13 years could be characterized as a process in which neither government nor private sector actors exercised dominance, resulting in the necessity for mutual cooperation since all parties lacked a strong legal basis for action. In any case, all actors involved shared the common goal of trying to achieve better cyber security.

However, as cyber threats and risks continue to become ever more global, the Japanese government needed to restructure its organizations to cope. One of the answers was the enactment of the Cyber Security Basic Law in November 2014.

Implementation of the Basic Law has just begun, and it is too early to evaluate anticipated changes. However, the Basic Law envisions and promotes a stronger, wider role for the new NISC as the headquarters of cyber security policy. Although, the NISC is not defined as an intelligence agency and its powers remain limited, it has gained additional new authority to enable better leadership.

Therefore, we can foresee that Japan's cyber security governance now has more characteristics of "administrative governance," in which the government takes a leadership role in guiding developments in the policy area. Needless to say, serious and large-scale cyberattacks or other incidents might change this situation. However, private sector actors are not resisting this movement by the Basic Law. Their compliance implies probable continuing progress in this direction.

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9. Privacy Governance in Japan

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Abstract

This chapter analyzes the development of information privacy in post-World War II Japan from comparative and historical perspectives. It first presents a brief overview of the evolution of privacy regimes in Western Europe and the United States since the early 1970s, and highlights a general trend that governments in advanced industrial democracies have instituted information privacy regulation that covers many policy areas, accompanied by the development of international rules on privacy protection. The rest of the chapter shows that Japan's privacy regime followed this trend by historically tracing its development. In the 1960s and 1970s, the concept of privacy became a social norm. Citizens' attachment to privacy prevented the government from establishing national identification number systems although the government did not institute information privacy protection policy. In the 1980s, privacy protection was discussed in the context of administrative reform, leading to enactment of the Personal Information Protection Act of 1988, which covered only a part of personal information held by government agencies. In the early 1990s, discussion of information privacy developed in the context of the promotion of the use of advanced network services in both public and private sectors, eventually prompting the government to legislate a privacy protection law. After lengthy political battles, the Personal Information Protection Act of 2003 passed the legislature, establishing a comprehensive privacy regime in Japan. When the government introduced a database to comprehensively manage information related to taxation and social welfare payment in 2013, it established a commission to oversee the protection of personal information, enhancing Japan's privacy regime. The chapter shows that Japan's privacy regime developed through the interaction of various factors.

1. Introduction

Since the introduction of digital technology for data processing in the 1960s, more and more personal information has been stored in databases and used for various purposes around the world. By the 1990s, the development of information communications technology (ICT) had accelerated, allowing significant expansion of activities based on ICT. As a result, today, both government and private-sector organizations collect and store vast amounts of personal information and are capable of quickly disseminating this information to a wide variety of outlets. These developments,

made possible by the evolution of ICT, have prompted awareness of the importance of privacy protection, or citizens' control over the flow of personal information. Privacy governance for privacy protection has subsequently developed in advanced industrial democracies, particularly in countries in Western Europe, the U.S., and Japan.

This chapter raises and answers two questions: (1) what is Japan's privacy governance model and (2) how did it develop. To this end, I analyze the evolution of Japan's privacy governance by historically tracing the development of its privacy regime since the 1960s, using the comparative cases of the US and Western Europe. The US and Western Europe developed very different privacy regimes, both of which influenced Japan's development. Privacy governance in the US developed in a fragmented or piecemeal fashion, creating a governance regime best characterized as *sectoral*, lacking comprehensive regulation in favor of different privacy rules for different sectors or issues. In contrast, Western Europe, whose privacy regulations developed earlier than in the US, is best characterized as having *comprehensive* privacy rules, with governments actively pursuing the development of privacy regulation not only within their own countries and region, but also at the global level. In contrast, Japan's privacy governance regime is a hybrid of the Western European and US privacy governance regimes, using rather uniform rules across sectors while relying on self-regulation and the interaction between multiple actors. I argue that Japan's privacy regime developed as a result of the interactions between political/policy actors.

This chapter first provides an overview of the historical development of privacy regimes in the US and in Western Europe and the related development of international rules. It then traces the process of Japan's privacy regime development, starting from the initial determination of privacy as a legal right in the 1960s to current discussions regarding strengthening of privacy regulation. This section serves to highlight the institutions, organizations, and public factors at play that slowly gave shape to Japan's hybrid model. It concludes with an evaluation of Japan's current privacy governance structure. The final section of the chapter analyzes the causes behind the format of Japan's privacy governance by comparing it to privacy governance in Western Europe and the US. I argue that the timing of ICT development in relation to the timing of political developments surrounding privacy, both domestic and international, was an

important factor influencing all three types of privacy governance regimes.

2. The Development of Privacy Regulation in the U.S., Western Europe, and the International Domain

Privacy regimes developed early in the U.S. and Western Europe, especially in Sweden, (West) Germany, and France. Despite developing in the same post-WWII period, the U.S. and West European countries have quite different privacy regimes. The U.S. has a sectoral privacy regime wherein each policy area has formal or informal privacy rules whose enforcement is overseen by an individual government agency. West European countries have a comprehensive privacy regime in which data protection authorities enforce privacy rules across the various policy areas. If the time period of development does not explain difference, to what factors can we attribute this divergence? Both the U.S and West European regimes developed through interactions between domestic policy actors and have co-evolved through interactions with one another.

2.1. The U.S. – An Overview

The development of privacy regulation began early in the U.S. with attempts to define privacy. Although privacy is now seen as an integral component of a contemporary liberal democracy, it is a relatively new concept. The term was first developed among legal scholars during the late 19th century. In their seminal work published in 1890, Samuel Warren and Louis Brandeis defined privacy as the "right to be let alone".[134] In his 1928 dissenting opinion in *Olmstead vs. United States*, Supreme Court Justice Brandeis argued that the "right to be let alone" was, in fact, a fundamental right.[135]

Despite these early debates, legal discussion on privacy protection developed slowly among legal scholars and judges. It wasn't until 1965 in *Griswold vs. Connecticut* that the Supreme Court referenced the right to privacy as a constitutional

[134] Samuel V. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 5, no. 3 (1891).
[135] Daniel J. Solove, "Conceptualizing Privacy," *California Law Review* 90, no. 4 (2002).

right derived from the Bill of Rights.[136] Since then, the Court has considered privacy in making many important decisions, exemplified by the Supreme Court decision on abortion in *Roe vs. Wade* in 1973 and the dissenting opinion in Bowers vs. Hardwick in 1986, which connected privacy and gay rights.[137]

These legal discussions of privacy protection slowly developed in the early to mid-twentieth century, but no substantive action to legislate a law or institute a policy for privacy protection occurred until the early 1970s and Watergate. The Watergate Scandal in 1973 exposed the Nixon administration's illicit collection of information on Democratic Party members. Viewing this unregulated government surveillance of citizens' activities as problematic, Congress enacted the Privacy Act of 1974 (PA-1974). The Act set up basic rules for government organizations' handling of citizens' personal information, emphasizing restricted information sharing and the proper use of safeguard measures. Although the Senate included the establishment of an independent government board that would oversee the protection of privacy by government agencies in its bill, the lack of support in the House prevented Congress from including the board in the final draft of the Privacy Act.[138] Additionally, since this law did not cover all government activities, in the late 1970s,[139] the government added privacy rules regarding citizens' financial records as well as restrictions on the surveillance of U.S. citizens.

Similarly to the development of privacy rules for the use of citizens' information by government organizations, over time the U.S. government instituted rules and regulations for non-government organizations in different policy areas. In 1970, Congress enacted the Fair Credit Act, specifying rules for credit agencies on how to handle citizens' financial and medical information.[140] In the mid-1970s, based on the Family Educational Rights and Privacy Act of 1974, the U.S. government set up

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[136] Robert B. McKay, "The Right of Privacy: Emanations and Intimations," *Michigan Law Review* 64, no. 2 (1965): 259.
[137] Michael J Sandel, "Moral Argument and Liberal Toleration: Abortion and Homosexuality," *California Law Review* 77, no. 3 (1989).
[138] U.S. Senate Committee on Government Operations, "Legislative History of the Privacy Act of 1974, S. 3418, Public Law 93-579 : Source Book on Privacy," (Washington, DC: U.S. Government Printing Office, 1976).
[139] Matthew N Kleiman, "Comment, the Right to Financial Privacy Versus Computerized Law Enforcement: A New Fight in an Old Battle," *Northwestern University Law Review* 1169 (1992).
[140] Privacy Protection Study Commission, *Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission* (US Government Printing Office, 1977).

regulations for the management of student records by schools. These regulations emphasized records as private information and designated responsibility for regulatory enforcement to the Department of Education.[141] In the following decade, the Cable Communications Policy Act of 1984, which laid out the arrangement of governmental regulation of the cable television industry, specified restrictions on the use of subscriber information.[142] As the use of communications technology accelerated in the 1990s, the government continued to add or reinforce issue-specific privacy protection measures, such as telemarketing,[143] health information management for insurance purposes,[144] children's privacy on the Internet,[145] and consumer privacy in financial services.[146] With these developments, issue-specific privacy regulation has gradually spread across many policy areas in the U.S. since the 1970s.

Although the strength of privacy regulation varied and still varies across issues, many privacy rules have forced relevant organizations to change their approach to personal information. Credit agencies are required to give all citizens access to their credit information. School administrators pay more careful attention to the disclosure of personal information, exemplified by the prohibition of posting student grades in public. The establishment of the national do-not-call registry prevents telemarketers from making unsolicited calls. Some companies have been fined for violating child online privacy rules. Health organizations routinely obtain consent from patients before sharing their information. Commercial banks and credit card companies issue detailed documents on their rules regarding the management of customer information. Although privacy regulation is inconsistent and often ineffective, it has had substantial impact on social activity in the U.S.

The greatest challenge to privacy regulation in the U.S. and in other advanced

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[141] Richard Graham, Richard Hall, and W Gerry Gilmer, "Connecting the Dots…:Information Sharing by Post-Secondary Educational Institutions under the Family Education Rights and Privacy Act (Ferpa)," *Education and the Law* 20, no. 4 (2008).

[142] Wenmouth Williams Jr and Kathleen Mahoney, "Perceived Impact of the Cable Policy Act of 1984," *Journal of Broadcasting & Electronic Media* 31, no. 2 (1987).

[143] Erika S Koster, "Zero Privacy: Personal Data on the Internet," *Computer Lawyer* 16 (1999): 11.

[144] Judith A Wiener and Anne T Gilliland, "Balancing between Two Goods: Health Insurance Portability and Accountability Act and Ethical Compliancy Considerations for Privacy-Sensitive Materials in Health Sciences Archival and Historical Special Collections," *Journal of the Medical Library Association* 99, no. 1 (2011).

[145] Dorothy A Hertzel, "Don't Talk to Strangers: An Analysis of Government and Industry Efforts to Protect a Child's Privacy Online," *Fed. Comm. LJ* 52, no. 2 (1999).

[146] Jolina C Cuaresma, "The Gramm-Leach-Bliley Act," *Berkeley Tech. Law Journal* 17, no. 1 (2002).

industrial democracies is the rapid expansion of Internet activities, which has made privacy regulation obsolete or ineffective. Technology has progressed faster than the regulatory structures put in place to govern it. This is not to imply that the government has made no attempt to respond to developments in ICT. Government efforts to contain privacy violation in cyberspace are exemplified in actions taken by the Federal Trade Commission (FTC) against major Internet service providers in the early 2010s.[147] In November 2011, the FTC ordered Facebook to change its practice of sharing members' personal information and Facebook complied.[148] In 2012, FTC and the Federal Communications Commission (FCC) investigations of personal data collection through Google Street View led Google to discard the information.[149] Most recently in 2013 and 2014, the FTC forced mobile service vendors to strengthen their privacy protection.[150] Although these government actions forced major ICT service providers to modify their business activities, the main mechanism of privacy protection in cyberspace is self-regulation, limiting the FTC and other government agencies to establishment of advisory guidelines.

Attempts have been made to change the fragmented, inconsistent, and reactive privacy regime, a regime often perceived by the public as ineffective. However, such efforts have been minimal or lacked the necessary public and political support. For example, just after the enactment of the Telecommunications Act of 1996, which included privacy protection rules for subscribers (in Section 222), the FCC issued an order in 1998 that set up strict so-called "opt-in" rules, requiring communications carriers to obtain consent from customers before using their subscriber information. A telecommunications carrier challenged the FCC order in court, arguing that the rules violated freedom of speech. The court ruled in favor of the carrier and the FCC ultimately loosened the rule by changing it to an "opt-out" rather than "opt-in" rule.

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147 For an overview of FTC's pursuit of privacy protection among Internet service providers, see Daniel J Solove and Woodrow Hartzog, "The Ftc and the New Common Law of Privacy," *Columbia Law Review* (2014).

148 Somini Sengupta, "Facebook Agrees to F.T.C. Settlement on Privacy," *The New York Times*, November 29 2011.

149 Matthew Mason, "Aligning Online Privacy Protection with Reasonable Expectations of Privacy: How Joffe Can Be Used to Modernize the Wiretap Act," *Minnesota Journal of Law, Science & Technology* 15 (2014): 1163-65.

150 Janice C. Sipior, Burke T. Ward, and Linda Volonino, "Privacy Concerns Associated with Smartphone Use," *Journal of Internet Commerce* 13, no. 3-4 (2014): 184-86.

Subsequently, the FCC became reluctant to strongly enforce privacy rules related to subscriber information.[151] Similarly, in 2012, the Obama administration published a report on consumer data privacy that specified privacy principles and basic approaches to its enforcement. However, despite this report, no substantial movement for online privacy protection laws developed in Congress.[152]

Today, privacy governance in the U.S. is often characterized as sectoral, when compared to comprehensive systems. Different privacy rules exist for different sectors or for different issues. The degree of enforcement also varies between sectors, although it is generally based on self-regulation, reflecting the lack of clear legislative mandate given to regulators and the recent surge of neoconservative ideology antagonistic to government activities.

2.2. West European Privacy Regimes and the Internationalization of Privacy Regulation

In Western Europe, privacy protection developed in the 1970s, similar to the timeline in the U.S. Unlike in the U.S., however, these developments favored comprehensive rather than sectoral governance structures. Additionally, in Europe, privacy governance featured a more top down approach by data protection authorities, which actively pursued the development of privacy regulation at the state, regional, and global level.

First let us consider the 1970s. In Sweden, an extensive data privacy law enforced by an independent government board went into effect in 1974.[153] In West Germany, following discussions on information privacy protection at the state level, in response to the increased use of digital communications for the storage and dissemination of personal information, the federal government began to formulate privacy protection policy in the early 1970s. Since privacy regulation was expected to restrict private sector activities and to impose extra costs on private-sector companies,

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[151] Geoffrey D. Smith, "Private Eyes Are Watching You: With the Implementation of the E-911 Mandate, Who Will Watch Every Move You Make?," *Federal Communications Law Journal* 58, no. 3 (2006): 710-12.
[152] Logan Kugler, "Online Privacy: Regional Differences," *Communications of the ACM* 58, no. 2 (2015).
[153] Colin J. Bennett, *Regulating Privacy : Data Protection and Public Policy in Europe and the United States* (Ithaca, NY: Cornell University Press, 1992), 60-64.

the government faced opposition, but it eventually passed privacy protection legislation in 1977, establishing a comprehensive privacy regime overseen by federal and state regulatory agencies. In the same period, the French government established a comprehensive privacy protection system whereby an independent data protection authority (or authorities) was placed in charge of privacy issues in both the public and private sectors.[154] Similar developments occurred in other West European countries roughly in the same period.[155]

As information privacy protection regimes developed in the region in the 1970s, data protection authority officials and privacy advocates formed a policy network to promote the enhancement and diffusion of privacy regulation both at the regional and global levels. As the Council of Europe discussed and set up rules to promote democracies, officials and advocates sought to develop a regional privacy rule. The Council adopted the *Convention for the Protection of Individuals with Regard to the Automatic Processing of Personal Data* in 1980.[156] At the global level, European data protection authority officials and representatives from major advanced industrial democracies began to discuss international rules for information privacy protection at the Organization of Economic Cooperation and Development (OECD) in 1978.[157] After extensive negotiations among the participants, the OECD issued the 1981 *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*. The guidelines set general rules and identified basic principles for privacy protection, such as obtaining an individual's consent when his or her data is collected, a clear purpose of data collection, non-disclosure of personal data without an individual's consent, etc.[158]

Both the Convention and OECD Guidelines had substantial impact on national privacy regulation globally, including Japan, exemplified by the eventual enactment of a privacy law in response to the issuance of guidelines for OECD member countries.

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[154] Abraham L. Newman, *Protectors of Privacy : Regulating Personal Data in the Global Economy* (Ithaca, NY: Cornell University Press, 2008), 46-70.
[155] Frank Kultenbower, "The World Data War," *New Scientist*, Septermber 3, 1981, 605.
[156] Newman, *Protectors of Privacy : Regulating Personal Data in the Global Economy*, 83-84; Colin J. Bennett and Charles D. Raab, *The Governance of Privacy : Policy Instruments in Global Perspective* (Cambridge, MA: MIT Press, 2006), 84-87.
[157] Michael Kirby, "The History, Achievement and Future of the 1980s Oecd Guidelines on Privacy," *Journal of Law, Information and Science* 20 (2009).
[158] Organisation for Economic Co-operation Development, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (OECD, 1981).

However, neither the Convention nor the Guidelines instantly caused the new establishment of comprehensive regimes in Western Europe in the 1980s.

The acceleration of regional economic integration in the 1980s made it essential to set up regional privacy rules for data transfer. However, major policy and political actors, such as national governments and business organizations, were opposed to the establishment of such rules. To overcome this resistance, data protection authorities threatened to disrupt data communications with other countries in the region that lacked privacy regulation, and pressed the European Commission to recognize the importance of regional information privacy rules for wider European economic integration.[159]

During the establishment of the European Union (EU) in the 1990s, the Commission deliberated on EU information privacy rules, and data protection authorities brokered an agreement by incorporating demands from businesses and national governments. The EU formalized the agreement in 1995 as the *Directive on the Protection of Personal Data with Regard to the Processing of Personal Data and on the Free Movement of Such Data.* Although the EU directive was based on the principles articulated in the OECD Guidelines,[160] the EU directive wielded much stronger and substantive impact on EU member countries' privacy regulation than did the OECD Guidelines. Because the directive was binding, each EU member country had to adjust its privacy protection regulations to be congruent with the directive and to enforce those policies. More importantly, the directive required each EU member country to set up an independent government authority in charge of privacy regulation. Along with these authorities in national governments, the directive created an EU organization where various representatives from member countries could work to promote privacy protection regulation.[161]

The EU directive had significant impact on non-EU countries as well. To prevent data firms from transferring personal information between the region and countries that lacked privacy protection regulation comparable to EU's, the directive's article 25 authorized the EU data authority to terminate connections between the

[159] Newman, *Protectors of Privacy : Regulating Personal Data in the Global Economy*, 88-91.
[160] Thibaut Kleiner, "The Future of Privacy in the Internet Age, a European Perspective," in *Cahier De Prospective: The Futures of Privacy*, ed. Carine Dartiguepeyrou (Fondation Télécom, 2014), 87-88.
[161] Newman, *Protectors of Privacy : Regulating Personal Data in the Global Economy*, 91-96; Bennett and Raab, *The Governance of Privacy : Policy Instruments in Global Perspective*, 93-96.

region's communication networks and countries whose privacy protection regulation it deemed inadequate. As the enactment of the directive came closer, data firms in advanced industrial countries outside of the region became anxious. Their governments, including the Japanese government as shown below, negotiated with the EU to avoid possible article 25 sanctions. EU regulations were exported through this type of sanction mechanism.

Negotiations between the EU and the U.S., however, became particularly controversial. The U.S. government insisted on privacy protection through self-regulation, and it attempted to convince the EU's privacy protection authorities of the adequacy of privacy protection in the U.S. Since the EU did not accept assertions by the U.S. government, the negotiations became tense.[162] While the U.S. contemplated bringing the case to the World Trade Organization to retaliate against possible EU sanctions, U.S. officials also actively sought to avoid escalation of the conflict through the creation of the Safe Harbor framework. Based on self-regulation, the framework allowed U.S. data firms to self-certify their compliance with the EU privacy protection standard. Following minor modifications to the framework by the U.S., the EU eventually accepted the Safe Harbor framework, allowing the U.S. to avoid sanctions in 2000.[163] Ultimately, the Safe Harbor agreement let the U.S. government maintain the fundamental format of its privacy regulations: sectoral (non-comprehensive) self-regulation without a central data privacy protection authority overseeing privacy issues.

Since the formulation of the EU Directive in the early 1990s, the Internet has evolved significantly and new services using personal information on the Internet have exploded, making the Directive obsolete. Facing the emergence of new technologies and Internet services such as cloud computing that would further expand the use of personal information, in 2010 the European Commission began to deliberate the establishment of a new regulatory framework for information privacy. The Commission published a draft

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[162] William J. Long and Marc Pang Quek, "Personal Data Privacy Protection in an Age of Globalization: The Us-Eu Safe Harbor Compromise," *Journal of European Public Policy* 9, no. 3 (2002): 335. For a detailed analysis of the Safe-Harbor dispute from a constructivist perspective, see Henry Farrell, "Constructing the International Foundations of E-Commerce: The Eu-U.S. Safe Harbor Arrangement," *International Organization* 57, no. 2 (2003).

[163] Long and Quek, "Personal Data Privacy Protection in an Age of Globalization: The Us-Eu Safe Harbor Compromise," 335-36.

of the General Data Protection Regulation in 2012, which would serve as the basis of the new framework.[164]

The proposed framework would strengthen privacy regulation in various ways, including the following five. First, it would be based on a regulation that member countries were required to enforce, as opposed to a directive that set up goals without specifying how to achieve them.[165] Thus, the proposed rules would be more uniformly implemented across the region. Second, it would include new rights related to privacy. The most important was the right to be forgotten, or the right to erasure, whereby citizens would be able to erase personal information posted on the Internet. Third, regardless of the data pressing location, the rules would be applied to violations involving EU citizens, committed by companies operating in the EU. Fourth, in the event of violation, sanctions would be significantly tougher than those in the current framework. Fifth and finally, the Safe Harbor arrangement with the U.S. would expire five years after the date of agreement.[166] In effect, this would re-raise questions over the adequacy of self-regulation.

Subsequently, the European Parliament and the European Council deliberated on the draft proposal. Unlike the directive that set the basic format of each member country's privacy regulation, the Regulation, if implemented, would set its regulatory rules for privacy protection; and, therefore, deliberation at each of the two EU bodies required extensive negotiations among national governments. Also, since the Regulation would greatly affect various business activities by restricting the use of personal information and requiring the use of privacy protection measures, various business groups such as the International Chamber of Commerce, major ICT service providers, and representatives of medical professionals, lobbied extensively. As a result, it took these EU bodies to approve of the Regulation with amendments. In March 2014, the European Parliament passed the General Data Protection Regulation. The European

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[164] Meg Leta Ambrose, "Speaking of Forgetting: Analysis of Possible Non-Eu Responses to the Right to Be Forgotten and Speech Exception," *Telecommunications Policy* 38, no. 8 (2014): 800; Kleiner, "The Future of Privacy in the Internet Age, a European Perspective," 87.

[165] European Union, "Regulation, Directives and Other Acts," http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm.

[166] Lee A Bygrave, *Data Privacy Law: An International Perspective* (Oxford University Press, 2014), 72; Kleiner, "The Future of Privacy in the Internet Age, a European Perspective," 88; Christopher Kuner, *Transborder Data Flows and Data Privacy Law*, First edition.. ed. (Oxford, United Kingdom: Oxford University Press, 2013), 153.

Council formulated its version of the Regulation in June 2015. The so-called "trilogue" between the Commission, the Parliament, and the Council followed, and the three bodies reached an agreement to enact the Regulation in December 2015. After the formal approval in 2016, the Regulation is scheduled to be in effect some time in 2018.[167]

Thus, West European governments instituted comprehensive privacy regimes very early, and their data protection authorities have actively pursued the development of privacy regulation not only within their own countries and the region but also at the global level, negotiating in the international domain by using their authority over network activities in the region as leverage. Each of these developments has affected the development of Japan's privacy regimes, as discussed in the following section.

3. Evolution of the Privacy Regime in Postwar Japan

Although the basic format of the current privacy regime in Japan is based on a privacy law enacted in 2003, the content of the law and timing of its legislation was also determined by the political, economic, and social developments that occurred prior to its enactment. In its development, Japan's regime has mirrored neither the U.S.'s piecemeal but largely self-regulatory system nor the EU's comprehensive privacy regulations. Instead, a hybrid system emerged out of the international and domestic debates in Japan.

Although what is currently termed *privacy* existed, albeit in a very limited way, in Japanese society before the end of World War II, privacy slowly became a policy issue after the end of the war. Until the early 1980s, there was no privacy regulation and the court handled violations of privacy as tort cases. Since the early 1980s, however, the government has made significant long-term progress in policy for more comprehensive privacy protection within and across sectors.

In this section, I will trace the development of the privacy regime in postwar Japan through early conceptualizations of privacy to the most recent laws and public debates.

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[167] Bill Roberts, "Tougher Data Privacy Law on Eu Horizon," *HRMagazine* 60, no. 1 (2015); NATO Cooperative Cyber Defense Centre of Excellence, "Developments in the European Union: Nis Directive, Data Protection Reform, Ep's Response to U.S. Surveillance," https://ccdcoe.org/developments-european-union-nis-directive-data-protection-reform-eps-response-us-surveillance.html#footnote10_b73m497; Paul de Hert and Vagelis Papakonstatinou, "The New General Data Protection Regulation: Still a Sound System for the Protection of Individuals?" *Computer Law and Security Review* 32, (2016), 179-194.

3.1. Emergence of Privacy in the Early Postwar Period in Japan

Before the end of World War II, especially during the military regime between 1937 and 1945, Japanese society was hostile to the development of privacy. Dominant ideology stressed the importance of the state over individual citizens, and the police set up an extensive surveillance system. Close-knit social organizations, such as traditional patriarchal families and neighborhood organizations, incorporated individual activities into collective activities and minimized individual freedom.

This environment changed significantly with the end of World War II. The democratic reform following the war instilled citizens with a sense of liberty from state or societal intervention into personal life. Also, through rapid economic development that began in the mid-1950s, the Japanese populace became urbanized and detached from traditional local community relations. As citizens became more individualistic, the concept of privacy spread across society.

In addition to the diffusion of privacy awareness in society, the threat of non-governmental privacy invasion rapidly increased due to the expansion of the mass media, which the postwar democratic reform initiated by establishing freedom of the press. During this expansion, a large number of mass-market weekly magazines entered circulation. Many of these magazines published scandalous articles on celebrities' personal lives, often based on information obtained from unreliable sources, stating unsubstantiated rumors and speculation. As these tabloids gained popularity, those whose private lives were exposed began to file complaints with the government.[168] Politicians then expressed their disapproval of such media coverage, calling it a violation of privacy.

Against the backdrop of emerging societal privacy norms, the Tokyo District Court gave a landmark court decision on privacy protection in 1964 in a civil case on the publication of a novel, *Utage no Ato* [After the Banquet], by leading novelist Yukio Mishima. Mishima's 1961 novel included personal details of the lives of Hachiro Arita, a former Minister of Foreign Affairs, and his wife. Although Mishima used pseudonyms,

[168] Ministry of Justice, Civil Liberties Bureau Chief reported a significant increase in the number of complaints regarding articles that exposed private lives in the House of Councilors, Education Committee, session on March 30, 1961.

due to Arita's celebrity status, readers easily deduced that the novel was about the couple. Arita and his wife sued Mishima and his publisher for violating their privacy. The Court sided with the plaintiff and imposed monetary compensation. In its verdict, the Court recognized the right to privacy as a fundamental right, defining it as the right for a citizen to be protected from the exposure of his or her personal life to the public without legitimate reason.[169] Although this court decision brought about no further lawsuits citing privacy violations in the 1960s,[170] the formal recognition of a privacy right accelerated the diffusion of the norm in society.

Although the development of a privacy norm did not necessarily cause immediate political change, it had substantial impact on government policy, particularly in management of citizens' personal information. As computer technology developed and gained wide use in society, beginning in 1959 with the National Meteorological Agency, various government agencies gradually introduced computers into their operations and continued to expand their use into the 1960s. To systematically promote the advancement of computer-based government operation, Prime Minister Eisaku Sato's cabinet issued a decision in 1968 that specified government measures including the establishment of an inter-agency committee for cooperative development of computer use.[171] The committee, consisting of the Administrative Management Agency and relevant ministries, issued a general plan for the advancement of information processing in government operation in 1970. It included a common personal code system, which would assign every citizen an identification code used across government agencies. The committee proposed a national identification number system (NINS), which came to be commonly called *Kokumin Sosebango Sei* (National Uniform Number System). Seeking to enact this system in 1971, the government began to experiment with the system and to train relevant agency officials in 1970.[172]

However, this plan faced significant opposition from the public, led by government workers' unions and the Japanese Socialist Party. Major government

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[169] Newman, *Protectors of Privacy : Regulating Personal Data in the Global Economy*, 91-96.
[170] Masao Horibe, *Puraibasi to Kodo Johoka Shakai [Privacy and Advanced Information Society]* (Tokyo: Iwanami Shoten, 1988), 45-46.
[171] Takahisa Sugano, "Privacy in Japan," *The Comparative and International Law Journal of Southern Africa* 3, no. 2 (1970).
[172] Noriyuki Yagi, "Outline of Training Courses on Gis Introduced by Management and Coordination Agency," *Joho Shori Gakkai Kenkyu Hokoku Konpyuta to Kyoiku* 41 (1995): 58, 64; Horibe, *Puraibasi to Kodo Johoka Shakai [Privacy and Advanced Information Society]*, 47-48.

workers' unions, particularly the Telecommunication Workers' Union and the Prefectural and Municipal Workers Union, opposed a reduction in government workforce and regarded NINS as such a measure. These unions embarked on a political movement to block the introduction of the national identification number system. Setting up a national organization for opposition (Kokumin Sosebango ni Hantai si Puraibasi wo Mamoru Chuo Kaigi: the National Conference for Opposition to the National Uniform Number in Defense of Privacy), they aroused the public fears that the system would force the government to invade citizens' privacy. The opposition movement gained substantial support from citizens concerned with privacy protection, and by 1974,[173] the government ultimately abandoned its pursuit of the national ID system.

The success of this opposition movement instilled popular belief in the importance of privacy and made it particularly difficult to set up an NINS for use among different government ministries. In 1980, as a part of tax system reform pursued by the Ministry of Finance (MOF), the Diet enacted the so-called Green Card system that would assign an identification number to each citizen and record his or her bank deposits to prevent the abuse of tax exemptions for small amount of deposits by holding multiple accounts in different financial institutions or using phony names. As the MOF prepared to launch the system, an opposition movement developed rapidly. Paradoxically, many politicians from the Liberal Democratic Party (LDP), a government party instrumental to the passage of Green Card bills in the Diet, actively sought to stop its implementation. Eventually the Green Card system was scrapped by the LDP leadership.[174] There were many reasons for opposition but a major reason was that the system would violate citizens' privacy. The government subsequently attempted to establish an NINS several times, but no substantial planning materialized until the early 2010s. Unintentionally, it did succeed in cementing concepts of privacy in public discourse.

3.2. The OECD Guidelines and the Personal Information Act of 1988

The next step in Japan's evolution stemmed not from domestic debate but from an international standard issued by the OECD. In the aftermath of the movement against

[173] Yoko Iwata, "Nozeisha Bango Seido No Donyu to Kinyu Shotoku Kazei," in *Issue Brief* (Tokyo, Japan: National Diet Library, 2005), 8.
[174] Horibe, *Puraibasi to Kodo Johoka Shakai [Privacy and Advanced Information Society]*.

the National Players' Number system plan, various discussions on privacy protection cropped up but the central government made no substantial effort to set up a privacy protection system in the 1970s.[175] However, in the early 1980s, in response to the 1981 OECD guidelines, the Administrative Management Agency (AMA) began to discuss ways to incorporate privacy guidelines into government policy in Japan. This discussion on privacy protection gained additional momentum in the government when the Administrative Reform Council (ARC) adopted the management of personal information by government organizations for its agenda at its beginning in 1981. The ARC was an advisory committee set up by the government mainly for reevaluating and reducing government activities. As exemplified by the privatization of NTT and Japan Railways, which originated from its recommendations, discussion at the ARC wielded significant impact on policymaking, and many of its agenda items continued to be discussed in government ministries after the publication of its final report in 1983. In fact, the final report suggested that the government should actively develop a system to protect personal information as government organizations expanded the use of advanced information systems. Hence, the protection of information privacy became a viable policy agenda, and the government reaffirmed its commitment to legislate a law for this purpose through several Cabinet decisions.[176]

The Administrative Coordination Agency (ACA), the AMA's successor, underwent administrative reform and took charge of making policy for personal information protection. In 1985, the ACA set up a study group to deliberate on a personal information protection law. Through extensive negotiations with other government agencies as well as discussions with academics and lawyers, the ACA formulated a legislative bill and the LDP government submitted it to the Diet. The bill passed the Diet and became the Personal Information Act of 1988 (PIPA-1988). Although the PIPA-1988 was the first law that specifically dealt with privacy in Japan, it was only applied to digitalized information stored by government organizations, excluding not only vast amounts of personal information recorded in paper government documents but also personal information kept by private-sector organizations.

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[175] Eiji Kawabata, *Contemporary Government Reform in Japan : The Dual State in Flux*, 1st ed. (New York: Palgrave Macmillan, 2006), 101-03.
[176] Horibe, *Puraibasi to Kodo Johoka Shakai [Privacy and Advanced Information Society]*, 50.

3.3. EU Directives and Self-Regulation through P-mark

The enactment of the PIPA-1988 did not originally generate any substantial impact, due to its narrow scope. Policymakers made no substantial effort to expand the area of privacy regulation until the mid-1990s, when as shown below, information privacy protection began to be discussed in relation to the development of ICT services. Although this discussion would eventually result in the enactment of the Personal Information Act of 2003 (PIPA-2003), more immediate impact on the development of information privacy came from the 1995 EU Directive on privacy protection. As shown in the EU-US Safe Harbor conflict, the directive essentially prohibited the transfer of information from EU member countries to countries whose privacy protection the EU deemed inadequate, and it authorized the EU data authority to terminate data connection between the EU and such countries.

Since the Directive was scheduled to take effect in 1998, the Ministry of International Trade and Industry (MITI) sought to avoid conflict by instituting a privacy protection policy based on self-regulation, similar to the U.S.'s Safe Harbor. Revising the guiding principle that it had formulated and announced to industrial associations in 1989, MITI issued the *Guidelines for the Protection of Personal Information in Computer Processing in the Private Sector* in March 1997. Based on the OECD privacy principles, the Guidelines set up detailed rules, arrangements to assist private-sector firms' voluntary effort to protect privacy, and mechanisms to handle consumer complaints.[177] Since MITI had jurisdiction over data-processing industries but not over the telecommunication industry, guidelines were not intended for telecommunication carriers and firms. Therefore, the Ministry of Posts and Telecommunications (MPT), whose jurisdiction covered telecommunications, issued similar guidelines for the protection of personal information in telecommunications, in December 1998.[178]

MITI continued to work on rules for information privacy, emphasizing self-regulation as the central feature. In accordance with the Guidelines, major peak industrial organizations, such as the Federation of Electric Power Companies, the Japan

[177] Ibid., 91-92.
[178] Ministry of International Trade and Industry, "Kojin Joho Hogo Hoseika Senmon Iinkai Hiaringu Shiryo [Material for Personal Information Law Legislation Special Committee]," (2000).

Department Store Association, and the Japan Information Technology Services Industry Association, created industry-specific privacy guidelines. In 1999, to further strengthen privacy protection rules, the Japanese Industrial Standards Committee issued a comprehensive Japanese Industrial Standard (JIS) for the protection of personal information that clarified objective requirements for compliance with the privacy guidelines.[179]

The MITI guidelines and JIS specified rules that businesses should follow, but in the absence of a strong enforcement mechanism, compliance was ultimately voluntary. Further, citizens had no way of knowing which business organizations were complying. To solve these problems, the Japan Information Processing Development Corporation (JIPDEC), affiliated with MITI, introduced the Privacy Mark (P-mark) system in 1998. The JIPDEC authorized businesses and other entities to use the P-mark. Under the P-mark system, after examining applications from business organizations based on the JIS privacy standard, the JIPDEC issued P-marks to business organizations that had installed adequate measures for privacy protection.[180]

While MITI and other related government organizations developed measures for information privacy protection, MITI communicated with the EU, informing them of development of these privacy measures. Although the EU did not fundamentally recognize self-regulation as sufficient for privacy protection in either Japan or the U.S., it agreed to continue to observe the development of privacy regulation in Japan and did not pursue sanctions.

No major change has occurred in this self-regulation scheme since its establishment. Nonetheless, in response to the EU's movement since 2012 toward enactment of the General Data Protection Regulation, as well as the emergence of additional ICT using personal information, the government has recently been actively pursuing the establishment of more formal privacy regulation. Cloud computing and so-called "Big data," have prompted the Japanese government to consider more formal

[179] Ministry of Posts and Telecommunications, "Denki Tsushin Jigyo in Okeru Kojin Joho Hogo Ni Kansuru Gaidorain [the Guidelines for the Protection of Personal Information in Telecommunications]," (1998).

[180] Ministry of International Trade and Industry, "Kojin Joho Hogo Hoseika Senmon Iinkai Hiaringu Shiryo [Material for Personal Information Law Legislation Special Committee]."; "Kojin Joho Hogo Ho Hoseika Senmon Iinkai Hiaringu Shiryo [Material for the Personal Information Protection Law Formulation Special Committee Hearing]," (2000).

privacy regulation.[181] Thus, the development of privacy regulation in the EU continues to affect Japan's privacy regime as did the U.S. and international standards historically.

3.4. Privacy Protection and ICT Promotion

The PIPA-1988 and the self-regulation schemes, including the P-mark system, expanded the scope of privacy regulation in Japan but they still left most social and economic activities outside of formal privacy regulation. These developments were basically a response to international pressure. While they led certain policy networks, such as government agencies and related organizations, to establish policy measures for privacy protection, they did not bring about the mobilization of a broader spectrum of policy actors that the establishment of a comprehensive policy regime would require. Policy discussion on making Japan's privacy regime more comprehensive began as an auxiliary policy measure to the promotion of ICT services in Japan—a broad and urgent policy issue that inspired involvement by many policy actors beginning in the 1990s.

The promotion of ICTs had always been important for individual ministries, such as MITI and MPT, but it was separately pursued by each government agency in a very fragmented fashion. However, effective ICT promotion required comprehensive policy that encompassed almost all ministerial jurisdictions, particularly since the 1990s when ICT use penetrated every aspect of social activity.

To develop a comprehensive plan for development of ICT, the prime minister established the Headquarters for the Promotion of Advanced Info-communications Society (Kodo Joho Tsushin Shakai Suishin Honbu) in 1994, consisting of senior officials from various ministries, including MITI and MPT. Recognizing ICT technology's importance to the economy, the Headquarters' basic strategy issued in 1995 indicated the Japanese government's commitment to policy for info-communication use, and emphasized the importance of privacy protection in the development of *e*-commerce in Japan.[182]

After elevating the development of *e*-commerce to one of the four goals when it

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[181] Kodo Joho Tsushin Nettowaku Shakai Suishin Senryaku Honbu, "Pasonaru Deta No Rikatsuyo Ni Kansuru Seido Kaisei Taiko [Policy Outline of the Institutional Revision for the Utilization of Personal Data]," (2014).

[182] Japan Information Processing Development Corporation, "Privacymark System," http://privacymark.org/news/2009/1201/ThePrivacyMarkSystem.pdf.

revised the ICT development strategy in 1998, the Headquarters set up a study group for privacy protection in June 1999. The study group's members included representatives from various segments of society, including telecommunication industries, libraries, schools, hospitals, consumer unions, and the legal profession.[183] The study group held hearings, inviting representatives from central government agencies, the national banking association, the national medical association, the national bar association, broadcasting companies, magazine publishers, newspaper publishing companies, etc. Based on the hearings and on discussions among members, the study group published an interim report on the protection of personal information in November 1999. While the report presented a comprehensive analysis of the importance of privacy protection in the information age, one of its specific points was the necessity of setting up principles for the protection of privacy in private-sector activities because of the importance of this protection in the development of businesses that would utilize advanced communications.[184]

In response to the report, the Headquarters created a special committee for the legislation of a basic law to protect personal information, *Kojin Joho Hogo Hoseika Senmon Iinkai*. Unlike its predecessors, which explored strategies to promote use of ICT, this committee was specifically designed to deliberate on the basic content of a law covering privacy protection in the private sector in order to make Japan's privacy regime more comprehensive. This special committee continued to hold hearings with representatives from various government organizations, business organizations, mass media, the peak bar association, etc.

Based on hearings and internal discussions, the committee issued a report entitled *General Principle on the Legal System for the Protection of Personal Information* on October 2000. The report outlined basic features of the law for privacy protection, such as its purpose, the basic principles of personal information protection, and the method of enforcement.[185] Soon after the issuance of this report, government officials began to frame a Diet bill for this purpose. Thus, the policy trend toward

[183] Kodo Joho Tsushin Shakai Suishin Honbu 1999.
[184] Kodo Joho Tsushin Shakai Suishin Honbu, "Kodo Joho Tsushin Shakai Suishin Honbu Ni Muketa Kihon Hoshin [Basic Strategy for the Promotion of Advanced Info-Communications Society]," (1995).
[185] Kojin Joho Hogo Kento Bukai Kodo Joho Tsushin Shakai Suishin Honbu, "Kojin Joho No Hogo Ni Tsuite Chukan Hokoku an [on the Protection of Personal Information: Intrim Report Draft]," (1999).

making Japan's privacy regime more comprehensive developed in the discussion to promote ICT use, especially through e-Commerce.

3.5. The Legislative Process of the Personal Information Protection Act of 2003

The government sent the bill to establish a personal information protection law (to be named the Personal Information Act of 2003 (PIPA-2003) on passage), to the Diet in March 2001. The PIPA-2003 legislation did not proceed smoothly. Due to political turmoil resulting from the unpopularity and subsequent resignation of Prime Minister Yoshiro Mori, deliberation of the bill was postponed until the following session when Junichiro Koizumi became Prime Minister. The Koizumi cabinet regarded the privacy bill as one of the most important proposals and actively pursued its passage, but opposition parties vehemently opposed the bill, pointing out that the law would result in excessive government intervention into private-sector activities and would infringe on the freedom of the media because the law did not clearly specify how it would be applied.[186]

As deliberation on the PIPA-2003 legislation progressed, major societal organizations began to voice their opposition. The Japan Federation of Bar Associations disapproved of stipulations in the bill that would put lawyers in private practice and the bar associations under the Ministry of Justice's tight regulation and thereby threaten the bar associations' self-governance.[187] Japanese newspaper companies and broadcasters regarded the bill as a government attempt to control the media. The chairman of Keidanren spoke against the bill because of its impact on media activities, while acknowledging the importance of privacy protection.[188] Because of the extensive opposition movement, Prime Minister Koizumi admitted that the existing bill was problematic with regard to media regulation and expressed his willingness to modify

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[186] Kodo Joho Tsushin Shakai Suishin Honbu-Kojin Joho Hogo Hoseika Senmon Iinkai, "Kojin Joho Hogo Hosei Ni Kansuru Taiko-Gaiyo [General Principle on the Legal System for the Protection of Personal Information, Outline]," (2000).

[187] "Yato Yon-to, Kojin Joho Hogo De Mondai-Ten Shiteki" [Four Opposition Parties Pointing out Problems in Personal Information Protection]," *Nihon Keizai Shimbun*, April 26 2002. Accessed on January 10, 2010.

[188] Japan Federation of Bar Associations, "Kojin Joho Hogo Ho Ga Dekiru Made [the Process to the Establishment of the Personal Information Protection Act]," http://www.nichibenren.or.jp/ja/committee/list/joho_mondai/hogohou_01.html.

it.[189] However, since the opposition parties maintained their firm stance, the bill was scrapped again when the Diet session ended in December 2002.

Pressure to end the deadlock came from another government project that sought to utilize ICT by the establishment of Juki-net, a network system that connected local and central government databases across Japan in order to improve on the efficiency of government operations.[190] Despite the obvious convenience of this system, citizens were worried about security of their personal information. Civil liberty advocates were critical of the introduction of the Juki-net system because of its potential for use as a government surveillance system. To deal with these concerns, the LDP and its coalition partners agreed in 1999 to legislate a personal information protection act that would prevent the abuse of Juki-net in conjunction with its establishment.[191]

Although the PIPA-2003 legislation was stalled, the government began to introduce the Juki-net system in August 2002. Charging that startup of the system without enactment of PIPA, breached the 1999 agreement between the majority coalition, and that the system did not properly protect personal information, many localities, including very populous ones such as Kanagawa Prefecture, Yokohama City, and Tokyo's Suginami Ward, refused to participate, while some citizens went to court to halt operation of the Juki-net system. Since further delay in the legislation of the PIPA-2003 would allow opposition against the Juki-net to spread and thus endanger its operation, the government needed to proceed quickly. For this reason, the government parties modified the content of the original bill by adding numerous exemptions designed to alleviate opposition.[192]

The opposition parties again refused to accept the modified version of the bill and demanded inclusion of an independent government organization that would oversee privacy protection to prevent government ministries from arbitrarily applying the

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[189] "Nikkeiren Kaicho, Kojin Joho Hogo Hoan Ni Hantai No Iko Hyomei [the Chair of Japanese Economic Federation Expressing Opposition to Personal Information Protection Act Bill," *Nihon Keizai Shimbun*, May 16 2002.

[190] Juki-net's formal name is Jumin Kihon Daicho Network [Basic Resident Register Network]. In the Juki-net system, each citizen is assigned a 11 digit number, and his/her personal information, such as full name, date of birth, and home address, is stored in the database accessible from anywhere in Japan.

[191] "Shusho, Kojin Joho Hogo Ho, Hodo No Jiyu Hairyo [Prime Minister Giving Extra Consideration in Personal Information Protection Act]," *Nihon Keizai Shimbun*, June 19 2002.

[192] "Ic Kado Kyusoku Ni Fukyu, Joho Hogo, Tsukai-Yasusa Mosaku [Rapid Development of the Use of the Ic Card, Exploring Information Protection and Usability].", *Nihon Keizai Shimbun*, March 25 2002.

proposed law in restriction of citizens' activity. Since the establishment of a new government agency contradicted the dominant policy trend toward reduction in government size, the coalition refused to include it in the bill.

Nonetheless, they made some conciliatory gestures, agreeing to pass a non-binding resolution that would include provisions for the enactment of laws for personal information protection in specific areas that would constrain the power of the minister in charge. This led (most of) the opposition parties to soften their position. Although the opposition parties still maintained their stance against the bill, they did not use measures to delay its passage. The bill for the protection of personal information passed the Diet in May 2003, which reduced the opposition to the Juki-net system.

3.6. My Number System and Specific Personal Information Protection Commission

After the enactment of the PIPA-2003, which set up general privacy protection rules covering almost all social activities, the Japanese government continued to explore adjustments to Japan's privacy regime in conjunction with its pursuit of e-Government. In 2007, designating the development of e-Government as one of the important policy measures for ICT development, the IT Strategy Headquarters (ISH) began to formulate a plan to integrate ICT technology into government operation. In 2010, the ISH issued *A New Strategy in Information and Communications Technology*, which specified policy measures for e-Government promotion. One of the important measures was the establishment of a national ID number system (NINS), but the ICT called for a system to protect personal information in order to remedy issues that the national ID number system might generate.[193] Thus the government continued to discuss improvement of information privacy protection in the context of ICT development, especially the introduction of a national ID number system that would promote efficient management of citizens' information.

Parallel to the developments in e-governance, a national ID was discussed for taxation and social welfare management purposes, both of which were urgent

[193] "Kojin Joho Hogo Shin Hoan Wo Kakugi Kettei" [Cabinet Decided on the Revised Bill of the Personal Protection Act]," *Nihon Keizai Shimbun*, March 7 2003.

government agendas. After the failure of the Green Card System, the Government Tax System Research Council (GSTRC) continued to discuss the use of a national ID number for taxation. In 1988, its special committee on the tax ID system issued a report suggesting the introduction of a national ID number system for use not only in taxation but also in other areas. In the follow-up report published in 1992, the committee examined the cost of different national ID number systems but did not implement one immediately. Subsequently, the GSTRC referred to the necessity of a tax ID system in its annual report.[194] However, no substantive action for this purpose was taken until the late 2000s.

In 2009, the Democratic Party of Japan (DPJ) won the House of Representatives elections by setting the integrated reform of taxation and welfare systems as its major campaign item. Taxation and welfare systems have consistently been important government agendas in recent years in Japan, reflecting policymakers' growing concern over the accumulating national debt and rapidly aging society. The issue of reform attracted huge public attention in 2007 when the government disclosed that the Social Insurance Agency had about 50 million pension records that could not be identified and appropriately credited to citizens for pension payment.[195] Fueled by public outrage, the DPJ increased its support by appealing to the widespread interest in pension reform and proposing a comprehensive reform to integrate taxation and welfare systems.

Central to the reform was the establishment of an NINS ID that would improve the efficiency and effectiveness of government operation by keeping track of each citizen's information about incomes, taxes, welfare payments, etc. In this process, the two separate discussions on NINS, one based on e-Government and the other on taxation, merged and the government began to prepare for an NINS, later called the My Number system. To deal with citizens' concern over privacy issues that the My Number system would generate, the DPJ government set up a committee to formulate measures for privacy protection and duly incorporated proposals from this committee into the My Number legislation.

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[194] Kodo Joho Tsushin Nettowaku Shakai Suishin Senryaku Honbu, "Aratana Joho Tsushin Gijutsu Senryaku [a New Strategy in Information and Communications Technology]," (2010); Yoshihiro Kondo, "Brief Overview and International Comparison of the Identification Number System of Japan," *Joho Kanri* 56, no. 6 (2013): 345.

[195] Iwata, "Nozeisha Bango Seido No Donyu to Kinyu Shotoku Kazei," 3.

When the DPJ government sent a package of NINS-related bills to the Diet in February 2012, it included bills for privacy regulation reform, in which the central item was establishment of an independent privacy commission. However, after the Fukushima earthquake in the following month, deliberation on the bills was disrupted and they were eventually scrapped in November when the House of Representatives was dissolved for elections. Even though the DPJ lost in the elections and the LDP took over, the reform process continued because tax and welfare reforms were urgent issues, generating high-level energy to move the process forward. After the two parties negotiated and made revisions in the NINS bills, while keeping the component of privacy regulation reform intact, the LDP government sent the bills to the Diet in March 2013, and they rather quickly passed in two months. As a result, an independent committee, the Specific Personal Information Protection Commission (SPIPC), to oversee privacy protection was established in 2014 and the My Number system started to be used in January 2016.[196]

3.8. Privacy Governance in Japan Today

The above historical analysis of the evolution of privacy governance shows that the Japanese government has slowly developed and expanded an arrangement for privacy protection. This arrangement has not matched the US's piecemeal but largely self-regulatory system or the EUs comprehensive privacy regulations. Before the early 1980s, there was no privacy regulation and courts handled violations of privacy as tort cases, but since the early 1980s the government has made significant long-term progress in policy for privacy protection.

Currently, since the PIPA-2003 established rules for the protection of personal information in all policy areas and the SPIPC came into effect in 2014, Japan appears to have a comprehensive privacy regime similar to privacy regimes in Germany and France.[197] However, in reality, Japan's privacy regime differs from comprehensive

[196] Noriyuki Takayama, "On Fifty Million Floating Pension Records in Japan," *The Geneva Papers on Risk and Insurance. Issues and Practice* 34, no. 4 (2009): 631-32.

[197] For an overview of the current privacy governance in Japan from a legalistic perspective, see Katsuya Uga, Kazuko Otani, and Harunori Mukai, "Mai Nanba Seido Donyu No Igi to Jitsmu He No Eikyo [the Significance of the Introduction of the My Number System and Its Impact on Business Affairs]," *Jurist*, no. 1457 (2013).

privacy regimes in which the central data protection authority uniformly applies well-defined privacy rules to society. Instead, Japan's privacy regime is a patchwork of institutional arrangements, each of which maintains the original characteristics that policymakers assigned when it was created. In this regard, it shares striking characteristics with its US counterpart.

The SPIPC is the first independent government commission dedicated to the protection of personal information in both public and private sectors. Considering that privacy protection has never been an important policy agenda in Japan, its establishment is a remarkable step toward the improvement of privacy protection. However, reflecting the circumstance of its establishment, its scope of activity is far more limited than that of other privacy commissions. As shown above, this commission was established in conjunction with the introduction of the My Number system. The commission's main task is to specifically protect personal information in the use of My Number, but not necessarily personal information in general. Moreover, the use of My Number is restricted to social and economic activities related to taxation and social welfare, while its use in transactions unrelated to them is prohibited. Consequently, the commission deals with a very specific type of personal information. In addition to this limitation of scope, it has weak enforcement authority and its main activities for rule enforcement are setting up guidelines and providing suggestions. Nonetheless, this commission would serve as a basis for the establishment of a new privacy commission, if policy discussion to further consolidate privacy governance should develop.[198]

Since the establishment of the SPIPC did not make any fundamental changes, the PIPA-2003 that went into effect in 2005 determines the basic format of privacy governance in Japan. This law expanded the coverage of privacy regulation, but, unlike the comprehensive coverage in West European privacy regimes, it grants various exemptions. The PIPA-2003 privacy regulation is applicable only to organizations that handle 5,000 or more individuals' personal information that could reveal their identity. Among such organizations, those engaging in media, academic, religious, and political

[198] The establishment of a privacy commission has been discussed in a committee to deliberate on policy for the use of personal data within the IT Headquarters since 2013. In its strategy to revise the system to use personal data issued in December 2013, the Headquarter called for the establishment of a privacy commission. See Graham Greenleaf and Fumio Shimpo, "The Puzzle of Japanese Data Privacy Enforcement," *International Data Privacy Law* 4, no. 2 (2014).

activities are exempt from the regulation, thus preventing government intervention into their activities in the name of privacy protection, which was the major concern among groups opposing the legislation of the PIPA-2003.

In addition to its limited scope, the current privacy regime lacks a strong and coherent enforcement mechanism. The newly established SPIPC has a very specific mandate and the enforcement of privacy regulation is left to individual government ministries. Each minister ultimately determines specific rules for business or other organizations under the ministry's jurisdiction, while PIPA-2003 stipulates rules for government organizations and the form of punishment in case of violation. This is a fragmented and complex mechanism from the public's viewpoint because ordinary citizens are not necessarily aware of the jurisdictional structure of the government.

For organizations that have close relations with their regulatory ministries or agencies, privacy regulation developed through consensus building within the broad legal framework set up by the PIPA-2003 and self-regulation plays an important part in this arrangement. Therefore, government ministries or agencies take a reactive role. Instead of actively looking for possible violations, they begin to work on investigation after the submission of complaint. If they recognize a citizen's complaint as valid, they will order the offending organization to rectify the situation, and will punish the organization in the case of non-compliance with that order. In the current privacy governance in Japan, government regulation is rather weak and fragmented.

PIPA-2003 also significantly increased citizens' attention to privacy and in many ways undermined important government functions. After its enactment, citizens became highly sensitive to the protection of personal information. Many citizens became overly reluctant to share their personal information, sometimes based on an overstretched or inaccurate interpretation of the law. Particularly during the early years of the new privacy regime, these hyper reactions to the PIPA-2003, or *kajo hano*, became so prevalent that they often caused disruptions in social interaction. For example, it became very difficult for schools and other organizations to access class or membership directories due to reluctance or opposition from members citing PIPA-2003.[199] When a

[199] Kodo Joho Tsushin Nettowaku Shakai Suishin Senryaku Honbu, "Pasonaru Deta No Rikatsuyo Ni Kansuru Seido Minaoshi Hoshin [Strategy for the Rvision of the System Related to the Use of Personal Data," (2013), 3.

major railroad accident occurred on a JR-West line near Osaka, JR-West initially refused to share information about victims who died or were injured. This refusal extended not only to the media but also to relatives of victims who tried to learn the victims' conditions and hospital locations, as well as to local government officials who sought to provide accident benefits to their residents among the victims.[200] Also, government organizations have used the privacy regulation to hide information that should be open to the public, such as the names of government employees dismissed for disciplinary reasons.[201] Since the government reacted quickly to the development of excessive reaction and clarified privacy rules in specific cases, the reaction has eventually subsided to less severe levels.

Ultimately, since public outrage against a government or non-government organization's privacy violation causes significant reputational and monetary damage, most government and non-government organizations are careful in dealing with personal information, making up for the weakness of the enforcement mechanism. Thus, despite the lack of a strong enforcement mechanism, Japan's privacy governance is not as weak as its formal arrangement suggests.

4. The Development of Japan's Privacy Governance in Comparative Perspectives: Concluding Thoughts

In general, privacy governance in Japan, the U.S., and West European countries, has shifted away from judicial governance, in which legal discourses on libel and individual liberty, especially court decisions, determined rules of privacy protection, and toward regulatory governance, in which government authorities play an important role (although the strength of enforcement varies across the three regimes). This common general trend reflects the development of digital technology and the accompanying diffusion of services. The wide use of advanced digital network technologies has steadily increased the potential for privacy violation through rapid dissemination of personal information on a large scale. Since this technological change has occurred and become central to economic development in Japan, Western Europe and the U.S., policymakers

[200] "Kojin Joho Hogo, Nayamu Chiki Shakai [Local Communities Having Troubles with Personal Information Protection]," *Asahi Shimbun*, April 14 2005.
[201] "Kojin Joho Atsukai Tesaguri Puraibasi Hogo Ka Koeki Ka [Exploring How to Personal Information: Privacy Protection or Public Interest]," *Asahi Shimbun*, May 25 2005.

in these countries have needed to balance the development of ICT and privacy protection.

In addition to technological development, rather exogenous to privacy regime change, the common trend has been fostered by an endogenous factor, i.e., interaction between the three regimes, especially West European countries' effort to establish international rules on privacy protection. As shown above, the development of international rules wielded substantial impact on privacy governance change in Japan. The OECD guidelines prompted the Japanese government to initiate discussion on privacy policy, which resulted in the legislation of the PIPA-1988. EU data protection authorities pressed MITI to strengthen privacy protection, using the EU directives as a strong leverage, and MITI set up an arrangement for information privacy protection based on self-regulation. Due to current discussion over strengthening privacy regulation in the EU, the Japanese government began discussions to amend privacy regulation in Japan in order to comply with a new EU privacy regulation. Both of these exogenous and endogenous factors contributed to privacy governance change in Japan and the other countries, thereby increasing the importance of state actors in privacy governance.

While the direction of long-term change is similar, the main characteristics of current privacy governance differ among these privacy regimes. In Western Europe, state actors have strong power in regulating privacy. Each of the privacy regimes in the EU has comprehensive privacy laws and rules that consistently regulate organizations in both public and private sectors, as well as a central data protection authority with substantial enforcement power. Such regimes are closer to administrative governance in which a state actor strongly pursues a public goal and wields influence over social and political activities. By contrast, the U.S. has neither comprehensive privacy laws and rules nor a central data protection authority. The format of privacy regulation varies across sectors, and self-regulation plays an important role, resulting in inconsistency of regulation. In this sense, the US has interactive governance, in which interaction between state and societal actors determines the format of privacy protection.

Japan's privacy governance is a hybrid of the West European and US privacy governance. The Japanese privacy regime lacks a strong central authority in charge of privacy protection, and individual government agencies implement privacy policy. Privacy protection relies on self-regulation to a great extent; volatility of public concern

over privacy means that public and private-sector organizations must be scrupulous in avoiding controversy that might arise over intrusions into citizens' privacy. In this sense, similar to the case in the U.S., the Japanese privacy regime is based on interactive governance, with state and social actors interacting to shape policy. However, Japan's long-term development trend in its privacy regime differs from that of the U.S., becoming more similar to what is found in West European countries. Currently, Japan has a very fragmented enforcement mechanism but, unlike the situation in the U.S., Japan has PIPA-2003, a measure that defines fundamental principles of privacy regulation applicable to all policy areas. Moreover, the Japanese government has been discussing means to strengthen privacy regulation through the establishment of a central data protection authority for privacy protection. The further development into a comprehensive West European style of privacy governance is not yet clear but Japan's privacy regime has been progressing toward a comprehensive privacy regime.

One of the important determinants in evolution of each privacy regime is the timing of privacy regime shifts with regard to the relative maturity of ICT. In Western Europe, privacy regimes began to develop in the 1970s as the use of network technology expanded. Data protection authorities in the region built networks and used their authority to diffuse elaborate (comprehensive) privacy regulation. The region's privacy regime evolved in conjunction with ICT development, refining comprehensive governance. In the U.S., a privacy regime began to develop roughly in the same period as in Western Europe. However, privacy governance in the early period was very limited, and privacy regulations followed in the wake of ICT development. Policymakers found themselves addressing privacy issues that derived from an ICT service after the service was already in wide use. Therefore they faced strong resistance from providers, making establishment of a comprehensive privacy regime difficult in the U.S.

Similarly, in Japan, the characteristics of the initial privacy regime and the timing of regime change have influenced the development of privacy governance. Since the privacy regime established with the PIPA-1988 lacked a central data protection authority, changes in Japan's privacy governance did not involve the introduction of strong enforcement mechanisms, making Japan's privacy governance more similar to that of the U.S. than of West European countries. Despite the lack of data protection authority, Japan's regime change concurred with ICT service development. Japan had lagged

behind the U.S. in ICT service development, especially after the expanded use of the Internet, and both the Japanese government and private sector companies strove for ICT service development. They considered privacy aspects in the context of ICT service development and sought to institute more effective privacy regulation in order to stimulate use of advanced ICT services. The Japanese government worked on the PIPA-2003 to stimulate e-Commerce and e-Government, and now deliberates on its revision to advance the use of new ICT services. For this pragmatic reason, Japan's privacy governance has been shifting toward the Western European style that explicitly deals with citizens' privacy concerns.

Since the 1980s, privacy governance has evolved significantly in Japan. It has transformed from judicial to interactive governance and is now moving toward administrative governance, in which government actors lead the policy process. The development of ICT was the driving force of this change, but the change has also progressed in various institutional and societal concerns related to privacy. The lack of a NINS in Japan, for example, was remedied and institutionalized in the early 1970s when labor unions maintained substantial influence. Consequently, the government has extensive experience in dealing with privacy concerns related to the NINS.

Initial movement toward the establishment of a privacy regime in Japan came from the OECD, but later action by the EU prompted Japanese policymakers to institute privacy regulation. The form of this regulation was influenced not only by these exogenous factors, but also by interplay between the developing sophistication of ICT and various efforts by both private and governmental actors to meet the new challenges to privacy. Thus the relationship between stages of ICT development and the previously existing characteristics of privacy governance at the time of regime change influenced the nature of the emerging privacy governance model. Privacy governance in Japan evolved within these webs and is most fully understood through knowledge and analysis of this background interplay of changing actors and institutions over time.

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10. False Dawn: The War on Watchdog Journalism in Japan

David McNeill

Abstract

The role of journalism as guardian of the public interest against abuses of power has long been understood as perhaps its key function in liberal democracies. The conflicting view -- prevalent in wartime Japan and perhaps contemporary China -- is that media should be an instrument of state power. While Japan's media was reformed in the postwar era, putting it closer to a "watchdog" model, the ideal was circumscribed by monopolies, official and informal restrictions, political pressure, and most significantly, a layer of formalized control in the form of press clubs. While dramatic change seemed to be around the corner when the new government of the Democratic Party of Japan in 2009-2010 came into power, the watchdog function was quickly undermined when the long-ruling Liberal Democratic Party (LDP) returned to power in late 2012. This chapter argues that Japan's media, aided by the press club system, is being strong-armed by the state into toeing a narrow ideological line on the key issues facing the nation, including nuclear power, contested territory, and the disputed history of World War II. This chapter contends that the media is increasingly being tugged back toward its old role as instrument of state power. Although it remains far from clear how successful this assault on the media will be, it carries serious risks for the democratic health of Japan.

1. Introduction

The role of journalism as guardian of the public interest against abuses of power has long been understood as perhaps its key function in liberal democracies. According to this view, an independent media should facilitate pluralist debate and the free flow of information about the political and economic interests that dominate our lives. A conflicting view – one prevalent in wartime Japan and perhaps in contemporary China – is that the media should primarily be an instrument of state power. Japan's media was famously reformed after World War II to put it closer to the "watchdog" model. In reality this ideal was circumscribed by monopolies, official and informal restrictions and political pressure. Critics have long noted an extra layer of formalized control over the free distribution of information in Japan: press clubs.

Japan's century-old press club system underwent what appeared to be dramatic change, however, in 2009-10. The new government of the Democratic Party of Japan (DPJ), which had declared its intention to challenge Japan's powerful bureaucratic

apparatus, began to allow journalists from magazines, cyberspace, foreign media companies and freelancers to attend regular press conferences. All of those categories of reporters had been previously banned from full participation at official press events, which have for decades been dominated by an umbilical relationship between lawmakers, bureaucrats and Japan's largest TV and newspaper outlets. The DPJ move was widely expected to strengthen the watchdog function of the media and push Japan's sclerotic political institutions toward reform.

The shift was welcomed by, among others, media watchdog *Reporters San Frontiers* (RSF), which hoisted Japan to No.12 in its 2010 global index of press freedom, a long way from its dismal ranking of No.51 four years previously, when RSF noted an "extremely alarming" erosion of media liberties. As I write, Japan is in 61th place[202] (out of 180 countries) and retreating fast from that turn-of-the-decade high point. Reporting on the Fukushima nuclear crisis and the return of the Liberal Democratic Party (LDP) in 2012 have helped weaken open media enquiry. An association of freelance journalists posing a de-facto challenge to the press club system has largely failed to make an impact. Above all, the press clubs themselves continue to dominate newsgathering, with deep implications for media freedom and information governance in the world's third-largest economy.

As a foreign correspondent and lecturer in the media in Japan for 15 years, I've had the opportunity to both observe this system and work inside it. This chapter draws on that experience to survey Japanese journalism and its approach to newsgathering and dissemination. I argue that Japan's media, aided by the press club system, is being strong-armed by the state into toeing a narrow ideological line on the key issues facing the nation, including nuclear power, contested territory, and the disputed history of World War II. In my view, the media is increasingly being tugged back toward its old role as instrument of state power. Although it remains far from clear how successful this assault on the media will be, it carries serious risks for the democratic health of Japan.

[202] See: https://index.rsf.org/#!/ (April 2, 2015)

2. The DPJ Spring

Japan's mass media is famously sophisticated and lively. The country is home to a powerful public service broadcaster, the ad-free, quasi-governmental Nippon Hōsō Kyōkai (Japan Broadcasting Corp: NHK), and the world's most widely read newspapers, led by the *Yomiuri Shimbun,* which has a total combined print circulation of about 9.5 million – many times that of the venerable *New York Times*.[203] Japanese publications include a mass-selling communist and religious daily newspaper, millions of manga comics every year, some dealing with highbrow topics such as economic models, history and even Marxism; and boast a readership in the hundreds of thousands for both scandalous tabloid weeklies and monthly magazines.[204] In addition to 100 percent diffusion of terrestrial TV, Japan has one of the world's highest (80 percent) diffusion rates of the Internet, and (since 2012) full nationwide digital broadcasts.[205] Unlike in many Asian countries, all forms of freedom of expression are legally protected, thanks to the 1946 Constitution. Article 21 specifically notes: "No censorship shall be maintained."

Yet that diversity and openness is deceptive. The news media in Japan is conservative and shackled by institutional constraints: a widely criticized system of information distribution that encourages journalists to collude with official sources, discourages independent lines of enquiry and institutionalizes self-censorship. Mainstream reporters shun critical stories about Japan's imperial family, war crimes, corporate wrongdoing, the death penalty, religion and other issues, striving to achieve a bland consensus that only rarely troubles the nation's political and economic elite. Like most advanced nations, Japan's media is monopolized by just six powerful companies, which are highly susceptible to political and commercial pressures.

It hardly needs to be stated at the outset that I am not offering uncritical support for any idealized watchdog media outside Japan - as Laurie Anne Freeman notes, such a

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[203] Circulation figures for the NYT: http://www.stateofthemedia.org/2013/newspapers-stabilizing-but-still-threatened/newspapers-by-the-numbers/ (accessed Nov.1, 2015)
The Yomiuri: http://adv.yomiuri.co.jp/yomiuri/download/PDF/circulation/national.pdf (accessed Nov.1, 2015)

[204] The *Seikyo Shimbun*, a newspaper run by religious group Soka Gakkai, claims a daily circulation of 5 million-6 million. *Shimbun Akahata*, the daily newspaper of the Japanese Communist Party has a claimed circulation of 1.6 million.

[205] See Japan Fact Sheet, http://web-japan.org/factsheet/en/pdf/e41_mass.pdf (Accessed April 5, 2013)

system does not exist.[206] Whatever the problems above, Japan's contemporary media has made strides from the prewar and wartime period when it largely became a tool of the authoritarian, militarist state.[207] After 1945, overt ideological control over the mass media was relaxed. The Allied occupation (1945 – 52) initially saw the media as a conduit for its policies of liberalizing and revitalizing the capitalist state.[208] When the occupation ended, newspapers and television, responding to popular support from below, arguably played an independent role in some of the key national debates of the postwar era.

Nevertheless, there is much overlap between the prewar and postwar media. As Susan J. Pharr notes: "Most of Japan's key media institutions of the 1990s were…fully in place in the period of military ascendency and strict censorship from the 1930s through the end of World War II."[209] The Allied reformers, initially strongly influenced by liberal New Dealers, veered away from radical reform of media institutions and preserved and even strengthened the prewar structures. Purged newspaper managers and editors, led by Matsutaro Shoriki, president of the *Yomiuri Shimbun*, were allowed to resume their old positions. Hierarchical controls over editorial policy were encouraged to combat the growing problem of left-wing militancy. "Continuity, rather than discontinuity, became the dominant theme" of postwar media history," concludes Tatsuro Hanada, a media scholar at Waseda University.[210]

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[206] See Laurie Anne Freeman's "Japan's Press Clubs as Information Cartels," Japan Policy Research Institute, Working Paper No.18, April 1996. Available at http://www.jpri.org/publications/workingpapers/wp18.html (October 6, 2011). Also see *Closing the Shop: Information Cartels and Japan's Mass Media*, Princeton University Press (2000). And DeLange, W., *A History of Japanese Journalism: Japan's Press Club As the Last Obstacle to a Mature Press, Routledge* (1998).

On differences with the US media, Freeman notes: The institutional machinery for cartelizing official news is virtually absent in the US…It is at this fundamental level – the initial source – that the two systems vary so dramatically. While the US media industry shares common institutional features in the 'downstream' stages of report – notably in the role of concentrated media groups in the dissemination of news – there is nothing similar at the 'upstream' stages. And it is here that the two systems are sufficiently distinctive to represent not simply differences in degree but differences in kind.

[207] For an account of prewar and wartime control over the Japanese media, see Kasza, G., The State and the Mass Media in Japan: 1918-1945, University of California Press (1993).

[208] Pharr, S.J., "Media and Politics in Japan: Historical and Contemporary Perspectives" in Pharr and Krauss (ed.) Media and Politics in Japan, University of Hawaii Press (1996).

[209] Pharr, S.J., Ibid.

[210] Hanada, T., "The Stagnation of Japanese Journalism and its Structural Background in the Media System," in Bohrmann et all (eds), Media Industry, Journalism Culture and Communication Policies in

Though a legacy of the prewar period, press clubs have become even more important since 1945. Essentially newsgathering organizations attached to the nation's top government, bureaucratic and corporate bodies, the clubs were established in the 1890s by journalists seeking to strengthen their collective position by demanding access to official information. During the war, they became part of a top-down system dedicated to disseminating official views. For most of the postwar era, they have been closed shops, banned to all but journalists working for Japan's top media. Foreign reporters, freelancers, tabloid and magazine journalists were excluded for decades and have only recently started to gain entry.

The Japanese Newspaper Publisher & Editors Association, the main industry to benefit from them, defends the clubs, commending them for their accuracy and calling them "voluntary institution[s]" of journalists "banding together" to "work in pursuit of freedom of speech and freedom of the press."[211] In reality, critics say, they are elite news management systems, channeling information directly from what Herman and Chomsky (1989) call the "bureaucracies of the powerful" to the public, locking Japan's most influential journalists into a symbiotic relationship with their sources.[212] Journalists are little more than well-paid mouthpieces, in this view, "co-conspirators in the cartelization of the news," according to Freeman. One of their best known critics famously inverts the declared aim of press clubs: Although apparently designed to facilitate the dissemination of information to the Japanese public, says Karel Van Wolferen, the press club system "in fact is the most serious barrier to this dissemination."[213]

In late September 2009, however, all this seemed up for grabs. Reporters in Japan enjoyed that rarest of events: a genuinely open encounter with a government official. Katsuya Okada, foreign minister with the newly elected Democratic Party of Japan (DPJ), announced at his first press conference in office that all present, including members of the Foreign Correspondents' Club of Japan (FCCJ), Japanese freelancers,

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Europe, Halem (2007).

[211] See: Nihon Shimbun Kyokai, http://www.pressnet.or.jp/english/about/guideline/ (accessed May 2, 2015)

[212] Herman and Chomsky. Also,

[213] Van Wolferen, Enigma of Japanese Power.

magazine writers and Internet scribes would be allowed to ask unscripted questions.[214] Okada then answered everyone, running over the allotted time by about 30 minutes - at one point preventing a foreign office official from calling time.

The Okada event was exceptional because Japanese cabinet ministers are normally shielded from journalists behind thick ramparts. The first line of defense is the bureaucrats who coax, nudge and steer journalists into preferred topics and away from political landmines. The second, most controversially, are the journalists themselves. As press club members, reporters for the elite media operate in isolation, with their own set of codified rules and practices.[215] In return for exclusive access to information and sources, the journalists pull their punches, discouraging what might otherwise be a more adversarial relationship.

Most foreign correspondents collide with this system at some point. In 2002, when then Prime Minister Junichiro Koizumi made his historic visit to North Korea, not one Tokyo-based reporter from the 15 European Union member nations was allowed to accompany him. During the investigation into the 2000 murder of British hostess Lucie Blackman, foreign reporters were barred from police press conferences.[216] Both incidents were cited in a landmark European Commission report in 2002, which criticized the press club system for impeding reporting "of events of widespread international interest and significance."[217]

Years of pressure by the Foreign Press in Japan (FPIJ), the main conduit for information between official Japan and the foreign media, resulted in the production of a letter by the Ministry of Foreign Affairs (MOFA) in 2002, in principle essentially guaranteeing foreign reporters the same rights to ask questions as Japanese journalists.

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[214] A record of this press conference can be found here: http://www.mofa.go.jp/announce/fm_press/2009/9/0929.html (date accessed April 6, 2015)

[215] See Laurie Anne Freeman's "Japan's Press Clubs as Information Cartels," Japan Policy Research Institute, Working Paper No.18, April 1996. Available at http://www.jpri.org/publications/workingpapers/wp18.html (October 6, 2011). Also see *Closing the Shop: Information Cartels and Japan's Mass Media*, Princeton University Press (2000). And DeLange, W., *A History of Japanese Journalism: Japan's Press Club As the Last Obstacle to a Mature Press*, *Routledge* (1998).

[216] This had been happening for years: In 1964, LA Times reporter Sam Jameson was famously barred from a police press conference following the stabbing of US Ambassador Edwin O. Reischauer.

[217] "Press clubs stymie free trade in information: EU," *The Japan Times*, Nov. 7, 2002. Available online at: http://www.japantimes.co.jp/news/2002/11/07/national/press-clubs-stymie-free-trade-in-information-eu/ (April 3, 2015)

Though little noticed at the time, outside of foreign media circles, the letter was an important marker in the fight for better access. "When enforced, it neutralized the press club system," says Richard Lloyd Parry, then head of the FPIJ.[218]

In practice, the system has proved more resilient. In July 2009, for example, as the LDP government prepared to dissolve parliament for the general election that would see it fall from power, Taro Aso gave his final press conference as prime minister. Foreign reporters were granted observer status only, barring them from asking questions. In protest, Italian SkyTV reporter Pio D'Emilia and I, then working for *The Irish Times* and *Independent* newspapers, kept our hands aloft throughout in a futile attempt to be noticed. We were ignored, not just by the bureaucrats who work for the Prime Minister's Office (*Kantei*) but also by the rest of the assembled media.

Japan's government is of course hardly alone in stage managing meetings with the media, or in giving favored journalists proprietary access to information and sources.[219] One need only view the clubby, mannered affairs run by the US White House for evidence. Press clubs are very effective, however, in *systematically* co-opting journalists into a shared worldview with their sources, and blocking access to "outsiders" who might prove disruptive. Day in, day out, Japanese reporters share a symbiotic relation to elite bureaucrats and politicians unmatched elsewhere. Questions are often shared between competing media and even with sources in a pattern that clearly works against the public interest. Two examples should illustrate this point.

In 2007, Crown Prince Naruhito was set to embark on a trip to Mongolia. Following protocol, the Imperial Household Agency (IHA) invited a small number of foreign correspondents to a pre-trip press conference. For the IHA, such conferences are a way of publicizing imperial foreign tours but they also involve an element of risk. So the agency insists on running events so controlled and scripted, with questions submitted – and sometimes refused – weeks in advance – that they are of little interest to the foreign press except as an opportunity to see possibly the world's oldest hereditary monarchy up close.

[218] Personal interview, April 15, 2015.
[219] Laurie A. Freeman, Japan's Press Clubs as Information Cartels," Japan Policy Research Institute, April 1996: http://www.jpri.org/publications/workingpapers/wp18.html

Prince Naruhito himself, however, had managed to crack the stultifying embrace of the IHA in 2004 when he told reporters that the career and personality of his wife, Princess Masako, had been "denied". Her mental health and the couple's relationship with the Imperial House had since been the subject of some speculation. The IHA's screening ensured that we were discouraged from asking about these topics, or why the prince would again be traveling without his wife on an official foreign engagement. But unusually for an event often timed down to the last minute, the scripted questions ran out before the end of the press conference and an IHT official asked if there was another.

For a journalist this was a unique opportunity to get under the rampart of the IHT defenses and ask an unmediated question to a member of the imperial family, so I immediately put up my hand. I wanted to hear more about the health of Princess Masako. The IHT official ignored me. The seconds ticked by and another foreign reporter, Eric Talmadge of the AP news agency, also raised his hand. The IHT official looked very uncomfortable and glanced pleadingly at the row of Japanese reporters sitting opposite him, heads down, and after the longest time one obligingly if very reluctantly put her hand up. "Ok, shall we have ladies first?" said the official rhetorically.

What was instructive about this incident was that the reporter had not seen me as a professional colleague in our collective struggle to get more information from the IHT in the interests of the general public. Instead, she considered it necessary to rescue the IHT official from embarrassment and save him from the troublesome interloper. Of course, foreign reporters are less sensitive to the strange institutional taboos surrounding Japan's imperial household; all the more reason – and in everyone's interest - why they should be encouraged to ask tough questions.

During a rare media tour of Japan's secretive gallows in 2009, the same strategy of blocking "outsiders" was evident. The Justice Ministry had reluctantly allowed the tour, possibly under pressure from abolitionist Justice Minister Chiba Keiko, who was apparently trying to trigger debate on the death penalty. Many Japanese freelance reporters applied. As then chairman of the FPIJ, I lobbied unsuccessfully on behalf of our membership. Meanwhile, elite journalists in the Justice Ministry Press Club were being briefed to prepare for the morning of Aug. 27, and to keep the date secret.

Sanitized pictures, without the all-important hangman's noose, subsequently ran

on NHK and a handful of other media outlets, along with anodyne reports by trusted journalists. Not surprisingly, the death penalty debate never materialized. Support for hanging in Japan remains at a record high.[220] The press club journalists will undoubtedly say they got the best possible information to the public. But it is possible to characterize this episode in a very different way: elite journalists collaborating with elite bureaucrats to stage-manage a difficult story about an uncomfortably controversial issue.

In both these cases – and countless others - journalists who are members of these clubs aligned themselves with the people whose statements they're supposed to be reporting so that instead of the traditionally tense relationship between the press and official sources elsewhere, you get something that is more clubby and collaborative; a cartel of rich media groups that "rewards self-censorship, fosters uniformity and stifles competition," concludes Jonathan Watts, former Tokyo bureau chief of *The Guardian* newspaper.[221]

The DPJ's ascent to power seemed to signal a break with this cartel. The pledge of more open access to the media was led by Prime Minister Yukio Hatoyama, who said he would scrap brief, informal prime ministerial meetings with a limited number of select reporters and make press conferences "open to everyone."[222] This was partly self-interest since the DPJ (rightly) felt Japan's closed media system favored its Liberal Democratic Party rivals.

Hatoyama also revealed an open secret: the existence of a slush fund in the *Kantei* that for years had reportedly been used to curry political favor among journalists and television commentators.[223] *The Economist* noted the "extraordinary silence" from most of Japan's mass media on Hatoyama's revelation; more evidence, said the weekly, of the media's "central role in Japan's longstanding political dysfunction."

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[220] Feigenblatt, Hazel and Global Integrity (eds), (2010) *The Corruption Notebooks. vol.VI*, Washington: Global Integrity.

[221] Jonathan Watts, "EU acts to free Japanese media," The Guardian, Nov. 29, 2002. http://www.theguardian.com/world/2002/nov/29/worlddispatch.pressandpublishing

[222] See: http://japan.kantei.go.jp/hatoyama/statement/201003/26kaiken_e.html (April 27, 2015)

[223] See "See No Evil: A slush fund is revealed in Japan," The Economist, May 18th, 2010. http://www.economist.com/blogs/banyan/2010/05/slush_fund_revealed_japan (Accessed April 29, 2015)

It's important not to undervalue the efforts of Hatoyama, Okada, and Shizuka Kamei, minister in charge of banking and postal services (who had to hold separate meetings with reporters after members of the press clubs refused to share access with other journalists). After a fight, reporters for foreign wire services such as Bloomberg, Dow Jones and Reuters have been allowed basic access to Diet and other power centers. Freelancers have wider access. "But the system itself has stayed intact," says Tetsuo Jimbo, a veteran freelance journalist. Moreover, since 2011, it has retrenched.

3. Rolling Back Media Freedoms

The LDP's return to power in late 2012 (in coalition with Komeito) has seen a reversal in media openness. LDP officials have used a range of informal methods to limit exposure to reporters outside the press club system. Freelancers are discouraged from using media facilities and not notified by government handlers of upcoming press events[224]; senior officials seek out established reporters and avoid or shun others; media meetings with the prime minister have been shortened. "I've attended every single press conference held by Prime Minister Abe and I've never had an opportunity to ask a question," says Jimbo. Even mild critics of the coalition, such as the Asahi group have been sidelined. All of this has helped Abe avoid scrutiny, concludes Jimbo. "The only place he faces harsh questions is in the Diet, and only part of that is on TV."[225]

Occasionally, a shaft of light peeks though this closed system. During a press conference by Abe at the United Nations in New York on September 29, 2015, for example, journalists submitted pre-determined questions and the prime minister read from a teleprompter. A reporter for the *Reuters* news agency, "unaffected by the professional strictures that keep his Japanese counterparts in line," broke press club protocol, however, by asking the prime minister an unscripted question on whether Japan intended to accept more refugees from Europe.[226] Forced to speak off the cuff, Abe gave a confusing answer that suggested he had not seriously considered the refugee

[224] Personal interview with Tetsuo Jimbo; Asahi journalist
[225] Ibid. See also, Brasor, P., "Abe raises eyebrows when he's off script," The Japan Times, October 24, 2015. At press conferences with Shinzo Abe, NHK reporter Seiki Hara is selected, even when he doesn't have his hand up.
[226] Brasor, P., *The Japan Times*. j

issue. His reply was reported extensively around the world, but mostly ignored in Japan.[227]

In another telling incident, Eriko Yamatani, Chairman of the National Public Safety Commission & State Minister in Charge of Abduction Issue, gave a press conference at the FCCJ on September 25, 2014. Briefed to discuss the abduction issue, Yamatani found herself instead sidelined by a string of questions about her alleged links to a far-right pressure group. Again, the controversy was mostly ignored by the Japanese mainstream media, though reported in some of the weekly press. Afterwards, government ministers drastically cut their attendance at FCCJ press conferences rather than face a similar grilling.[228]

The failed attempt to reform the press club system is cited in the 2014 and 2015 World Press Freedom surveys as a reason for Japan's plunging ranking; from 12th (in 2010) to 61st place. A second reason was coverage of the Fukushima nuclear crisis, in which press clubs were implicated. Indeed, the verdict by critics of mainstream media reporting of the triple meltdown has been harsh. Hanada of Waseda University says Japanese journalism effectively surrendered (*haiboku*) in Fukushima.[229] Martin Fackler, the Japan correspondent of *The New York Times*, said the accident triggered a major rupture in the public's relationship with the media, a "big bang" that has weakened trust in one of the country's most important institutions.[230]

To cite some of the more serious problems, television pictures of the explosion at the plant's reactor one building were delayed for over an hour while broadcasters determined what to do with them. During the week after the Fukushima accident it seemed to many that the most accurate information was coming from outside Japan, particularly from Washington. Japanese experts connected to the nuclear industry filled

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[227] McNeill, D., "Japan pulls up the drawbridge as refugee problem grows," The Irish Times, October 3, 2015. Available online: http://www.irishtimes.com/news/world/asia-pacific/japan-pulls-up-the-drawbridge-as-refugee-problem-grows-1.2376785 (Nov.1, 2015).

[228] No.1 Shimbun, Ibid.

[229] Press Conference: Foreign Correspondents' Club of Japan, Tuesday, December 16, 2014.

[230] See Martin Fackler, "Media and Politics in Japan: Fukushima and Beyond," Chatham House, Nov. 6, 2014. Available online at: http://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20141106Summary.pdf (accessed April 28, 2015)

the airwaves to give false assurances about the safety of the Daiichi plant. Critics were effectively banned. Public service broadcaster NHK relied on openly pronuclear experts to explain what was happening.[231] According to one careful study, there was just a single notable appearance on TV by an academic critical of nuclear power.[232] Yuko Fujita, a former professor of physics at Keio University, speculated on Fuji TV on the evening of March 11, 2011 that the Daiichi reactors were in a "state of meltdown." He was never asked back.

Journalists covering the crisis via the press clubs quickly settled on the explanation that "partial" fuel melt was suspected, a line maintained for two months until operator Tokyo Electric Power Co. confirmed the triple meltdown. When it was reported in the foreign media that information on the diffusion of radiation had been withheld, Japanese newspapers took weeks to follow up.[233] In Fukushima itself, elite journalists evacuated en masse from Minami-soma city and from the wider threat of radiation fallout on March 12, even as their companies were publicly reassuring millions of Japanese that the area was safe. They returned some forty days later.[234] When questioned afterward, the journalists said it was "unsafe" in the zone, which is true, but does not explain why they did not use their considerable resources to protect themselves, or why they did not try to out-scoop their rivals.[235] "Fukushima demonstrated the worst kind of compliance journalism," concluded Mamoru Ito, professor of media and cultural studies at Waseda University.[236] Kengo Suganuma, chief editor of *Tokyo Shimbun*, compared Fukushima reporting to Japan's wartime-era, when military dispatches (*daihonei happyo*) lying

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[231] See McNeill, D., "Pro-Nuclear Professors Accused of Singing Industry's Tune in Japan," *The Chronicle of Higher Education,* July 24, 2011.

[232] Ito, M., (2012)*Terebi Wa Genpatsu Jiko Dou Tsutaetenoka*? (How Did Television Cover the Nuclear Accident?),Tokyo: Heibonsha.

[233] Fackler, Ibid.

[234] By that time a steady stream of foreign and freelance reporters had been to see the town (AFP was the first to arrive, on March 18th).

[235] Japanese reporters for the big media have little to gain from breaking ranks during major news stories such as Fukushima because they form cartel-like arrangements to prevent rival scoops. In particularly dangerous situations, managers of TV networks and newspapers will form agreements (known as "*hodo kyotei*") in effect to collectively keep their reporters out of harm's way. The volcanic eruption of Mt. Unzen in 1991 and the 2003 invasion of Iraq, both of which led to fatalities among Japanese journalists, solidified these agreements—one reason why so few Japanese reporters could be seen during the Iraq War, or in conflict zones such as Burma, Thailand or Afghanistan. There, freelancers did much of the heavy lifting.

[236] Personal interview, April 2012. Former Washington TBS Bureau Chief Akiyama Toyohiro, who owned a farm in Fukushima, made a similar assessment, accusing the mass media of being a mouthpiece for the government and the power company."

about the doomed war effort were carried word-for-word in the national media.[237] "Throughout the war, newspapers reported exactly what they were told and that's why the war went the way it did," he says.

Fukushima also deepened the adversarial relationship between the *Asahi Shimbun*, Japan's flagship liberal newspaper, and the government, in a way that may have long-term implications for Japanese journalism. Among Japan's daily newspapers, the *Asahi* (and *Tokyo Shimbun*) has been among the most persistent post-Fukushima critics of TEPCO and the nuclear industry. The Asahi's critical coverage arguably climaxed on May 20, 2014, when it published a story based on the leaked testimony of Masao Yoshida, the manager of the Daiichi plant during the 2011 meltdown. The scoop, (所長命令に違反), claimed that 650 panicked onsite workers had disobeyed orders and fled during the crisis.

The Asahi's claim, challenging the view of the workers as heroes who risked their lives to save the plant, was strongly contested by the industry, the government, and *Asahi* rivals, particularly the right-leaning *Sankei Shimbun,* which blamed the confusion at the plant on March 15-16, 2011 on miscommunication. Finally, on September 11, 2014, Tadakazu Kimura, the *Asahi*'s president announced the retraction of the article, the dismissal of the paper's executive editor Nobuyuki Sugiura and punishments of several other editors. The highly damaging announcement pleased *Asahi* critics and stunned journalists at the newspaper who say they were kept in the dark beforehand.[238]

Lawyers, journalists and academics expressed puzzlement at Kimura's retraction. While the factual details of the Yoshida testimony were open to interpretation, there was little doubt that despairing onsite plant workers had abandoned their duties during the worst of the crisis.[239] "The content of the article and the headline were correct," insisted Yuichi Kaido, a lawyer and opponent of nuclear power who blamed the retraction on political pressure.[240] An independent press monitor might have cleared up the controversy but the *Asahi* relied on its in-house Press and Human Rights Committee to

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[237] Personal Interview, June 24, 2015. Also see:

[238] Personal interview with Hideaki Kimura, journalist with the *Asahi Shimbun*, May 6, 2015. Kimura was one of the disciplined journalists.

[239] See: 朝日新聞「吉田調書報道」は誤解ではない、

[240] Yuichi Kaido, Satoshi Kamata & Tatsuro Hanada: "Crisis of Asahi and Japanese Journalism", press conference at The Foreign Correspondents' Club of Japan, Dec. 16, 2014. Available online: https://www.youtube.com/watch?v=35kkfAGN87U

probe the story and discipline those behind it. "In Japan, there is no such press council or professional organization in place to support journalists such as there would be in the US, for example," lamented journalist Satoshi Kamata of the newspaper's conduct. "The press club system is completely obstructing the development of professionalism within Japanese journalism."[241]

The *Asahi's* mea culpa followed another even more damaging retraction a month earlier, over a series of articles in the 1990s on so-called "comfort women" - Asian women herded into wartime Japanese military brothels. Seiji Yoshida, the source for some of these stories had long been discredited and the Asahi's retraction was years overdue. Yet, the reaction on the political right was not only to question the newspaper's entire reporting reputation but to blame it for damaging Japan's reputation abroad and poisoning ties with its neighbors.

In the right's narrative, the *Asahi* articles triggered the 1993 Kono Statement, acknowledging the army's role in forcing the women into sexual slavery. In 2007 came U.S. House Resolution 121, calling on Japan's government to "formally acknowledge and apologize for the comfort women episode." In fact, the Yoshida memoir and Asahi's reporting of it had nothing to do with Resolution 121 – so said the group of experts who helped write it. The scholars were moved to make this clear when the liberal *Mainichi* newspaper reported exactly the opposite after interviewing them. "All of us were astonished," they recalled.[242]

The Yoshida controversy embroiled foreign reporters too. Several of us were approached by Japanese news organizations asking the same question: Wasn't the *Asahi* coverage of the comfort issue a major influence on reporting by foreign coverage? The answer was no. Seiji Yoshida was before our time. Over the last decade, however, we have interviewed many comfort women first hand, in South Korea and elsewhere.[243] These points, and the rebuttals by the scholars who wrote Resolution 121, appear to have no impact on the right's narrative in Japan. Journalists who continued to write critically

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[241] Kaido et al, Ibid.

[242] "Scholars adamant that Yoshida memoirs had no influence in US," Asia Policy Point, Sept. 25, 2014. Available online at http://newasiapolicypoint.blogspot.jp/2014/10/scholars-adamant-that-yoshida-memoirs.html (Accessed May 2, 2015)

[243] See David McNeill and Justin McCurry, "Sink the Asahi! The 'Comfort Women' Controversy and the Neo-nationalist Attack", The Asia-Pacific Journal, Vol. 13, Issue 5, No. 1, February 2, 2015. *http://www.japanfocus.org/-David-McNeill/4264/article.html (May 2, 2015)*

on the comfort women issue were subject to harassment and threats, or even asked to show their 'love' for Japan.

Nuclear power and WWII history are two sensitive areas and the *Asahi* erred partially on both. Yet it is difficult to avoid concluding that the attacks on the paper are ideologically driven. Many of the newspaper's leading critics have joined a national "anti-*Asahi Shimbun*" committee, led by lawmaker Nariaki Nakayama. Over 20,000 people, led by Shoichi Watanabe, a professor emeritus at Sophia University, have demanded an apology from the newspaper for "spreading erroneous facts to international society." The *Asahi* scandal prompted some to resurrect the old wartime vision of the media as instrument of state power, notably Hideaki Kase, co-author of the bestseller *Falsehoods of the Allied Nations' Victorious View of History, as Seen by a British Journalist* with Henry Scott Stokes. "I hope we can force the *Asahi* to change its stripes and admit its past mistakes," he said. "It did many good things, including supporting our last war in liberating the rest of Asia."[244] Of course, such views are extreme, but it was notable that throughout the Asahi's difficulties, Prime Minister Abe sided with its critics and declined to defend the principle of a broad, pluralist media.

4. Carrot and Stick

The attacks on the *Asahi* appear to be part of a broader assault against liberal journalism – in the domestic *and* foreign media. The government has sent diplomats out across the world to complain to history professors and journalists. In one incident, officials with the Ministry of Foreign Affairs attempted to steer foreign journalists away from a Japanese academic critical of the government's stance on the war.[245] In another, Japanese officials accused Germany's largest business newspaper, ***Frankfurter Allgemeine Zeitung***, of carrying pro-Chinese propaganda against Japan. "There is a clear shift taking place under the leadership of Mr. Abe," wrote the newspaper's correspondent Carsten Germis. "A move by the right to whitewash history."[246]

This intolerance of criticism became particularly insidious at critical points in the Abe project. During campaigning for the December 2014 snap election, for example, the

[244] McNeill, McCurry, Ibid.
[245] Anna Fifield, Washington Post.
[246] His account can be found here: http://www.fccj.or.jp/number-1-shimbun/item/576-on-my-watch.html (May 8, 2015)

LDP demanded "fair and neutral" reporting by all the domestic media, and effectively boycotted Asia's oldest foreign correspondents' club, the FCCJ in Tokyo. As I write, neither the foreign nor defense minister have made an appearance at the FCCJ since 2012; it took 19 months to get Chief Cabinet Secretary Yoshihide Suga, who tried (but failed) to have the questions scripted beforehand.[247] It need hardly be said that Japanese politicians are under no obligation to prostrate themselves before the foreign press, but such micromanaging hardly indicates a confident administration.[248]

In March 2015, political commentator and well-known Abe critic, Shigeaki Koga, abruptly quit his regular slot on Asahi's TV's nightly news show, Hodo Station, after executives apparently succumbed to pressure from the Abe government during debates on the contentious security bills. Koga's silencing highlighted the concerted carrot-and-stick campaign by the government to cow the media: a mix of sharp-elbowed tactics against its critics and the wining and dining of media executives.[249]

These gatherings of cabinet and media bosses violate any sense of distance between politics and journalism. It seems only sensible to speculate, then, if they are related to the disappearance from the airwaves in March 2016 of Japan's most outspoken liberal anchors: Ichiro Furutachi, the salty presenter of evening news show "Hodo Station", Shigetada Kishii, who had a regular slot on rival TBS, and Hiroko Kuniya, who helmed NHK's flagship investigative program "Close-up Gendai" for two decades.

Producers connected to Furutachi's show relate months of pressure against his on-air criticism of the Abe government.[250] A climax of sorts came after Koga's on-air comments. Koga's aim, he insists, was to rally the media against government interference. Instead, the show's producer, TV Asahi, apologized and promised tighter

[247] See McNeill, D., "LDP vs. FCCJ – Behind the Barricades," No.1 Shimbun, December 2014. Available online: http://www.fccj.or.jp/number-1-shimbun/item/532-ldp-vs-fccj-behind-the-barricades/532-ldp-vs-fccj-behind-the-barricades.html (March. 31, 2016)

[248] McNeill, D., No.1 Shimbun, Ibid.

[249] For example, on Jan. 21st 2016, Tsuneo Watanabe, editor-in-chief of the *Yomiuri Shimbun*, hosted an evening dinner with Prime Minister Abe and some of Japan's top media executives at the company's headquarters in central Tokyo. The companies represented included the *Mainichi*, *Sankei*, *Asahi* and *Nikkei* newspapers, along with the nation's biggest broadcaster, NHK. Writing in the *Asahi Shimbun* a few days later, journalist Akira Ikegami asked the obvious questions: Who pays when the country's leader eats with the head of its most-read newspaper? "Does the *Yomiuri* owe Abe something? Enough to invite him for a meal?...Did Abe meet with Watanabe because he wanted the *Yomiuri* to understand his viewpoints? Or did Watanabe give advice to Abe?" See: 池上彰, "安倍氏は誰と食事した？"朝日新聞, Jan 29, 2016. http://www.asahi.com/articles/DA3S12183068.html (Last accessed on March 21, 2016)

[250] Personal interviews, Tokyo, Feb. 12/13, 2016. See: "Anchors Away," *The Economist* Feb. 20, 2016.

controls over guests. "It shows that if you repeat a lie often enough people will believe it," Koga says.[251]

Kishii used his nightly spot on News 23 to question legislation in the summer of 2015 expanding the nation's military role overseas. His on-air fulminations prompted a group of conservatives to take out newspaper advertisements accusing him of violating impartiality rules for broadcasters. In January 2016, he announced he was stepping down. "Nobody said directly I was going because of my comments – that's not how it works," says Kishii.[252] He blames a whispering campaign by Suga, who may also have been behind the sacking of Kuniya. She had the temerity to ask him, in a live interview, unscripted questions on the possibility that the new security legislation might mean Japan becoming embroiled in other country's wars.

It is against NHK where the government's hostility to critical, independent journalism can be most keenly observed. Like British Prime Minister Margaret Thatcher, who was notoriously suspicious of the BBC's supposedly liberal bias, Abe has never trusted Japan's most powerful broadcaster and has run into conflict with it in the past.[253] NHK is vulnerable to pressure because its ¥600-billion budget is funded from license fees, subject to parliamentary approval. When Abe returned to power, one of his government's first moves was to stuff the company's 12-member board with four conservative allies led by Director-General Katsuto Momii.[254] The Abe appointees have repeatedly denied editorial interference – as they must.[255] But one of the outcomes of their stewardship has been to increase the incentives for media workers toward greater self-censorship. The clearest example of this is the creation of the "Orange book," an index of censorship for NHK's international broadcasting that shows NHK sides with conservatives in the government, in some cases against Japan's official position.

For example, the book instructs editors, translators and journalists to avoid using the expression 'so-called comfort women' and "in principle" to avoid giving explanations of what they were: "Do not use 'be forced to,' 'brothels,' 'sex slaves,'

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[251] Personal interview, Tokyo, February 13, 2016.
[252] Personal interview, Tokyo, March 24, 2016.
[253] Cite the 2000 "comfort women" affair.
[254] Profile of four appointees: Naoki Hyakuta, Michiko Hasegawa, Katsuhiko Honda, Katsuto Momii. Hyakuta doesn't believe Japan committed war crimes: http://time.com/5546/japanese-nhk-officials-world-war-ii/
[255] The Broadcast Law says governors of must make "fair judgment concerning public welfare."

'prostitution,' 'prostitutes' etc."[256] While careful not to deny the Nanjing Massacre, the book says the 1937 destruction of the Chinese capital by the Imperial Japanese Army must be referred to only as "the Nanjing Incident". "'The Nanjing Massacre' is used only when directly quoting remarks made by important people overseas etc., when the fact that it is quotation must be made clear." In reference to Yasukuni, the Shinto shrine that venerates Japan's wartime leaders along with its 2.4 million war dead, NHK employees must avoid English expressions such as "war-related shrine," "war-linked shrine" and "war shrine". This tilt toward making Japan's broadcaster a tool of government propaganda could hardly have been a surprise since it was signaled by Momii on his appointment.[257] "Avoidance of controversy, pandering to audiences, parochial nationalism; these appear to be the three basic tenets of NHK's current operations," concludes media scholar Kaori Hayashi.[258] "They are diametrically opposed to the original spirit of public service broadcasting as it developed after World War II."

This brief survey does not exhaust official attempts to roll back the limited autonomy of the media in Japan. The passage of the State Secrets Law in 2014 expands the bureaucratic state's discretion to keep information under wraps. Breaching secrets will be punishable by up to 10 years in prison and up to a ¥10 million fine. The law triggered protests from Human Rights Watch, the International Federation of Journalists, the Federation of Japanese Newspapers Unions, the Japan Federation of Bar Associations, the FCCJ and hundreds of Japanese academics. An expert for the UN Human Rights Council said it carried "serious threats to whistleblowers and even journalists reporting on secrets."[259] "Transparency is a core requirement for democratic

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[256] The original MOFA document on comfort women notes: With regard to the supervision of the comfort women, the then Japanese military imposed such measures as mandatory use of contraceptives as a part of the comfort station regulations and regular check-ups of comfort women for venereal and other diseases by military doctors, for the purpose of hygienic control of the comfort women and the comfort stations. Some stations controlled the comfort women by restricting their leave time as well as the destinations they could go to during the leave time under the comfort station regulations. It is evident, at any rate, that, in the war areas, these women were forced to move with the military under constant military control and that they were deprived of their freedom and had to endure misery. Available as of Nov. 3, 2015: http://www.mofa.go.jp/policy/postwar/issue9308.html

[257] Momii's statements after appointment.

[258] http://www.nippon.com/en/currents/d00125/#note04

[259] See http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14017 (Nov. 3, 2015)

governance," warned Frank La Rue, the special rapporteur on freedom of expression." Those warnings were ignored.

Members of the Abe government have hinted at revoking broadcasting licenses of overly critical networks.[260] Allies have openly proposed shutting down newspapers deemed hostile to government policies.[261] Meanwhile, the low-level harassment of media professionals continues. In April 2014, the LDP summoned NHK and Asahi TV executives to dress them down for recent reporting failures, in a show of official force clearly designed to intimidate. Perhaps not surprisingly, some journalists and editors now use wartime analogies to describe their relationship with the government. "Japan is in a situation that is essentially a war on the truth," said Kengo Suganuma, chief editor of *Tokyo Shimbun*. The job of the media is to not to facilitate power but to monitor it, he said, "from the perspective of people with no power." Newspapers should be watchdogs on behalf of readers. We're not 'anti-Abe' – we're just doing our job."

5. Conclusion

In hindsight, the 2009-10 reforms of Japan's press club system proved to be a false dawn. The promise of more open access to sources, let alone the dismantling of the institutional machinery of the press club system, has evaporated. Watchdog journalism, always an embattled project, has retreated as conservative forces aligned to the state have increasingly demanded a less autonomous line from the nation's media. Similar struggles rage elsewhere, but Japan's defense has been weakened by the press club system with its cosseted and co-opted army of well-paid journalists. The solutions are as prosaic as they are difficult: media professionals should end the divided, cartel-like conditions of the industry, and abolish the press club system. Universities must fight to establish proper critical journalism courses and train graduates who identify their allegiances first to independent-minded professional reporting, not to their companies. Above all, Japan needs to fight for the integrity of watchdog journalism. If that seems like a tall order, the alternative surely is that the media slips further down the route to ambiguity toward state power and ultimately subservience.

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[260] Fackler, NYT: http://www.nytimes.com/2015/04/27/world/asia/in-japan-bid-to-stifle-media-is-working.html
[261] Hyakuta: http://english.ryukyushimpo.jp/2015/07/01/19051/

11. Information Governance and Election Campaigning in Japan: The Public Offices Election Law in Historical and Comparative Perspective

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"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." (emphasis added)

The Universal Convention on Human Rights, Article 19.

"Common sense, as well as constitutional law, compels the conclusion that the government must play an active role in structuring elections; 'as a practical matter there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'"

U.S. Supreme Court Justice, Byron White[262]

Abstract

The control and regulation of information provided to the public during election campaigns by candidates, parties and the mass and electronic media is a long-neglected, yet vitally important, aspect of information governance in Japan. Japan's Public Offices Election Law (POEL), enacted in 1950, but having its roots in prewar electioneering laws, is possibly the most rigid election campaign law among democratic nations. Notably, as detailed in this chapter, it has remained largely unchanged in the postwar era in spite of substantive revisions to the electoral system itself in 1993, and the introduction of the Internet at around the same time. Until quite recently, the POEL was interpreted in such a way as to prohibit the use of the Internet and other social media by politicians and the electorate during the campaign period. Though some changes have been made, controls over internet-aided electioneering remain. Importantly, a large number of constraints also are in place on the provision of information to voters through the more traditional mechanisms found in other democracies, including print and broadcast media advertisements and endorsements, as well as door-to-door canvassing and debates. Japan's rigid election controls stand in dramatic relief when compared to those of the U.S.,

[262] Cited in: Citizens Divided, by Robert C. Post, Harvard University Press, 2014; p.82. Widely cited in many other works, the statement comes from a case involving the constitutionality of Hawaii's ban on write-in voting. The court ruled that this ban was constitutional. Post himself notes that, "To the end of protecting electoral integrity, the state can and must restrict speech in ways that would be unconstitutional if applied to public discourse."

especially after the Supreme Court's decision in Citizen's United v. Federal Election Commission (2010). As a result of this ruling, the United States now has one of the least restrictive election campaign regimes among advanced industrial democracies. It has been said that while Japanese electoral rules aim for "information fairness," the goal of American electoral laws is to guarantee "information freedom." The tendency among scholars has been to criticize Japanese rigid adherence to the notion of "fairness" and praise American openness when it comes to information governance during election campaigns. However, the excesses of American electioneering by "Super PACs" and other ostensibly independent groups in the most recent (2012) presidential election suggests a need to rethink electoral policy in both nations.

Introduction

Elections and election campaigns are the central festivals of democracy; it is through them that political parties, candidates, and the public are brought together to perform the most important rite of a free society -- the selection of representatives and the legitimate transfer of power. But democratic elections cannot take place without at least a modicum of government intervention aimed at promoting the integrity of the electoral process and limiting corruption. As democratic legislatures and courts have sought to establish electoral rules of the game, however, they have frequently found themselves having to strike a balance between two essentially competing and ultimately irreconcilable values – those of "fairness" and "freedom."[263] The distinction between these two is an important one and the tradeoffs they entail are real. If a state chooses to uphold fairness and establish financial limitations or other rules to level the playing field and protect the integrity and equality of the electoral process, it will likely restrict the free speech rights of some actors as a result. Alternatively, if the state chooses to promote unfettered speech and focus on freedom, and allow the 'marketplace of ideas' to be the final arbiter of truth, it does so knowing that those with substantial wealth may have greater opportunities to amplify the power of their voices and dominate public debate.[264]

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[263] Legal scholar, Brian Pinaire, calls these competing legal strains the "marketplace of ideas" and the "electoral superintendence idea." The Constitution of Electoral Speech Law: The Supreme Court and Freedom of Expression in Campaigns and Elections, by Brian K. Pinaire, Stanford University Press, Stanford, 2008.

[264] A number of American First Amendment legal scholars have described two 'theories' of free speech that can be used to classify most decisions related to speech rights. Ronald Krotoszynski summarizes these as follows: "two basic models of the First Amendment's Free Speech Clause have emerged: the marketplace of ideas metaphor and the democratic self-government paradigm." The First Amendment in Cross-Cultural Perspective: A comparative Legal Analysis of the Freedom of Speech, New York

As democratic nations have sought to balance these two competing visions of democracy they have crafted campaign regulations running the gamut from the exiguous to the minutely-detailed. Recently and infamously, the U.S. Supreme Court has found that electioneering rules are unconstitutional if they limit speech in the broadest sense -- including the speech rights of corporations. In contrast, the Canadian Supreme Court has consistently upheld statutes whose goal is to achieve electoral equality and limit corruption, even when they conflict with freedom of speech concerns.[265] Free speech is not an absolute in many European countries, either. In Germany, for example, free speech rights are guaranteed in the constitution but are "proclaimed with an important German twist: they are to be exercised responsibly and used to foster human dignity within the framework of ordered liberty."[266]

While substantive differences exist across otherwise democratic systems, two nations, the U.S. and Japan, are outliers in the extent to which they give prominence to one value at the expense of the other. Located at opposite ends on the freedom versus fairness continua -- with the U.S. upholding freedom and Japan promoting fairness -- both governments' electioneering policies have had pernicious impacts on their respective political systems and political public spheres. The U.S. Supreme Court's decision in Citizens United v. the Federal Election Commission (2010), and the related ruling in McCutcheon v. FEC (2014), opened the floodgates for campaign spending and gave the U.S. the dubious distinction of having both the least restrictive -- and the most expensive -- election campaign regime among advanced industrial democracies.[267] In

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University Press, 2006; p.13.

[265] "The Supreme Court of Canada holds that: "the overriding aim of fair elections demands that all views shall be heard in an election campaign, and subsequently the use of financial resources should be limited to avoid unequal opportunities for the political competitors. The freedom to use unrestricted amounts of money and other resources in politics transfers the unequal distribution of income and wealth among members of a modern society to the political process. This endangers equality (one person, one vote), an essential aspect of all democratic politics." The International Institute for Democracy and Electoral Assistance (IDEA, 2014, p.257-258). See also Samuel Issacharoff, "The Constitutional Logic of Campaign Finance Regulation," 36 *PEPP. L. Rev*. 373, 389-91 (2009).

[266] The Constitutional Jurisprudence of the Federal Republic of Germany, Second Edition, by Donald P. Kommers; Duke University Press, 1997, p. 239. See also: Krotoszynski, Chapter on "Free Speech in Germany." Krotoszynski points out that "the German Constitutional Court has firmly embraced dignity as a preferred constitutional value over the freedom of speech." p.104

[267] In McCutcheon v. FEC, plaintiffs called the limits on contributions to federally elected candidates a "burden on speech and association." On April 2, 2014, the court overturned limits on aggregate federal campaign contributions, but not on individuals. Chief Justice John Roberts wrote that, "The government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse." One scholar has described these decisions as "the beginning of a long

the context of this book, the U.S. provides an interesting case of a nation eschewing information governance in the electoral domain even when the social, political and systemic costs are high. On the other hand, Japan's deeply-rooted tradition of electoral superintendency imposes myriad, broad-scope constraints on political speech during the campaign period, severely circumscribing the electoral public sphere in the process. Ostensibly, these rules were formulated in the interest of securing "fair and equal elections," "electoral integrity" and protecting an ill-defined "public welfare." But the result has been the establishment of a highly-formalized, excessively-ritualized and closely-monitored election campaign process that relegates voters to the sidelines and distorts Japanese democracy. Although the tendency has been to criticize the Japanese government's rigid adherence to the notion of fairness and praise American openness, the anarchy evident in American electioneering since the Citizens United decision suggests the need to exercise caution when making judgments about the relative merits of one information governance regime over another.[268] In fact, if voter turnout is any indication of the health of a democracy, both the U.S. and Japan had better rush to their nearest urgent care facilities. In 2015, both nations had turnout rates for the voting-age population that were among the lowest in the democratic world, with the US ranking 31st and Japan ranking 32nd among the 34 OECD nations.[269]

Why Study Japanese Campaign Rules?

The bureaucratic control and legislative regulation of the discursive domain during election campaigns is a long-neglected, yet vitally important aspect of Japanese information governance. Japan has a highly literate society with some of the highest rates of broadcast television viewership, newspaper readership, and broadband and

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dialogue on what may well be the most controversial (and challenging) First Amendment free expression issue of our times." When Money Speaks: The *McCutcheon* Decision, Campaign Finance Laws, and the First Amendment, by Ronal Collins and Fredric C. Tausend, (Top Five Books, 2014).

[268] Japanese legal scholar, Dan Rosen, has commented that: "Unlike the United States, where political speech is considered so important that it should not be restrained, in Japan, it is considered so important that it must be restrained," "Policing Political Speech: Japan's Mistrust of the Marketplace," by Dan Rosen, 22 *Mich. St. Int'l L. Rev*. 799 (2013), p. 801. On the other hand, one critic of the Citizens United decision claims that "it has practically supplanted Dred Scott as the worst Supreme Court decision of all time." In Jeffry Toobin, "Annals of the Law: Money Unlimited: The Chief Justice and Citizens United," *The New Yorker*, May 21, 2012, p.36.

[269] Pew Research, May 6, 2015, "U.S. voter turnout trails most developed countries," http://www.pewresearch.org/fact-tank/2015/05/06/u-s-voter-turnout-trails-most-developed-countries/

Internet connectivity. But many of the means and methods of electoral campaigning routinely found elsewhere -- including door-to-door canvassing, wide and open distribution of printed campaign materials, open debates and speeches organized by political parties, candidates and third parties, and the regular, animated and creative use of the internet and social media by individuals of all ages -- have either been prohibited outright or highly circumscribed by interpretations of the nation's Public Offices Election Law (POEL). Enacted in 1950, the POEL provides uniform regulations for municipal, prefectural and national elections and is the main legislative means by which elections and electioneering are managed in Japan. An amalgamation of prewar imperialist, wartime fascist, and postwar Occupation electioneering regulations, the majority of its articles were originally passed by the Imperial Diet in the 1920s and 1930s, an era in which the Japanese public were considered imperial "subjects" rather than democratic citizens.[270] Unlike the Japanese constitution and judicial system, the POEL is a thoroughly Japanese law that largely went unscathed by postwar Occupation reforms.[271] Today, its scope is so broad and its focus on the minutiae of campaigning so penetrating that enforcement necessitates an entire nationwide network of electoral management and policing organizations, including those within the National Police Agency and local and prefectural police offices. As *the most restrictive election campaign law among democratic nations*, the POEL has rarely been revised.

It is important to point out that the POEL exists separately from, and in addition to, laws specifically designed to address the potential corrupting influence of money in politics. Like other democratic nations, Japan has a number of statutes regulating various aspects of political finance (including contributions, expenditures, disclosure and subsidies), among them the Political Funds Control Law passed in 1948, and the Political Parties Subsidy Law (PPSL) enacted in 1994.[272] Where the law differs,

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[270] Prior to this, each election was held under rules contained in separate acts (the Lower House Election Law, the Upper House Election Law and the Local Autonomy Law). These laws were consolidated in 1950 into the Public Offices Election Law.

[271] In fact, some of its restrictions were actually *strengthened* under Occupation rule and never subsequently repealed.

[272] The major election finance laws in Japan are as follows: Political Funds Control Act, 1948 (as amended by Act No. 135 of 2007); Public Offices Election Act, 1950 (as amended by Act No. 35 of 2011); National Public Service Act, 1947 (as amended by Act No.108 of 2007); and the Political Subsidies Act, 1994 (as amended by Act No of 2011). When political finance was overhauled in 1994 with the introduction of a new electoral system in Japan, campaign finance regulations were strengthened, and disclosure and contribution limits, spending caps and public subsidies were introduced. According to

however, is in the ways it burdens speech and association by placing serious constraints on the means and methods of electoral discourse, and not purely its financing. Additionally, the law does not merely constrain the communicative activities and tools utilized by candidates, parties and/or those hoping to influence these two agents with their wealth; it goes much further by limiting the discursive rights and avenues for electoral participation of voters, youth, and a large pool of Japanese citizens who happen to work for the government.[273] Truly exceptional in its scope and reach,[274] since 1946, more than 90,000 Japanese have been prosecuted under the POEL for carrying out "illegal campaigning."[275] Many of these individuals were voters who were charged with taking part in such otherwise innocuous activities as handing out leaflets and/or asking people to vote for a specific candidate. To its Japanese detractors, the law is a "bekarazu-ho," a "law of must nots." To foreign journalists and legal scholars having similar contempt, "The guiding principle is: everything is forbidden, except that which is allowed ."[276]

Japan's status as an outlier in this important aspect of electoral governance is such that in 2008, the United Nations Human Rights Committee ("UNHRC") took the unusual step of asking the Japanese government, a 1979 signatory to the Human Rights Covenant, to remove its electoral restrictions on the dissemination of printed matter and its ban on door-to-door canvassing. In recognizing the scope and overwhelming power

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Professor Steven Reed, "The campaign finance reforms were intended to increase transparency, decrease reliance on corporate donations, reduce the costs of elections, strengthen the hand of parties over candidates, and foster party competition." "Evaluating Political Reform in Japan: A Midterm Report," *Japanese Journal of Political Science*, Reed, Steven, 2002 vol: 3 iss:02.

[273] Based on the British practice of "purdah," civil servants are obligated 'not to undertake any activity which could call into question their political impartiality' and 'ensure that public resources are not used for party political purposes.' See: "Purdah Before Elections and Referendums," in *Briefing Paper Number 05262*, 16 July 2015, www.parliament.uk/commons-library | intranet.parliament.uk/commons-library | papers@parliament.uk | @commonslibrary. The Japanese government takes a much more rigid interpretation than this and extends restrictions to electioneering by civil servants during their off hours.

[274] "Fairness versus Freedom: Constitutional Implications of Internet Electioneering for Japan," by Takaaki Ohta, Social *Science Japan Journal*; April 2008, Vol. 11 Issue 1, p.99; Also see: "Why Germany's Politics are much Saner, Cheaper, and Nicer than Ours," *The Atlantic*, September 30, 2013; and "France's Stringent Election Laws: Lessons for the America's [sic] Free-for-All Campaigns," by Bruce Crumley, *Time Magazine*, April 20, 2012 (world.time.com; accessed November 22, 2015).

[275] From: "Essay: E-lections Law in Asia & Online Political Activities," by Matthew J. Wilson, *Wyoming Law Review*, Volume 12, No. 1, 2012, p.247. Wilson says that, in contrast to Japan, Korean "prosecutors brought only thirteen enforcement actions in one year." P.247. See also Matthew J. Wilson, "E-Elections: Time for Japan to Embrace Online Campaigning," 2011 *Stan. Tech. L. Rev*., 4 (2011).

[276] Various related terms have also been used – bekarazu-shu; bekarazu-senkyoho, etc. "Policing Political Speech: Japan's Mistrust of the Marketplace," by Dan Rosen, Professor, Chuo University Law School; http://digitalcommons.law.msu.edu/cgi/viewcontent;

of Japan's electoral regime, the UNHRC also asked the Japanese government to "prevent the police, prosecutors and courts from unduly restricting political campaigning and other activities protected under articles 19 and 25 of the Covenant."[277] In spite of such requests, the POEL has remained largely resistant to change – even in the face of major revisions to the electoral system itself in 1994.[278] The law's persistence, owing in part to judicial conservatism, legislative inertia, and the various path dependencies described below, is a likely explanatory factor in a number of distinctive, enduring and less-than-democratic aspects of party politics in Japan. [279] Among these are the single-party dominance of the Liberal Democratic Party (LDP) for most of the last six decades; the long-lived and transferable individual candidate support organizations known as "koenkai;" and the nation's dubious distinction as a "hereditary democracy."[280]

In sum, no democratic state has extended its regulatory reach as broadly or as deeply into the discursive aspects of the electoral domain as has the government of Japan. How this came to be, what sorts of developments have taken place in recent years, and

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[277] "The Committee is concerned about unreasonable restrictions placed on freedom of expression and on the right to take part in the conduct of public affairs, such as the prohibition on door-to-door canvassing, as well as restrictions on the number and type of written materials that may be distributed during pre-election campaigns, under the Public Offices Election Law. It is also concerned about reports that political activists and public employees have been arrested and indicted under laws on trespassing or under the National Civil Service Law for distributing leaflets with content critical of the government to private mailboxes. (arts. 19 and 25)The State party should repeal any unreasonable restrictions on freedom of expression and on the right to take part in the conduct of public affairs from its legislation to prevent the police, prosecutors and courts from unduly restricting political campaigning and other activities protected under articles 19 and 25 of the Covenant." *Concluding observations of the Human Rights Committee: Japan CCPR/C/JPN/CO/5,2008*

[278] Curtis argues that the other way Japanese politicians have tried to handle corruption is through manipulation of the electoral system. Corruption was one of the reasons for revising the electoral system in 1994. "Japanese Political Parties: Ideals and Reality," Gerald L. Curtis, Discussion Paper No. 34, *Discussion Paper Series APEC Study Center*, Columbia Business School, October 2004, p.5.Ironically, in 1994 the Japanese parliament passed the Political Parties Subsidies Law (PPSL) in part to limit corruption, which is the same ostensible reason the POEL had been enacted 90 years ago.

[279] See, e.g., Saibansho Keiji Hanre Keishu, 819 1955; ("distribution of unlimited amounts of literature would create harmful levels of competition that are inimical to sustaining fairness"). Cited in Rosen.

[280] "This term refers to Diet members who have a blood relative within three degrees of consanguinity or a relative by marriage within two degrees of affinity with experience of serving in the Diet and have taken over this relative's name recognition, supporters' association, and other political assets." "So-called hereditary politicians, who now make up the largest group in the Diet (a third of LDP members of the House of Representatives prior to the recent general election fell into this category). "The reason why hereditary politicians are so controversial is that the electoral resources they inherit from previous generations of their families—the *jiban* (constituency; literally "terrain"), *kanban* (name recognition; "billboard"), and *kaban* (fundraising apparatus; "briefcase")—give them a tremendous advantage when fighting an election." What Is a 'Hereditary Politician'?" *Yomiuri Shimbun*, May 15, 2009, p.14.

what the implications of the nation's electoral governance regime are for Japanese democracy is the subject of this chapter. In order to illustrate and explicate the Japanese case, we begin the discussion with an historical analysis of the rise of political representation and election campaigning in Japan, taking care to detail the prewar roots of the modern POEL. This is followed by an analysis of several Japanese electioneering restrictions not found elsewhere: 1) the ongoing ban on door-to-door canvassing (kobetsu homon); 2) restrictions on the hand distribution and online posting of political party manifestos during the campaign period; and 3) the 18-year ban on online- and social media-aided election campaigning (netto senkyo), which was only partially lifted in 2013. A final section briefly summarizes the implications of these developments for Japanese democracy, and their relevance as a cautionary tale for nations seeking to improve deliberative democracy, protect electoral integrity, and counter electoral anarchy by expanding state managerial authority in the electoral domain.

1. Political Representation and Election Campaigning in Japan: 1890-1945

"It is a mystery as to why the spirit of the General Election Law enacted under the prewar imperial reign is still firmly in place today as we approach 60 years since the end of the war."

Katsuo Sorimachi, Lawyer, 2003

1.1. Political Parties and Election Campaigns Under Japan's Imperial Constitution: From Meiji to Postwar

The promulgation of the Meiji constitution in 1890 was a noteworthy historical moment. The news that Japan had become the first Asian nation to introduce parliamentary processes and representative government was welcomed with great fanfare and pride by Asian nations, at the time under the throes of western imperialism, and was favorably remarked upon by Western newspapers and world leaders. In the process of drafting the constitution, the nation's oligarchs had examined a number of documents from around the world before selecting the Prussian Constitution of 1850 as their model. This constitution was itself the product of a state one scholar has described as one of "the most advanced and repressive examples available elsewhere in the

world."[281] In the period before the new constitution was introduced to the public (actually, bestowed by the Emperor), bureaucratic elites loyal to the emperor worked to strengthen imperial rule and consolidate administrative control over the Japanese archipelago.[282] According to historian Carol Gluck, during this period "the oligarchs devoted considerable effort to the denial of politics as a practice acceptable among those who would count themselves as patriotic countrymen."[283]

Political parties, too, were constrained from the beginning. Although Japan's first political party, the Public Party of Patriots (Aikoku Koto, formed in 1874 under the leadership of Taisuke Itagaki), had been responsible for making the original demand for the establishment of representative government, the oligarchs initially rejected political parties as a threat to imperial rule, and the party was disbanded in 1874, soon after it had been formed. But political parties were not formally prohibited under the Meiji constitution, and party politics and political competition gradually developed in Japan, even as the state worked to bring them under its influence. Many early politicians were former government officials (a trend that continued well into the postwar era) and most cabinets under the Meiji constitution were formed in collaboration with the government. The electoral and campaign practices that developed during the prewar period of party government were not particularly free or fair, but Takenaka suggests that Japan slowly developed into a "semi-democratic," "hybrid" regime combining democratic institutions with authoritarian controls. By the end of the Taisho period (1912-1926), parties played an important role in the political process as two major parties (the Minseito and Seiyukai) competed against one another in forming seven cabinets; between 1924-1932.[284] Beginning in 1932, however, after naval officers assassinated Prime Minister Tsuyoshi Inyukai and took over the government, Japan became a fully authoritarian regime in the making. Although elections were still held, as militarism continued to gain power in the 1930's, military officers and others loyal to the emperor gradually usurped the parties' functions. Japan's political parties eventually disbanded

[281] A Political History of Japanese Capitalism, by Jon Halliday, The Pantheon Asia Library New Approaches to the New Asia, New York: Random House, 1975, p.3.
[282]Ibid. p.31.
[283]Japan's Modern Myths, by Carol Gluck, Princeton University Press; 1985, p.50
[284] See: Failed Democratization in Prewar Japan: Breakdown of a Hybrid Regime, by Harukata Takenaka, Studies of the Walter H. Shorenstein Asia-Pacific Research Center, Stanford, 2014. There were a number of extralegal players who also held considerable power at that time: the House of Peers, the Privy Council and the military were among them.

altogether in 1940 and did not reemerge until after the war. By the time the nation held its 21st general election in 1942, candidates supported by military-influenced organizations held eighty percent of the seats in the Diet.

1.2. Elections and Campaigning in Imperial Japan: More Voters Means More Rules

The first law regulating Japanese elections, the Representatives' Election Law (giin senkyoho) was established in 1889, a year before the Japanese Diet officially opened as a parliamentary institution. According to this law, electoral districts were in principle small, single-member districts (in a few exceptional cases there were two representatives from a single district); ballots were not secret; and suffrage was limited to males over the age of 25 who paid a minimum of 15 yen per year in taxes.[285] This ruling effectively limited the right to vote and run for office to wealthy landowners and kept the actual pool of voters to about 1% of the Japanese population. The following year (1890), the law was revised to allow for greater suffrage. No restrictions on campaign activities or the financing of campaigns were included in the laws of 1889 establishing representative government in Japan. But in the 35-year period between 1890 and 1925, the year universal manhood suffrage was finally introduced, a distinctive pattern began to emerge in the government's handling of the issue of suffrage on one hand, and campaign-related informational activities and the requirements for candidates running for office, on the other.

In his detailed historical analysis of the design and development of Japan's electoral system, Professor Masao Soma argues that this was not mere coincidence. As the government gradually felt compelled to expand the scope of those eligible to vote, it hedged its bets by increasing the number and kinds of restrictions on electoral campaigning, while also placing restrictions on those who could run for elected office.[286] Revisions to the law in 1900, for example, lowered the tax requirement to 10 yen, and increased the size of electoral districts, raising the number of eligible voters to

[285]The requirements for those running for elective office were the same. Ballots were not secret, as voters were required to place their names and addresses at the top of their ballots.

[286]Nihon Senkyo seido-shi: Futsuu Senkyo kara Koshoku Senkyo-ho made," by Masao Soma, Kyushu University Press [Kyushu daigaku shuppan-kai], 1986.

approximately 2.2% of the population. This law also provided for secret ballots. But the government simultaneously took two steps backwards in introducing a repressive Public Order and Police Law (chian keisatsuho, 1900) designed to constrain freedom of thought, religion, speech and assembly. The suppression of political dissent under this law had a predictably chilling effect on the nascent labor and political movements of the time, which were now prohibited from organizing or striking.

1.3. The Demand for Expanded Suffrage and The Birth of Japan's Electoral Governance Regime

Almost as soon as the Meiji Constitution was promulgated, a movement known as the Union for General Elections ("futsu senkyo domeika") was formed to push for the abolition of financial requirements for suffrage and the establishment of "general" or "ordinary" (futsuu) elections.[287] Gradually, other groups also began to work for the expansion of voting rights, and by 1918 the movement included students, laborers, and other urban citizens.[288] Movement supporters argued that the limitations placed on suffrage were unfair. Japan had undergone a period of rapid urbanization, but suffrage requirements still favored the much smaller group of rural landowners, giving them disproportionately greater power in the political process than city dwellers.[289] Eventually, domestic and international factors provided those calling for reform with the needed momentum for change. The end of the First World War and a concomitant international trend towards democratization taking place towards the end of what political scientist Samuel Huntington has described as the "first wave" of democracy, gave these groups the support of international opinion.[290] Changes in the composition of the Diet reflecting demographic shifts were also important in gaining legislative support

[287]See Soma for a description of this process. See also: Senkyo to Nihon no Seiji, by Naoki Kobayashi, Iwanami Shinsho, Tokyo, 1960. A separate movement within the Diet submitted a number of bills intended to reform the election law but none were successful.
[288]Soma, pp. 25-26, and other sections of his book.
[289]Rural votes are still worth considerably more than urban votes today and this remains an important constitutional issue in Japan. In 2012, the Japanese Supreme Court ruled that the election that year was unconstitutional. The Japanese Supreme Court has been willing to make judgments about the unconstitutionality of vote weights, but not about the issue of electoral management of the public sphere (e.g. campaign rules).
[290] See "Democracy's Third Wave," by Samuel Huntington, *Journal of Democracy*, vol.2, No.2, Spring, 1991.

for electoral reform.[291]

In 1925, the government finally agreed to the growing demands for universal male suffrage by passing the "General Election Law."[292] This law gave voting rights to "all male subjects of the emperor" who were at least 25, raising the number of eligible voters to 20% of the population. The law also introduced a new electoral system (the medium-size, multi-member constituency system with a single, non-transferable vote) and Japan's first electoral campaign rules.[293] Both of these changes were readily supported by incumbent parties (including the Kenseikai, the Seiyukai and the Kakushin Club) who calculated that the new constituency system and campaign rules would allow them to retain control of the parliament even with the expanded suffrage provided for in the law.[294] Diet deliberations over the law lasted about a month, with most of the discussion focusing on who would be eligible to vote and run for office, not on campaign rules. Newspaper reports at the time emphasized the voter and candidate qualification issue and few articles discussed the deliberations simultaneously taking place in the Diet over the establishment of Japan's first election campaign regulations and the extension of the government's managerial reach into the electoral domain.

The General Election Law passed in 1925 contained a number of articles pertaining to electoral campaigning.[295] Among them, article 102 aimed to reduce corruption by introducing the kinds of campaign funding limitations familiar in other

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[291] In 1890, 129 of the Diet members were from the landowner class and 19 were from the commercial-urban. By 1920, however, there were 92 landowners and 29 politicians from urban areas. Similarly, although there were only 7 politicians who worked for companies in 1890, by 1920 the number had increased to 91. In 1919 the tax requirement was reduced again, this time to 3%, raising the percent of those eligible to vote to 5.5% of the male population.

[292] Soma, pp. 69-97.

[293] See Japan's Postwar Party Politics, by Masaru Kohno, Princeton University Press, 1997, for a rational choice analysis of this period. Kohno argues that studies of the decision to initially adopt this system in 1925 have found that "it was the result of political bargaining among the three incumbent parties allied at the time (the kenseikai; seiyukai and Kakushin Club)."

[294] Japan's New Party System, by Ronald J. Hrebenar, Westview Press, 2000. p.39.

[295] "Waga kuni no senkyo undo kisei no kigen to enkaku: taisei 14-nen futsuu senkyo seitei no teikoku gikai ni okeru giron wo chishin ni," by Yoshi Sato and Tomoyoshi Marumoto, *Refurensu*, National Diet Publication, November, 2010. Accessible online: http://www.ndl.go.jp/jp/diet/publication/refer/pdf/071805.pdf

This article states that the main restrictions in the 1925 law were 1) each candidate could not have more than seven election offices (art.90); 2) it was illegal to provide "resting spots" for electioneering (Art.92); 3) with the exception of speeches and letters of support, third parties could not take part in electioneering (Art 96); 4) canvassing, requesting votes during chance encounters with voters in the street, train, shops, etc., and use of the telephone for electioneering were prohibited.(Art 98); 5) The Home minister was given the authority to place restraints on the distribution and posting of printed matter for electioneering (Art. 100); 6) a ceiling was established for electioneering expenditures. (Art. 102)

democratic countries at the time.[296] Two additional articles, Article 98, introducing a ban on door-to-door canvassing, and Article 100, placing strict limitations on the publication, number, type and dissemination of campaign-related printed matter, went much further than campaign laws elsewhere. As detailed below, the restriction on door-to-door canvassing was *sui generis*, a fact known by Diet members as they deliberated.[297] No other democratic country at the time -- or today -- has similar restrictions. The new law also prohibited pre-election campaigning, established penalties for violations of the law, and strengthened the nationwide system for the public management and policing of elections and electioneering practices. Together, these pernicious and persistent controls functioned to severely delimit the communicative and informational aspects of Japanese election campaigns, constraining democratic participation by candidates and voters, and hampering the development of a vibrant political public sphere.

But campaign restrictions were not the imperial regime's only controls on free speech implemented at this time. Following the previous pattern of one step forward (increased participation) and one step back (public sphere controls), a few days before the new suffrage law was passed, legislators introduced what would quickly become the linchpin of a prewar, and later, wartime *information governance regime* -- the stifling Peace Preservation Law (chian ijiho, May 12, 1925) designed to suppress political dissent. A strict Press and Publication law intended to criminalize those who "disturbed the public peace," and a restrictive newspaper ordinance were also passed at the same time.[298] All of these laws were enacted during the final years of the "Taisho" era (e.g.1912-1926), a period considered by some historians and scholars as a time of flourishing Japanese democracy. But Halliday notes with some irony that, "the real achievement of 'Taisho Democracy' was the 1925 Peace Preservation Law, the key instrument of political repression for the next two decades."[299] According to Mitchell,

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[296] Ibid. The government stipulated that funding rules were necessary because bribery had become a major political problem and was driven by the need for electoral funds. In aiming to establish "fairness" in elections, then, Japanese officials hoped to control campaign expenditures so that even candidates with limited resources would be able to compete. The financial restrictions were based on the British 1883 corruption law; there was agreement about the limitations to expenditures but there was criticism that it would not be effective because there were no restrictions placed on contributions made by third parties.
[297] Soma, page 9.
[298] Also called the "Public Security Preservation Law."
[299] Halliday, p.73.

the introduction of this law "marked a major turning point in the expansion of political democratization…[I]n the spring of 1925 it is unlikely that a majority of politically-sensitive Japanese saw the fundamental contradiction between the passage of the law and the maintenance of the emerging parliamentary system."[300] Japanese electoral historian Masao Soma agrees, adding that the goal of bureaucratic and legislative elites at the time was to strengthen imperial rule; any appearances to the contrary, they had no intention of putting in place a genuine or "normal" system of democratic rule by the people.[301] In short, Japan's imperial leaders were not seeking to broaden the public sphere; they intended to suppress it. This they accomplished by instituting an enduring system of information governance *par excellence* that successfully denatured the political process for many decades to come.[302]

With the introduction of "regular" (e.g. general) elections the Japanese government had relinquished its right to determine the criteria for democratic representation (e.g. who could vote). But it had simultaneously strengthened its grip over general political activities through the Peace Preservation Law, while placing chilling restrictions on the entire spectacle of electioneering activities considered central to any truly representative government. How did this work in practice? The Peace Preservation Law had been enacted partially out of fear of rising public support for socialism, communism, and anarchism, especially following the founding of the USSR and Japan's own Communist Party, both in 1922. Aiming to stamp out this support and the interest expressed by the public in other "extremist" ideas, the law gave the government a free

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[300] See Richard H. Mitchell, Japan's Peace Preservation Law of 1925: Its Origins and Significance," *Monumenta Nipponica*, 28:3, 1973 p.343. Okadaira concurs, noting that there was not much opposition to the law inside or outside of the Diet. See: Yasuhiro Okudaira, Chian iji-ho shoshi, Iwanami Shoten, Iwanami Gendai Bunko, June 2006, pp.55-56.

[301] Soma, p. 9

[302] It is important to note that the desire to control opinion and information in the period during and after the First World War was not limited to Japan by any means; in fact, the issue of free speech and the potential need to constrain it was also one of the most important topics being discussed in the U.S. See: Freedom of Speech by Zachariah Chaffee, New York, Harcourt, Brace and Howe, 1920 for a contemporaneous report. During the First World War, there were more than 1900 – prosecutions in the U.S. involving speech violations. Post cites a January 10, 1920 editorial by Frank Cobb, editor of the *New York World*: "For five years there has been no free play of public opinion in the world. Confronted by the inexorable necessities of war, Governments conscripted public opinion as they conscripted men and money and materials. Having conscripted it, they dealt with it as they dealt with other raw recruits. They mobilized it. They put it in charge of drill sergeants. They goose-stepped it. They taught it to stand at attention and salute." See: "Representative Democracy: The Constitutional Theory of Campaign Finance Reform," by Robert Post, *Tanner Lectures on Human Values,* Harvard University, May 2013, p. 259, footnote 251.

hand in controlling dissent, paving the way for the formation of the notorious Thought Police (tokko) under the wartime Home Ministry. Kasza argues that, as the central pillar of prewar, and later wartime, thought control, the law was "used exclusively against leftists until 1935, by which time there were few true radicals left to arrest."[303] Strengthened in 1928, and again in 1941, between 1925-45, more than 70,000 people were arrested and prosecuted under the law.[304] Having successfully controlled the larger political sphere and general political activities and eliminated and/or stifled political extremists and alternative points of view, the electoral laws were then able to focus on the direct management of the political sub-sphere of electoral campaigning.

1.4. Establishing the Prohibition on Door-to-Door Canvassing

Rigid restrictions on political speech and discursive action have existed to varying degrees in many representative governments over the course of democratic history. Examples from the American context include the Sedition Act of 1798 criminalizing scandalous criticism of the US president and Congress, passed just seven years after the ratification of the First Amendment; the "Espionage Act" of 1917-18 banning criticism of the form of American government and the constitution;[305] and the Smith Act from 1950 criminalizing the advocacy of the overthrow of the US government. Nevertheless, in legislating the electoral domain, most modern democratic nations have narrowed the scope of their regulations to campaign contributions and/or expenditures, public financing, and transparency requirements.[306] With the possible exception of

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[303] "The main thrust of the law was contained in Article 1, which read: "Anyone who has formed an association with the objective of altering the *kokutai*, or the system of private property, and anyone who has joined such an association with full knowledge of its object, shall be liable to imprisonment with or without hard labor for a term not exceeding ten years." The State and the Mass Media in Japan, 1918-1945, By Gregory J. Kasza, University of California Press, 1993, p. 40;

[304] In 1941, the Security Preservation Law of 1925 was completely re-written, introducing more severe penalties for suspected communists; religious organizations were also now included among the groups watched by the Thought Police; appeals courts for thought crimes were removed. Thought Control in Prewar Japan, by Richard H. Mitchell, Cornell University Press, 1976.

[305] "The Espionage Act of 1917 was amended in 1918 and became known as the Sedition Act. The Act made it a crime to "utter, print, write or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States…." *Tanner Lectures*, Post, p.250. More recent examples might include the American "Patriot Act" passed in the tumultuous days after the 9/11 terrorist attacks, and the Japanese "State Secrets Act" discussed in this book.

[306] Legal scholar, Geoffrey Stone, notes that Americans "have not historically thought of elections as institutions in which extensive government regulation of speech is either natural or desired." "Electoral Exceptionalism and the First Amendment: A Road Paved with Good Intentions," Geoffrey R. Stone, 35

limitations placed on the use of broadcast advertisements, most democratic nations have refrained from regulating the means and methods of campaigning itself. Japan is an extraordinary outlier in this regard and is currently the only democratic country to prohibit electoral canvassing, long considered one of the primary forms of campaign communication, and one of the most important means for direct contact between voters and candidates.[307] Given the distinctiveness of the Japanese ban in comparative and historical terms, both the process that led to its introduction in 1925, and the judicial, legislative and historical reasons it remains in full force almost a century later, require fuller examination.

The effort to prohibit door-to-door canvassing first began in 1909, when a ban aimed at eliminating electoral corruption was included in a bill submitted to the lower house.[308] Although that bill did not pass, in 1914 the government established another committee to consider revisions to the electoral law.[309] This group deliberated from 1914-1917 and eventually submitted a draft election law to the Diet reintroducing a prohibition on door-to-door canvassing. Though neither of these early drafts passed, both contained similar justifications for a canvassing ban, including dissatisfaction with the way votes were garnered in Japan, that canvassing made it possible for candidates to solicit votes directly from voters, "bred favoritism," and "*harmed the freedom and impartiality of elections*."[310]

In 1925, as part of the major electoral reform that finally introduced universal manhood suffrage, the Diet began to consider anew the possibility of introducing a ban on canvassing as a way to control electoral corruption. Supporters of the proposed amendment argued that door-to-door canvassing was "harmful to the dignity of Diet members" and a major source of corruption.[311] In contrast, politicians opposed to the ban argued that it would limit the scope of permissible electoral activities to speeches and printed matter and have a negative impact on Japanese politics and society.

New York University Review of Law and Social Change, 665 (2011).

307 The other country was Korea, which no longer prohibits canvassing.

308 Americans did not become concerned with the power of money and corruption in politics until the late nineteenth century, at which time they introduced the direct primary, secret ballot and other reforms. The resulting introduction of these and other progressive reforms fundamentally changed the electoral landscape. See Soma: p. 46.

309 Soma, pp. 46-51.

310 Soma p.47.

311 Ibid.pp.48-49.

Opponents believed that if door-to-door canvassing were indeed corrupting the political process, the government should pursue and prosecute corrupt candidates instead of denying voters and candidates the opportunity to exchange views. They also rightly feared that the true aim of the government was to gain a tighter grip over election activities by limiting informal processes that would otherwise have been difficult for the government to control. No other democratic country in the world had a similar restriction – and the Diet members who eventually passed this legislation were apparently aware of that fact.[312]

At the time the law was being deliberated, door-to-door canvassing was one of the primary means of election campaigning in Japan, and had *never been regulated*. Until 1925, the pool of eligible voters and the pool of eligible candidates had come from the same relatively small group of tax-paying property owners. Given such familiarity, candidates often announced their candidacy by going to voters' houses one by one. Soma argues that the practice, more social than political, was an important form of greeting and that the policies or leadership qualities of the candidates were rarely directly addressed. Although vote buying did take place in Japan at that time – as it did in many democratic countries in some form or other (Britain had enacted one of the earliest corruption laws, the Public Bodies Corrupt Practices Act, in 1889) – most vote buying in Japan did not take place through door-to-door canvassing.[313]

By 1925, Japan's political parties had already established relatively strong organizational bases for voter mobilization and vote buying largely took place through "election brokers" and powerful campaign aides who acted as intermediaries in the candidate-voter relationship. Importantly, *votes were not bought one by one, but in groups or bundles*, with most of these interactions taking place in candidates' campaign headquarters, not in individual voters' homes.[314] This was especially the case in rural areas. Nevertheless, the arguments against the ban ultimately fell on deaf ears. When the prohibition on door-to-door canvassing was passed in 1925 it was justified for many of the same reasons provided a decade earlier, that it: 1) harmed the dignity of candidates;

[312] The reasons stated for introducing the prohibition on canvasing were: 1) to eliminate opportunities for improprieties and, 2) to have voting take place based on the qualifications of the candidate and their policies and not on favors.
[313] Ibid. pp.49-51.
[314] Ibid. p.50.

2) interfered with voters' selection of candidates; 3) interfered with the fairness of elections; and 4) was an opportunity for corruption and vote buying.[315] Although the ostensible aim of the law was to establish electoral fairness and integrity by removing avenues for vote buying and corruption, the ban substantially reduced opportunities for voters to interact with candidates and actively participate in the electoral process. Soma concludes that the extension of the government's reach into these areas of electoral communication is evidence that the real intention of the law was to remove any possibility for direct contact between candidates (especially socialist candidates who now had the opportunity to run for office) and voters -- and not merely to reduce corruption. Like corruption, however, the new law was harmful to the democratic process.[316]

Why had the bill passed? Most Diet representatives had not voiced strong opposition to the ban. After all, it was much more harmful to the small, working-class parties and candidates without strong party affiliation who had just been given participatory rights, than it was to the established conservative parties and incumbent politicians who already had considerable name recognition, campaign funds and support organizations capable of mobilizing the electorate. Additionally, a number of Diet members hoped that by limiting the scope of permissible electioneering tools to speeches and printed matter (and controlling the use, location and number of these), they might eventually get the government to agree to subsidizing the costs of campaigning, thereby removing the need for vote buying in the first place. Finally, incumbents in both houses of the Diet were genuinely fearful of the rising interest in socialist ideas among the Japanese public. Hrebrenar argues that, "When the Home Ministry promulgated campaign rules in 1924[sic], it acted under the assumption that the nation's voters were not sufficiently sophisticated to effectively evaluate the political appeals of politicians and thus might be easy targets for the rising Socialist movement that so worried Japanese leaders."[317]

The canvassing ban was not the only electoral restriction put in place in 1925. The government also introduced rigid restrictions on the number, size and distribution of

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[315] Ibid.pp.48-51; Also: "*Waga kuni no senkyo undo kisei no kigen to enkaku*," p.6:
[316] Ibid.
[317] Japan's New Party System by Ronald J. Hrebenar, Westview Press, 2000. p.50.

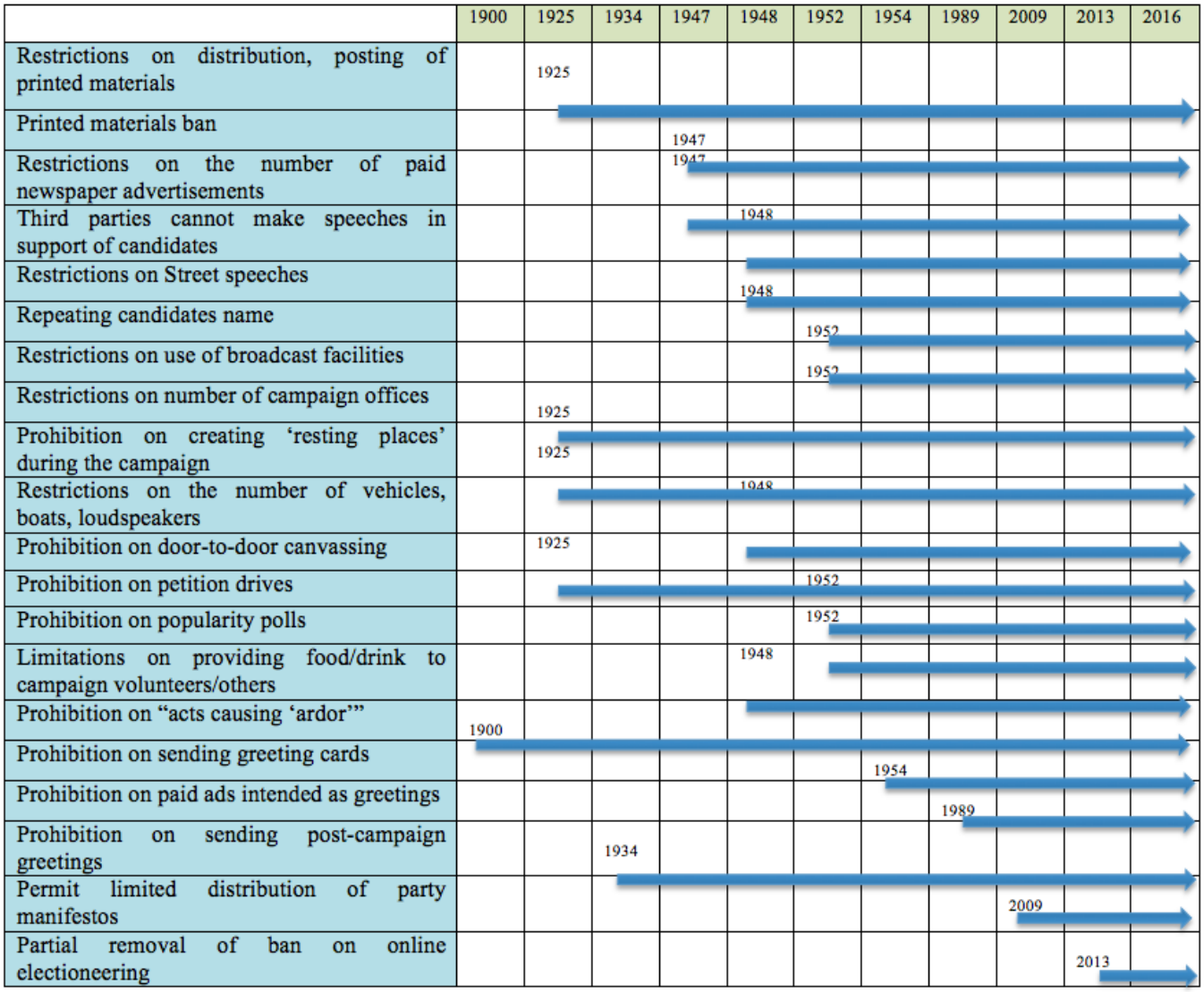
printed campaign materials, which, like the canvassing ban, still circumscribe electioneering today. When the first election under the law (in 1928) resulted in a wide array of election posters plastered throughout Japanese villages and towns, the government quickly instituted additional requirements mandating that all posted items had to be in black and white and no larger than 42cm by 30cm. In addition to making it a crime to distribute fliers from an airplane, they also banned use of the telephone, the most modern (though not yet widely-diffused) communication technology available at the time, and regulated the conduct and format of campaign speeches.

It is clear that the election regulations of 1925 were nothing but thinly-veiled attempts at establishing electoral rules beneficial to incumbents, a regulatory practice well known in the democratic world even today.[318] Even so, given the existing constraints on free speech in the Meiji constitution and the Peace Preservation Law, the canvassing ban and the restrictions on printed materials probably did not seem all that remarkable to most Japanese voters at the time.[319] After all, a significant portion of the Japanese public had just been given the right to vote – admittedly an historic move forward. It is unlikely in this context that Japan's newest citizens paid much heed to the government's quiet encroachment into the electioneering domain, or that they would have understood its potential historical significance if they had noticed it. In retrospect, however, there *is* something superbly epochal about the 1925 electioneering laws -- the canvassing ban and restriction on printed campaign materials, in particular -- and that is their utter resilience. Instituted under imperial rule, these laws would become momentarily irrelevant with the rise of fascism and the implosion of representative government during the prewar and wartime periods. But they would be resurrected part and parcel under the Occupation and strengthened in the postwar fever of democratization. Quirky, suboptimal and enduring, the electoral governance regime established in 1925 was flexible enough to serve the diverse aims of multiple masters – imperialist, fascist, Occupation and democratic. As detailed in Figure 1, below, ninety years after their introduction, regulations designed to stifle the rise of a political public

[318] "*Waga kuni no senkyo undo kisei no kigen to enkaku*." However, the restrictions on campaigning were not beneficial to new candidates, and many thought they were intended to protect incumbent politicians.
[319] Caps on electoral expenditures and a canvassing ban were put in place at that time. Other representative democracies (including the U.K.) also had election corruption laws in place that limited expenditures and contributions, but none of them placed limitations on the methods of electioneering.

sphere remain deeply embedded in Japan's electoral practice, subverting the discursive realm and genuine electoral participation in Japan. [320]

Figure 1. A Chronology of Major Japanese Electioneering Regulations, 1900-2016



Source: National Diet Library Legislative Reference Bureau, Nov. 2010, page 76; Translation and updates by author.

2. Electoral Domains and Information Governance in the Postwar Era

When Occupation authorities turned to the task of democratizing Japanese politics and society they chose to build on the prior history of representative government in Japan, placing the blame for the war on the military and the emperor system (if not the

[320] "*Waga kuni no senkyo undo kisei no kigen to enkaku.*"

emperor himself), and not on representative government.[321] As the first Asian nation to have established representative government, Japan had considerable prior experience in conducting elections and fairly well-institutionalized systems of political party competition, voter mobilization and parliamentary representation.[322] However, recognizing that the Meiji constitution had serious flaws as a blueprint for postwar Japanese democratization, and dissatisfied with the draft constitution proposed by Japanese politicians, General MacArthur selected a small group of Americans to write a new constitution, giving them just two weeks to complete the task. The new constitution passed by both houses of the Japanese Diet in 1946 (effective May, 1947) contained a free speech clause closely resembling the American First Amendment and provided for a Supreme Court empowered with the right of constitutional review.[323] It also introduced a number of important democratizing changes to the electoral system, established universal suffrage, and lowered the voting age from twenty-five to twenty. Following Japan's first election in 1946, however, the Japanese parliament voted to reinstate the prewar electoral system (medium-sized districts and the single nontransferable vote) as well as its attendant election campaign regulations.[324] As such, the ban on door-to-door canvassing, constraints on the size, number and distribution of printed matter, and other

321 Murai points out that, "Among the terms for surrender given in the Potsdam Declaration, there is reference to the removal of obstacles to "***the revival and strengthening*** of democratic tendencies among the Japanese people. This demonstrates the need to look back to Japan's political history in the period before World War II." The Rise and Fall of Taishō Democracy: Party Politics in Early-Twentieth-Century Japan", Murai Ryōta, September 29, 2014 published online: http://www.nippon.com/en/in-depth/a03302. See also: *Seitō naikakusei no seiritsu: 1918–27 nen* (The Establishment of the Party Cabinet System 1918–1927) and *Seitō naikakusei no tenkai to hōkai: 1927–36 nen* (The Development and Breakdown of the Party Cabinet System 1927–1936).

322 For one of the earliest discussions of the POEL and its impact on election campaigning in Japan see; Election Campaigning Japanese Style, by Gerald Curtis, Studies of the Weatherhead East Asian Institute, Columbia University, 1971; p.222.

323 For a history of the Japanese Supreme Court see: Kawagishi, "The birth of judicial review in Japan," *Int J Constitutional Law (2007) 5 (2): 308-331. doi: 10.1093/icon/mom011* 2007

324 See: Japan's Postwar Party Politics, by Masaru Kohno, 1997, for a rational choice analysis of the negotiations over electoral design in 1945 and 1947. Kohno argues that although the occupation represented a "specific historical circumstance" in which electoral design choices was made, this decision had not been dictated by MacArthur, but rather resulted from debates and power politics among the existing parties of the time. Kohno argues that studies of the decision to initially adopt this system in 1925 reveal that it was also "the result of political bargaining among the three incumbent parties allied at the time (the kenseikai; seiyukai and Kakushin Club)." The first postwar election in 1946 used a different system; however after that the country returned to the prewar system. He says that it is difficult to believe that this system was chosen merely because of its familiarity: "just as the adoption of the electoral system in 1925 was the result of interparty bargaining, the re-adoption of that system in 1947 must have been the product of the equally self- seeking behavior of political actors." He argues that the stakes were too high for members of the Diet to not have done so. (p.32)

oppressive imperialist and prewar limitations on electoral communication were reintroduced and/or subsequently strengthened over the next several years. In acknowledging its American parentage, some Japanese commentators sardonically noted that the new constitution "smelled like butter."[325] While this may have been true for the constitution, Japan's postwar election laws were thoroughly infused with the ideological premises of the nation's own imperialist and authoritarian past; they had been designed to strengthen an imperial nation, not to vitalize and empower a democratic public sphere.[326] Given the severity of these restrictions on speech, it is somewhat surprising that the Occupiers permitted their reintroduction. But they were likely as useful to the Occupiers in 1945 as they had been to imperialists in 1925, and would be to the dominant conservative party later on.

Japan thus began its postwar era with a brand new constitution based on the ideals of democratic citizenship, and a set of draconian, pre-modern campaign institutions designed to shape the electoral behavior of imperial subjects. Although the nation's unique canvassing ban was briefly abolished in February1947 after pressure by the Supreme Commander of the Allied Powers (SCAP), most postwar parties supported the ban and within a month it was reintroduced. Canvassing would briefly be permitted in limited ways a few additional times during the Occupation but after that no serious attempts were made to remove the ban until 1994; even that effort proved futile.[327] Today, this ban and other electoral relics of Japan's authoritarian past are strictly enforced and violators can be fined or imprisoned for violating them.[328]

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[325] "Though few were fooled about the document's origins (one Japanese journalist said it "smelled of butter," meaning it was distinctively American), the constitution was approved by both houses of the Diet on November 3, 1946, in the form of an amendment to the 1889 constitution. It went into effect on May 3, 1947." Alex Gibney, "Six Days to Reinvent Japan," *Wilson Quarterly,* Autumn 1996. Accessed at: http://archive.wilsonquarterly.com/essays/six-days-reinvent-japan.

[326]One small exception was that candidates were now permitted to use an important information and communications technology previously off limits – the telephone. Though few Japanese could afford to own telephones in the immediate postwar period.

[327] See: "Kobetsu homon kinshi wo meguru kokkai shingi to rippo jujitsu," [The Ban on Door to Door Canvassing, Diet Deliberation and Legislative Facts] by Tatsuro Fukjita, in *Seiskau kagaku*, 3-3, Feb.1996, for an analysis of Diet discussions in 1993 about abolishing the canvassing ban.

[328]Candidates were again given limited permission to visit the homes of relatives and friends during the campaign period but this was quickly reversed. Beginning in 2002, the Democratic Party of Japan included the removal of this ban (as well as the ban on internet use) during elections as part of its party manifesto.

2.1. The POEL and The Supreme Court: Public Welfare Versus the Public Sphere

It is impossible to understand the persistence of the public sphere constraints in the postwar era without examining the role of the Japanese Supreme Court. In addition to the constitutional guarantees of speech, religion and assembly provided in Article 21, one of the major institutional changes incorporated into the postwar constitution was the establishment of a Supreme Court with clear authority to carry out judicial review – including, of course, review of laws like the POEL. Given that many of the articles contained in this law were crafted under imperialist and fascist governments, one might expect the POEL to have been an obvious candidate for postwar judicial review. However, while legal scholars and academics in Japan have regularly debated the constitutionality of the canvassing ban and other restrictions contained in this law, and some lower courts have even ruled them unconstitutional, the Japanese Supreme Court has consistently, if curiously, found these controls on electoral speech in accordance with the Japanese constitution. In its first challenge on this issue in 1950, the Supreme Court held that freedom of speech could be curtailed in the interest of ensuring fair elections, declaring that, "Article 21 of the Constitution does not guarantee absolutely unlimited speech; legitimate constraints can be placed on its timing, place and means…in the interest of public welfare."[329] This classic example of the so-called "public welfare" thesis, an ill-defined yet all-encompassing judicial rationale, has been used by the Court in determining the constitutionality of the canvassing ban and many other political cases throughout the postwar period.[330][331]

In a well-cited 1981 case, the Supreme Court ruled again that the canvassing ban was constitutional. This time, however, in addition to the public welfare argument, the court opined that door-to-door canvassing was a matter of legislative policy and that its

[329] "Restrictions on Political Campaigns in Japan," by Masahiro Usaki, *Law and Contemporary Problems*, Volume 53, No. 2. Duke University Law Review, p 142.
[330] "Seiji sanka no kasseika to intanetto no kankeisei ni kansure ikkosatsu, [Effects of Internet Election Campaigns on Public Political Participation] by Chisako Tsuji, Shunichi Tsuji, and Shoichi Watanabe, *Josai Daigaku keiei kiyo*, No. 10, p. 86-87.
[331] ibid. In a subsequent case, the court clarified its initial reasoning, explaining that canvassing was harmful because it "raises the possibility of injustices such as bribery or threats...creates the opportunity for other harassment or unfair influence on voters…[and] causes excessive competition among candidates."

determination should ultimately be left to the parliament.[332] This decision is important because of what it reveals about the Court's assumptions concerning its role in the political process and the logic undergirding its decisions in electioneering and other political cases. Not only does the Court's deference to the legislature run counter to Article 81 of the Japanese constitution which gives the Supreme Court "the power to determine the constitutionality of any law, order, regulation, or official act," it consistently supports the conservative legislative status quo. The Court's tendency to eschew judgment on electoral matters and many other contested political issues is well-documented in its case history, leading foreign scholars to describe it as "the most conservative constitutional court in the world."[333] The Court's record of having struck down only 9 statutes since 1947 is confirmation that the moniker is well chosen.[334] However, the reasons for the Supreme Court's "judicial passivity" have been more difficult to tease out.

Twenty-five years ago Japanese legal scholar Masahiro Usaki took up a question that has been asked by many scholars since: "Why is the Japanese Supreme Court so Conservative?" Usaki answered by blaming the Court's conservatism on inexperience: "Except for a few legal scholars, the courts, the lawyers and the people were unfamiliar with the system of judicial review… [and] they have been willing to accept many restrictions on political freedom from ambiguous and equivocal "public welfare" concepts, without close examination of what these concepts actually entail."[335] But seventy years have passed since Japan adopted (or was forced to adopt) a system of judicial review, making arguments about judicial inexperience or a lack of familiarity with judicial review overly simplistic and less than satisfactory. In recent years, scholars have begun to consider a number of alternative explanations for the Japanese Supreme Court's *sotto voce* when adjudicating laws constraining freedom of expression. This exercise has

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[332] "Restrictions on Political Campaigns in Japan," by Masahiro Usaki, *Law and Contemporary Problems*, Volume 53, No. 2. Duke University Law Review, p 142.
[333] "Restrictions on Political Campaigns in Japan," by Masahiro Usaki, *Law and Contemporary Problems*, Volume 53, No. 2. Duke University Law Review, p 142.
[334] Law, David S. (2009). The Anatomy of a Conservative Court: Judicial Review in Japan," *Texas Law Review* 87: 1545. See also: Bolz, Herbert F. (1980) "Judicial Review in Japan: The Strategy of Restraint". *Hastings International and Comparative Law Review* **4** (87). The number was 9 as of 2013. Even in the rare case that the Supreme Court *has* found a legislative act or other action unconstitutional, such as in the case of chronic malapportionment, it has refrained from enforcing any legislative remedy.
[335] Restrictions on Political Campaigns in Japan," by Masahiro Usaki, *Law and Contemporary Problems*, Volume 53, No. 2. Duke University Law Review, p 156.

resulted in a number of plausible theories, confirming that the Court's "judicial passivity" is multi-causal, involving a combination of historical, institutional, structural and ideational factors.[336]

Though it is impossible to do justice to the broad, multi-faceted arguments that have been proposed for judicial passivism in Japan, it is still a useful exercise to briefly review a few of them.[337] Law professor Ronald Krotoszynski Jr. has deftly summarized a number of the explanations that have been proffered for the Court's conservatism. One of the variables discussed by Krotoszynski is historical. In its simplest form, the historical argument posits that Japan's prewar legal system established under the Meiji constitution was modeled after German and French civil law traditions that did not have mechanisms for constitutional review. Consequently, the problem with the court today is that "the ghost of Japan's civic law past haunts the common law constitution…" leaving the Court to "mediate rather than decide constitutional issues."[338] Although plausible on its face, many other nations without prior histories of judicial review have successfully introduced it into their legal systems. In fact, not only is "constitutionalism" on the rise, both Germany and France are among those nations that now have strong traditions of constitutionalism based on legal notions radically different from those of their prewar and wartime periods. Germany's postwar constitutional court was established several years after Japan's Supreme Court, but has struck down more than 600 statutes compared with the mere nine statutes found unconstitutional in Japan. France, too, adopted a form of judicial review more than a decade after Japan and yet "has found constitutional defects in over one third of the laws that it has reviewed."[339] This leads to the conclusion that although Japanese history and civic law practices have been important shaping mechanisms, by themselves they provide an incomplete explanation of the

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[336] "The Chrysanthemum, the Sword, and the First Amendment: Disentangling Culture, Community, and Freedom of Expression," by Ronald J. Krotoszynski, Jr; *Wisconsin Law Review*, 1998, No.905, pp. 23-26. See also: The First Amendment in Cross-Cultural Perspective: A Comparative Legal Analysis of the Freedom of Speech, by Ronald J. Krotoszynski, Jr; New York University, 2009, pp. 139-182.

[337] There are many articles in Japanese and in English on this issue. Two that contain summaries of the various arguments are: "Why is the Japanese Court So Conservative?", by Shigenori Matsui, *Washington University Law Review*, Vol.88 issue 6; 2011. Decision Making on the Japanese Supreme Court; See Also: "The Chrysanthemum, the Sword, and the First Amendment: Disentangling Culture, Community, and Freedom of Expression," by Ronald J. Krotoszynski, Jr; *Wisconsin Law Review*, 1998, No.905, p. 23-26.

[338] ibid. p. 25-26.

[339] p.1 The First Amendment in Cross-Cultural Perspective: A Comparative Legal Analysis of the Freedom of Speech, by Ronald J. Krotoszynski, Jr; New York University, 2009, pp. 139-182.

Japanese case.

Another explanation outlined by Kortoszynski relates to the process for selecting Supreme Court judges in Japan. As the dominant party for most of the postwar era, the conservative Liberal Democratic Party (LDP) has been able to single-handedly select members for the bench who share its basic conservative values. Thus, according to proponents of this theory, the conservative court merely reflects the conservative nature of the party itself. This argument is supported by law professors Ramsayer and Rasmusen, in an analysis of the Japanese judiciary's personnel decisions that goes beyond abstract theorizing to empirically deduce a number of structural and institutional reasons for the Court's conservatism. Ramseyer and Rasmusen's project is especially compelling because it explicitly examines an important topic discussed in this chapter – the electoral canvassing ban.

In their detailed econometric analysis of the careers of hundreds of Japanese judges, Ramseyer and Rasmusen singled out lower court judicial decisions related to the canvassing ban in order to illustrate how Japanese politics, and especially the political views of the Liberal Democratic Party (LDP), have discreetly influenced the career trajectories of Japanese judges.[340] Based on their analysis, the authors reach the astonishing conclusion that in politically-charged legal cases such as the ban on door-to-door canvassing, lower court judges whose decisions ran counter to the dictates of the ruling party were more likely to find themselves assigned to less desirable positions later on than those whose decisions supported the policies and practices of the LDP.[341] Ramsayer and Rasmusen cite numerous instances in support of this conclusion, including the case of a "star" judge and graduate of the prestigious University of Tokyo Law School, Haruhiko Abe, who in 1968 judged in Summary Court that the ban on canvassing was unconstitutional. According to the authors, "Abe's ten-year term came up for renewal in 1972, and observers worried that the Secretariat might not reappoint him. It did, but into oblivion. In 1973 it sent him to a Family Court, and in 1979 to a branch office," and there he stayed. [342] Abe's case is not an isolated one. The authors also provide evidence of

[340] Measuring Judicial Independence: The Political Economy of Judging in Japan by J. Mark Ramseyer and Eric B. Rasmusen, University of Chicago Press, 2003.
[341] Cited in "The Role of Precedent at Japan's Supreme Court," by Hiroshi Itoh, *Washington University Law Review*, Volume 88, Issue 6: "Decision making on the Japanese Supreme Court," 2011.
[342] Ramsayer and Rasmusen, p.21; The information on Abe is through 1997.

similar "punishments" meted out to other lower court judges, including Judge Tetsuro So, who found the canvassing ban unconstitutional in 1978, and subsequently spent long periods in Family Court and branch offices; Judge Kunio Ogawa, who held the ban unconstitutional in 1979 and never left branch offices until he retired in 1993; and Judge Masato Hirayu who found the ban unconstitutional in 1979 and spent his career in branch offices and Family courts.[343]

A separate analysis by Professor David Law also looks at judicial passivity from the standpoint of institutions. According to Law, the organization and structure of the Japanese Supreme Court "render it highly unlikely to depart from the wishes of the government for any meaningful period of time,"[344] an argument supported by a number of scholars in Japan and the U.S. who have examined the various rules and practices shaping judicial review in Japan. Law's argument, based on extensive interviews with Japanese judges (including sitting and former Supreme Court judges) and legal scholars largely supports the conclusions of Ramsayer and Rasumusen, though with a slightly different twist. Law does not deny that the LDP-dominated postwar political milieu has been important in shaping the actions of the Japanese judiciary; at the end of the day, however, he argues that it is the judiciary itself that renders the Supreme Court conservative. Law points to a number of factors in support of this claim, including the comparatively large number of seats on the Japanese Supreme Court (there are 15), and the "deliberate strategy of appointing justices close to mandatory retirement age" that make it literally impossible for a liberal judge to rise to the top. These and other factors, he argues, also make it easier to "correct the ideological direction of Court on an ongoing basis."[345]Ultimately, the Supreme Court is dependent for personnel and resources on a judicial bureaucracy (the General Secretariat), which "ensures that an already conservative judiciary will remain conservative with very little effort or intervention on the part of political actors."[346] These explanations for the career trajectories of judges (both those in the lower courts as noted by Ramsayer and Rasmusen, and those in the Supreme Court as pointed out by David Law) and their impact on judicial review are compelling, offering a more plausible

[343] ibid, p.21
[344] "The Anatomy of a Conservative Court: Judicial Review in Japan," by David Law, pp. 2; also by the same author: "Why has judicial review failed in Japan?" by David Law; *Washington University Law Review* 2011;
[345] ibid. p.2
[346] ibid.

explication for the constitutional passivity of the Court than either cultural or historical explications alone. But they, too, are not fully satisfactory.

It may be that in the search for a deeper understanding of the Japanese Supreme Court's passivity we need to look not only at history, structure and institutions, but also at ideas. Japanese legal scholar Yasuo Hasebe argues just that, saying that one cannot comprehend how the Japanese Supreme Court exercises (or does not exercise) its power of review without first understanding the "conception of democracy to which the Court subscribes." [347][348] In a thought-provoking article titled "Constitutional Borrowing and Political Theory," Professor Hasebe examines Japan's postwar practice of borrowing ideas about political processes and democracy from France, Germany and the U.S., finding an important clue to the Japanese Court's narrow conception of its role in German judicial positivism.

In the postwar era, Japanese legal scholars and judges borrowed fairly extensively from Austrian and German theorists who wrote during the Weimar era. Among these is the work of Hans Kelsen, who Hasebe describes as a democratic "pessimist." As a legal philosopher and jurist in Austria in the 1920s, Kelsen had seen firsthand how political bias could impact legal interpretations. The main architect of Europe's modern conception of constitutional review, Kelsen had written major portions of the Austrian constitution. As a jurist in the Austrian Constitutional Court, however, he was pressured by the government to take a conservative position on divorce. A liberal, social democrat, he refused and was removed from the Court in 1930. Later, in the preface to his classic tome from 1934, Pure Theory of Law, Kelsen lamented that "Jurisprudence had been almost completely reduced – openly or covertly – to deliberations of legal policy, and my aim from the very beginning was to *raise it to the level of a genuine science*…."[349] Kelsen did not believe that constitutional courts should be responsible for maintaining fundamental rights: "the role of constitutional review was

[347] Ibid. Also see Routledge Handbook of Japanese Politics, edited by Alisa Gaunder, Chapter on "Democratizing the Law in Japan," by Jonathan Marshall. p. 92-102.

[348] "Constitutional Borrowing and Political Theory," by Yasuo Hasebe; Professor Hasebe has recently (2015) been in the news for declaring his opposition to the LDP's plan to alter Article 9 in Diet discussions. As the speaker invited by the LDP itself, he surprised many when he spoke in opposition to the plan. See also: "Why is the Japanese Court So Conservative?" *Washington University Law Review,* Vol. 88 issue 6; 2011. Decision Making on the Japanese Supreme Court.

[349] From Empire to Union: Conceptions of German Constitutional Law since 1871, by Jo Eric Khushal Murkens, Oxford University Press,2013. p.22

rather to set clear rules for parliamentary democracy and to instruct the legislature on precisely what could be done by ordinary legislative process and what could be done only by constitutional amendments. For Kelsen, such vague concepts as "equality" and "liberty" are useless and even dangerous as bases for these purposes." [350] Kelsen was clearly no Habermas. The notion of a public sphere where "the basic principles of justice in society" could be deliberated was clearly anathema to Kelsen's democratic project.[351] Believing 'justice' an 'irrational ideal,' he excluded it from his research on practical law.

The adoption of a Kelsenian perspective is evident in the Japanese Supreme Court's steadfast refusal to "review the constitutionality of government action when the suit raises highly political questions."[352]Known as "the political question doctrine," in Japan, the doctrine provides the executive with an effective shield against judicial review and has been adopted in such notorious cases as the "Sunagawa case" which challenged the constitionality of the U.S.-Japan Security Treaty, as well as by lower courts in refusing to decide such hotly-contested issues as the constitutionality of Japan's Self Defense Forces.[353] Though it may seem odd that a court empowered with the right of judicial review would avoid making judgments in politically sensitive cases, Professor Matsui offers an intriguing explanation: "The conservative, noninterventionist constitutional jurisprudence of the Supreme Court may be seen as an attempt to preserve judicial independence from political accusation by introducing self-restraint." In other words, the Japanese Supreme Court skillfully employs Kelsenian theory not simply to promote a model of positivist democracy, but also out of a desire for self preservation. The problem for the Japanese electorate, however, is that even as the Court is able to save itself from politics, there remains no institution that can do the same for them. With no judicial counterbalance to the self-interested legislative rulemaking that protects conservative incumbents and perpetuates a right-leaning, nationalist "hereditary democracy" – it remains virtually impossible to incubate genuine democratic discourse and establish true deliberative democracy in Japan.

Hasebe concludes that the widespread adoption of a "Kelsenian" notion of

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350 "Constitutional Borrowing and Political Theory," by Yasuo Hasebe, pp241-242.
351 Ibid. Emphasis added.
352 "Why is the Japanese Court So Conservative?" by Shigenori Matsui, *Washington University Law Review*, Vol.88 issue 6; 2011. Decision Making on the Japanese Supreme Court.; p. 1387.
353 Ibid.

democracy and jurisprudence by Japanese legal scholars has meant that "the Supreme Court regards its principal role as that of guardian of 'pluralist democracy,' and … exercises its powers of review accordingly."[354] Hasebe claims that "most constitutional scholars in Japan do not subscribe to constitutionalism …but instead embrace a Kelsenian, noncognivist view of democracy." Lamenting the profound impact Kelsen's work has had on postwar Japanese legal theory, he admonishes Japanese constitutional scholars to move forward, complaining that, "Their adherence to relativistic notions in these areas represents an obstacle to Japan's achievement of an effective and dignified democracy."[355] Ironically, in spite of the translation of Kelsen's work into many languages, and its incorporation into numerous constitutional designs, legal theorist, Jo Eric Khushal Murkens argues that, "his thinking had little impact on postwar German jurisprudence."[356] It appears that this is also the case in much of the rest of the democratic world. According to American constitutional scholar Richard Pildes, the current trend among many democracies has been to embrace constitutionalism, which he defines as the effort by courts to bring "constitutional law to bear on the heart of the political process."[357] Figure 2, below highlights the extreme conservatism of Japanese electioneering laws in comparative perspective and reveals the impact that excessive judicial restraint has had on campaigning in Japan.[358]

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354 Ibid.

355 "Constitutional Borrowing and Political Theory," by Yasuo Hasebe.

356 From Empire to Union: Conceptions of German Constitutional Law since 1871, by Jo Eric Khushal Murkens, Oxford University Press, 2013. p.22

357 Oxford Handbook of Comparative Constitutional Law; edited by Michel Rosenfeld, András Sajó; Chapter 25 on "Elections" by Richard H. Pildes, pp. 529-544.

358 "Kore de ii noka: senkyo seido sekai demo ijo na bekarazu-ho"[Is this acceptable? The election system is an internationally unusual 'law of don'ts.'] From *Shinbun Akahata*, December 15, 2007.

Figure 2. A Comparison of Election Campaign Restrictions Among the G8 (2007)

	JAPAN	U.S	U.K.	GERMANY	CANADA	ITALY	FRANCE	RUSSIA
Restrictions on campaigning by public service personnel	Public servants prohibited from campaigning and almost all political activities; educators and minors may not campaign	None.	In principle none.*1	None.	In principle none. *2	None.	Prohibited from distributing ballots, manifestos and circulars.	Prohibited from making, distributing election-related printed materials.
Restrictions on canvassing	Prohibited.	None.	None.	None.	None.	None.	None.	None.
Restrictions on Pre-electioneering	Campaigning permitted solely from the day of notification of candidature through the day before the election	No set election period.	No set election period.*1	No set election period.	No set election period.	No pre-electioneering restrictions.	No pre-electioneering restrictions.	Electioneering is restricted to the campaign period.
Restrictions on distribution of campaign literature	Detailed restrictions on all types of literature; all non-specified means are prohibited.	None.	None.	None.	None.	None.	Detailed restrictions on handbills and posters.	None.
Restrictions on street rallies, speeches; campaign vehicles	Only between 8 am ~ 8 pm; limit on staff; must wear armbands; Limit on vehicles; loudspeakers restricted	None.	Loudspeakers only allowed on streets from 8 am ~ 9 pm.	None.	[No data]	[No data]	Prohibited on streets; permitted until the day before election.	[No data]
Restrictions on Internet & social media	Banned until 2013; now only partially banned	None.	None.	None.	[No data]	[No data]	Cannot refresh 2 days before election.	[No data]

*1 U.K.: Government election management officials cannot serve as campaign managers; Police officers cannot take part in election canvassing; Civil servants are expected to show restraint during the "purdah" period immediately before elections/referendums when specific restrictions on their activities are in place to avoid the appearance of bias towards a candidate or party. The term "pre-election" has also been used to refer to this period.

*2 Canada: Government election management officials cannot serve as campaign managers.

Source: Based on "Kore de ii noka: senkyo seido sekai demo ijo na bekarazu-ho," *Shinbun Akahata*, December 15, 2007. The G8 are now the G7 as Russia is no longer a member.

2.2. Introducing Pre-Modern Campaign Tools in the Digital Age: Japan's "Manifesto Movement"

It is clear from the discussion above that not only does Japan have one of the most micro-managed systems of election campaigning among the advanced industrialized democracies, neither its Supreme Court nor its legislature has been willing or able to promote substantive reform. In treating electioneering as a distinct category of constrainable (bounded) speech, the government, bureaucracy and the courts have endorsed and supported a law banning and restricting most potential avenues for electoral communication between candidates and the electorate. The Central Election Management Council, various local and prefectural election management committees

and local, national and prefectural police are charged with enforcing the law, and sanctions are applied. True to its sobriquet as a "law of must nots" (bekarazu-ho), the POEL has effectively limited the scope of discursive activities that *can* take place during the campaign period, constraining not only political parties and candidates but also voters, civil servants, youth and third parties. Beginning in the 1990s, however, a number of politicians began quietly talking about the possibility of a legislative revision of certain aspects of the POEL. Many of these early proponents of POEL reform were from opposition parties, but they were not a unified group and there was no clear consensus about how the POEL should be revised. Setting aside the thorny question of the canvassing ban, early discussions largely centered on revising the language of the POEL in order to permit *two electioneering activities widely used in other modern democratic nations*. The first of these was a very old electioneering tool initially used in the U.K. in the late 1700s – party manifestos; the second pertained to the use of the democratic world's most modern electioneering tool – the Internet (and other social media tools and applications as they arose). Though these two campaign tools are quite different from one another, exemplifying the oldest (pre-modern) and newest (post-modern) campaign tools used in democratic nations, both were constrained by the identical statute in the POEL, Article 142 regulating the distribution of printed matter.

These ad hoc deliberations on the revision of the POEL continued for a number of years in an uncoordinated way, but gradually the call for revision gained support among voters, the mass media, and many – but not all – Democratic Party of Japan (DPJ) and LDP politicians.[359] Eventually, in October 2003, the LDP introduced a limited bill to the Diet to revise Article 142 of the POEL, allowing distribution of party manifestos by political parties during election campaigns. The bill quickly passed both houses of the Diet and became law. Based on this revision, political parties finally gained the right to hand-distribute the kind of printed party manifestos that have been a

[359] The DPJ is now known as the Democratic Party (Minshinto in Japanese)At the time, one newspaper noted that,"Many LDP lawmakers have tried to block the bill, insisting it will give opposition parties an advantage by allowing them to make big promises that they wouldn't be able to easily fulfill. Opposition lawmakers then attacked the LDP for trying to scrap the bill, arguing that some of its members fear detailed campaign manifestos could be used against their efforts to water down Prime Minister Junichiro Koizumi's reforms." "LDP moves to revise electoral law: Change would let parties detail policies while campaigning," by Reiji Yoshida *Japan Times*, Oct 3, 2003.

staple campaign tool in other democracies for generations.[360] Notably, however, neither house of parliament had made any attempt at revoking restrictions on other classic means of election campaigning – including door-to-door canvassing and the distribution and posting of other types of printed materials. Nor was any effort made to change the law so that modern technologies such as the Internet could be utilized as electioneering tools. Online election campaigning would have to wait another decade – until 2013 – before removal of restrictions on its use. Even so, it was only partially liberated. Where had the movement to introduce party manifestos come from? And why had the revisions passed by the Diet in 2003 only allowed for the introduction of a 20th century "analog" campaign tool, but not the Internet?

2.3. The Political Primacy of Manifestos

Manifestos have been a part of British electoral politics in some form or other since the late 1700s, and have been employed in elections in the U.K. on a regular basis since 1906, when the Labour Party issued the first election-oriented party manifesto.[361] In Japan, the idea to disseminate similar policy manifestos as a form of electioneering was first promoted by local politicians in the 1990s and gained greater appeal at the turn of the century. Like many advanced industrialized democracies, Japan had been suffering from a decline in voter support for political parties, a rise in voter alienation, an increase in the number of floating voters (who tended to vote for unaffiliated, non-party candidates), and a fairly dramatic decline in voter turnout. Even after the major electoral reform in 1994 aiming to establish a pathway for the development of a two-party system and policy-based elections, Japanese elections largely remained constituency service-oriented and candidate-dominated,[362] with most voters mobilized through local candidate organizations (koenkai) and other social and personal

[360]The ostensible reason for this ban was that it was thought that their distribution would unfairly favor rich parties because they can afford to print many of these and are better able to mobilise volunteers to hand them out. The result of this historic decision was what became known as the "manifesto election." The idea was that the parties would finally have to stand for a set of policies for the first time ever. Importantly, parties were not allowed to distribute manifestos on their websites during the campaign.

[361] In 1935, the Conservative Party first issued the kind of pamphlet format utilized in the U.K. today, and it is this format that the Japanese adopted in 2003.

[362] "Political Reformers of Japan Unite!" by Gerald Curtis, *Miyakodayori* #74, July 17, 2003. Online: http://www.rieti.go.jp/en/miyakodayori/074.html

networks.[363] Tellingly, voter turnout in the first election held under the new electoral system in 1996 was one of the lowest in postwar history.

It was in this complex political context that a number of Japanese politicians initially proposed revision of the POEL to allow for the distribution of party manifestos during election campaigns. It was their hope that manifestos might help remedy the crisis in the discursive realm of Japanese electoral politics. When the idea of holding so-called "manifesto elections" (manifesuto senkyo) was first broached it was seen as a potential panacea for many of the ills of Japanese democracy. Japanese politicians and political pundits argued that once parties started to regularly provide voters with manifestos clearly stating their platforms, individual voters would be better able to distinguish parties from one another and select the one that best suited them. When the next election came around voters would be able to hold the parties accountable based on the promises they had made in their manifestos.[364] The result? Politics in Japan would at last become party- rather than personality- and candidate-centered, and policy issues -- instead of personal relations and image -- would become more important. However improbable, the idea was widely promoted by the mass media and had considerable appeal among voters, who understood manifestos as representing a binding social contract between the parties and themselves. By 2003, the word "manifesto" (マニフェスト; "manifesuto," a Japanized version of the English word;) was so widely-circulated in the media and party literature that it was awarded the grand prize in a popular "buzzwords-of-the-year" contest. Masayasu Kitagawa, former governor of Mie Prefecture, who had been an early adopter of a policy "manifesto" closely followed during his eight-year term as governor, [365][366]was selected to receive the award.[367]

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[363] See Also: Krauss and Pekkanen, 2010; Rosenbluth and Thies, 2010; Reed, 2009; Estevez-Abe, 2008.

[364]Once the manifestos were published, a number of websites provided ways for voters to compare the various statements included in them; some of these sites provided search engines so that a voter could look at specific issues and compare them across parties.

[365] "Campaigning for the Japanese Lower House: From Mobilising to Chasing Voters?, Patrick Köllner, *GIGA Research Unit: Institute of Asian Studies*. No. 55, July 2007. Online: http://repec.giga-hamburg.de/pdf/giga_07_wp55_koellner.pdf

[366] "Masayasu Kitagawa, now a Waseda University professor, has been credited with being the first politician in Japan to deem his platform a manifesto — a concept that caught on with other politicians. Kitagawa stuck to his action plan during his eight years in office. He then went on to urge other reform-minded governors and gubernatorial candidates to draw up their own manifestos during campaigning for April's elections." 'Manifesto' replaces slogans in election wordplay,' *Japan Times* by Junko Takahashi, July 16, 2003.

As Columbia Professor Gerald Curtis points out, however, Japanese politicians and the public had a very idealistic view of how party politics operates in any twenty-first century democracy:

> What's wrong with this Manifesto picture is that there are no politics in it. The Manifesto-inspired image of governance is of a kind of idealized bureaucratic state. In this ideal system, parties offer lists of specific policy promises. These promises are called Manifestos, that term written in katakana to suggest something new, original and profound. Voters decide what party to vote for based on the concrete policy promises made in the Manifesto, and then that party's elected politicians implement those commitments. When the next election comes around, voters will be able to judge how true the party in power has been to its Manifesto. Politics, in other words, ends when the Prime Minister comes into office armed with his Manifesto. After that governance is simply a matter of implementing the promises made in the Manifesto.[368]

Curtis continues with an important caveat: "Of course, parties, and the politicians who want to lead them, have an obligation to tell the voters what policies they favor. To the extent that the Manifesto movement will get parties to be more explicit in defining their policy agendas, it will provide information that voters can take into account at election time. But it is unrealistic to think that it can amount to more than that."[369]

Nevertheless, in October 2003, the LDP, which had remained in power for most of the postwar period without ever having had to provide the public with particularly clear summaries of its policies, submitted a bill to the Diet to legalize the distribution of party manifestos during election campaigns. According to newspaper accounts, the LDP was at least partially motivated by "fear of a backlash from voters and the media, which

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[367] For a humorous depiction of what it means to review British manifestos prior to an election, see: "An idiot's guide to the political party manifestos - GQ.co.uk May 5, 2015; Access at: www.gq-magazine.co.uk/.../who-should-i-vote-for-general-election-201... This tongue-in-cheek spoof on British manifestos offers summaries of major political *party's manifestos*, "to help you decide how to *vote." They note that* "parents of 3-4 year olds *will receive* 30 hours of free childcare per manifesto... **"Otherwise, they suggest that you "Read the party manifestos in full**: Labour: "Britain can be better" (86 pages); Conservatives: "Strong leadership, a clear economic plan, a brighter, more secure future" (84 pages); Liberal Democrats: "Stronger Economy. Fairer Society. Opportunity for Everyone" (158 pages); The Green Party: "For the common good" (86 pages); UKIP: "Believe in Britain" (76 pages).

[368] From Rieti.go.jp July 17, 2003 in *Miyakodayori* #74, by Gerald Curtis.

[369] Ibid.

have called on political parties to draw up detailed policies."[370] But both houses of the Diet quickly passed the law to amend the POEL, paving the way for the distribution of party manifestos for the first time in Japanese campaign history. Japan's first "manifesto election," held in November 2003, was met with great fanfare. Gaining a place in history as the first party to submit its party manifesto to the public, the opposition Democratic Party of Japan (DPJ) also gained considerable political ground, winning 177 of 480 seats in the House of Representatives – its largest share since its founding. Professor Steven Reed summarizes the DPJ's strategy as follows: "By presenting the public with a manifesto signed by every candidate, the DPJ solved two problems. First, a new party that has never held power must always overcome a credibility gap. The manifesto answered the charge that the Democrats could not rule because they did not agree on the policies they would enact if elected. Second, the DPJ manifesto challenged the LDP to respond with a manifesto of its own. The LDP response made it clear that it was much less unified on policy than the DPJ and gave the DPJ a single target to attack."[371]

The DPJ had gained political momentum from the introduction of manifestos, but the "manifesto election" failed to live up to its pre-election hype in at least one important regard -- voter turnout was the second lowest since 1945. Although the reasons for this are varied and complex, it cannot have helped that, in spite of all the buzz about "manifesto elections," voters had difficulty getting their hands on the information contained in them, if not the actual manifestos themselves. A survey conducted after the election found that 53% of respondents had received information about each party's manifesto from TV, while 27% of them gained this information from newspapers; *a mere 2% said that they had obtained an actual manifesto.*[372] How could this be? In spite of its buzzword status, the amendment to the POEL allowing for the distribution of party manifestos during elections had not actually opened the electioneering floodgates. Many of the regulations contained in the 450-page, 275-article POEL still applied to party

[370] "LDP moves to revise electoral law," by Reiji Yoshida, *Japan Times,* October 3, 2003.

[371] "Japan, Haltingly Toward a Two-Party System, by Steven Reed, Chapter 13, in The Politics of Electoral Systems, edited by Michael Gallagher and Paul Mitchell, Oxford University Press, 2005.p. 286

[372]"Opinion Survey on the 'Manifesto Election," *Fuji Research Institute*, November 2003. When asked which type of media would be the most appropriate for learning about the content of the parties' manifestos, 79% said TV; 75% said newspapers; and 47% chose the internet. However, at the time of this survey, parties were prohibited from providing their manifestos on their websites during the campaign period.

manifestos even after revision. This meant that politicians could only distribute them under very specific circumstances; placing the party manifesto online was not one of them (later revised).[373] Even after revision, Article 142.2 of the POEL still regulated the use of manifestos as electioneering tools in the following ways: 1) the type of election in which they could be distributed (only regular elections for the upper and lower house of the Japanese Diet; later extended)[374]; 2) which individuals and groups were permitted to distribute them (only individuals on the party directory); [375] 3) when they could be distributed (only during the official campaign period)[376]; 4) what could be distributed (only pamphlets containing important policies related to national politics;)[377]; and finally, 5)where they could be distributed (within the election offices of a registered political party; at a campaign meeting or a street speech, but not online).

Some of these remaining constraints appear to have come as a surprise to those who had been most active in calling for the amendment in the first place. Soon after the campaign began, the DPJ announced its intention to publicize its manifesto on its website and distribute it to supporters via email. The Party was promptly informed by national election management officials that this would be in contravention to the law.[378] The manifesto amendment had evidently not been drafted with 21st century technology in mind. Of course, neither had the POEL; and yet in the ninety years since its core tenets and articles were enacted, it has successfully constrained the use of a broad range of pre-modern (handbills, posters, speeches, newspaper advertisements, etc.), modern (television, radio) and post-modern (internet, twitter, Facebook) electioneering tools.

[373] In much the same way, local election manifestos were banned altogether until 2007, and even then conditions were attached to their distribution. They could only be distributed in prefectural governor and mayoral elections; they had to be in the format of standard political fliers (a single A4-size piece of paper printed on both sides and folded in half). The number of local manifestos was also limited: for gubernatorial elections: 100-300,000; for mayors of national designated capital cities: 70,000; for mayors of other cities: 16,000; for ward mayors: 16,000; for town and village mayors: 5000. They could only be distributed within campaign offices, at a campaign-related meeting, during "street speeches," and as newspaper inserts. The costs of publication were to be subsidized by local governments.

[374] "and not in national elections (kokusei senkyo), by-elections or local elections."

[375] "independent and unaffiliated candidates as well as incumbents who did not belong to a party could not disseminate manifestos."

[376] This was later revised to allow dissemination prior to the election for the upper house, but not at any public forums held prior to the start of the official campaign period.

[377] Local political manifestos could not be distributed.

[378] When the law allowing the distribution of party manifestos was first passed, manifestos were not allowed to be placed on party websites during the campaign period and were otherwise very difficult to obtain. This was later amended.

Like a running bamboo plant without a rhizome barrier, there seemed no method for halting the path dependent perversions inflicted on modern Japanese electioneering by the POEL. For proof of this point, one need go no further than the efforts to introduce online election campaigning that first began in 1996.

2.4. "Interpreting" the POEL in the Internet Age

"For some time now, the Internet has been widely used in the United States, Europe, South Korea and other parts of the world as an important channel of communication between the political community and the public and as an effective tool for election campaigns. We hope the Diet's move, albeit a grossly belated one, to catch up with the trend will lead to a significant change in Japan's closed political culture, which is marked by an excessive dependence on entrenched support groups and organizations."

Asahi editorial, April 20, 2013 (English-language edition; emphasis added):[379]

The same article in the POEL that had made it difficult for parties to hand-distribute their manifestos during election campaigns was also responsible for keeping the Internet at bay for more than 18 years. As in the case of the manifesto movement, the effort to remove restrictions on online election campaigning had begun in the 1990s. And like the changes made to the POEL in 2003 allowing for the distribution of manifestos, the revisions to the POEL finally introduced in 2013, making online electioneering (net elections, netto senkyo) a reality, represented a partial opening at best. How had the debate about online electioneering begun? Who were its major proponents and opponents? And why had the Diet chosen (once again) to pass a law that represented only a partial revision?

Most Japanese politicians, and a considerable portion of the public, first became aware of the so-called "ban" on online election campaigning in 1996 after the now-disbanded reformist party, the New Harbinger Party (shinto sakigake), submitted a public query on the issue to the
Election Affairs Bureau of the Ministry of Home Affairs (now the Ministry of Internal Affairs and Communication, or MIC) just prior to a general election.[380] The New

[379]Editorial: "Internet election campaigns can change Japan's politics," *Asahi Shimbun*, English edition, April 20, 2013.
[380] Ministry of Internal Affairs and Communications. "Ministry of Public Management, Home Affairs,

Harbinger Party posed three broad questions about the POEL and online election campaigning.[381] The first pertained to the constitutionality of an Internet ban; the second concerned the interpretation of various articles contained in the law (especially articles 142 and 143 relating to "printed matter" and "electronic media," respectively);[382] and the third related to the government's regulation of the "political activities" (seiji katsudo) of parties.[383]

In its response, provided after the election had concluded, the MHA's Election Affairs Bureau stated that Articles 142 and 143 limiting the distribution of printed matter during the election *had been found to be constitutional in separate evaluations by the Japanese Supreme Court* (in 1954 and 1963, respectively). They also explained that the phrase "printed matter" in the POEL referred to *any Japanese characters or letters that were written on an item*, and therefore characters appearing on the monitor of a personal computer fell within the scope of the law. Furthermore, because candidate and party websites were designed to "distribute printed material for use by an unspecified or large number of people (part of the official definition of electioneering)," they also fell under POEL rules limiting the distribution of printed material during an election campaign. Finally, any content that was a clear request for a vote, suggested that an individual was going to be a candidate, or included a prospective candidate's district and campaign promises, was considered electoral activity, and therefore fell under the law.

In short, the Ministry made clear with this pronouncement that the government intended to handle candidate and party websites exactly as it had handled all other types of printed materials since 1925. Furthermore, following the logic embedded in this "law of must nots" (bekarazu-ho), the Ministry concluded that, "because the distribution of printed materials on the internet was not something that had been outlined in the law," it

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Posts and Telecommunications (MPHPT)" was used prior to 2004.

[381]For the original query see; "Kaitogan" at" http://www.coara.or.jp/~sakigake/etc/situmondo" Accessed on October, 16, 2000.

[382] There were also clauses contained in these articles referring to the "distribution" and "display" of "printed matter."

[383] Here, the party asked whether, Article 201.5, which regulated political activities could be applied to the use of party websites on the Internet. In a separate section, the party included a number of concrete examples of what it wanted to know, such as the kinds of information that could legitimately be included on a website without violating the law; whether a party's URL could be included on various permitted campaign materials, such as newspaper advertisements and posters; whether websites would be subject to the ban if they were on foreign servers, and other related questions.

was prohibited.[384] Ironically, one of the reasons for passing the POEL in 1925 had been to minimize the electoral advantage enjoyed by candidates with better access to financial resources (the fairness issue). Yet the Internet is a much cheaper means than the posters and advertisements permitted under the law and subsidized by the government, and is a much more efficient tool for the wide distribution of political and campaign information than the printed materials of the past. The New Harbinger Party and subsequent supporters of online electioneering made this point forcefully over the next 18 years. But the Ministry's interpretation was fixed: anything not expressly permitted was forbidden. Under that reading it seemed as though the Internet might never be used for election campaigning.

Although the initial response from the Ministry only referenced the use of candidate and party websites, in practice, as new information technologies, software and applications became available they, too, were found to fall under the scope of the law. Eventually, the ban covered not only candidate and party use of the Internet and e-mail, but also electoral use of YouTube, Twitter and Facebook, as well as the domestic versions of these social media, Niconico Douga and Line. It was readily apparent that the Ministry's interpretation of the POEL was not limited to the electioneering behaviour of parties and candidates, either. The rules also applied to digital communication and electioneering by voters, activists, youth and other "third parties" in the same way they had been applied to written documents since 1925. One extraordinary early example of the impact the Ministry's interpretation of the law had on the electoral participation of these so-called "third parties," took place just prior to the June 2000 election. In this instance, a number of Japanese activist groups borrowed a technique successfully used by Korean activists and posted online "blacklists" (rakusen undo) of candidates they deemed unsuitable for office. Afraid of potentially breaking the law, one group, the Osaka-based "Alliance to Defeat Unqualified Parliamentarians," removed its list of 13 politicians whose re-election it opposed from its website for the duration of the campaign. When asked why they had done so, they cited concern that their actions might be construed by MOHA as campaign-related and thus against the law.[385]

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[384]Nihon Intaanetto Kyokai 2000, p.165

[385] "Movements like these are not democratic," Muneo Suzuki, campaign director of the Liberal Democratic Party, which has governed Japan for 43 of the last 45 years, told the daily *Asahi Shimbun*. "There is a fear

In the same election, some politicians left their websites untouched but up and running, because material that had been posted before the election was allowed to remain if no alteration was made. This became a fairly common practice over the next decade. Still, the rigid election rules and the watchful eye of the ministry and the network of election management bureaus throughout the country, made many politicians, voters and "third party" activists reticent to post *any* campaign information on their websites, especially during the first several years after the Ministry's interpretation of the law. There were, however, a number of "silent" protests during the campaign period that were widely reported in the press. During the June 2000 campaign, for example, DPJ politician, Satoshi Shima, posted *a blank webpage* in order to register his opposition to the ban. Visitors to his site who clicked on the page were treated with an audio recording of Mr. Shima criticizing the restrictions on cyber-campaigning.[386] This action was legal, in the same way that using the telephone is legal in Japanese election campaigns -- both are audio-based messages, so do not come up against the rules controlling printed matter. In the last few years before the law was finally revised in 2013, such acts of cheeky disobedience, rare in Japan in almost any realm, turned into unabashed flaunting of the rules by multiple parties and candidates.

2.5. The Partial Removal of the Ban on "Net Elections"

In the spring of 1998, five years before the LDP submitted the bill allowing for the distribution of party manifestos, the opposition DPJ, whose members were often younger and more Internet-savvy than members of the LDP, submitted the first ever bill to the Diet to amend the POEL to allow online electioneering. The bill was easily defeated by the majority LDP and its coalition partners, who had fewer members with active websites at the time (36 percent for the LDP versus 61 percent for the DPJ), and cited the danger posed by hackers and the existence of a digital divide as reasons for

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that opposition candidates may take advantage of this campaign. Their criteria are not clear, and it is not appropriate for the media to report about it." For a summary of the 2000 case, see: *New York Times*, June 18, 2000; "Lone Voice No Longer, a Japanese Gadfly Catches On," by Howard French. Whether or not such movements should be permitted during the campaign period is still widely debated in Japan.

[386] Personal interview with Satoshi Shima, November 2000. Accessed on 2000.10.16: http://www.coara.or.jp/~sakigake/etc.situmonsho]See also *Kyoto shimbun*, 2000.6.19 "HP onse dake de shiji Sonae"
Shima satoshi (cited in Seisaku torendo 2000.5.15)

maintaining the ban.[387] The LDP leadership was particularly reticent in the early years to support efforts at revision of the law. The party's traditional constituents and party members themselves were older, less likely to be online, and feared that changing the law could give the DPJ or other parties an advantage. As the LDP waffled and opposed, the DPJ made a number of subsequent legislative attempts to eliminate the ban in 2000 and 2001. Each time, the bills were either tabled or denied. In March 2000, as part of its "informatization project," the Democratic Party announced its goal of achieving online election campaigning by the 2003 election. Needless to say, that election came and went without the Internet. But 2003 was a noteworthy electoral year for a different reason: this was the year of Japan's first "manifesto election."

The DPJ continued to submit increasingly more refined bills in 2004, 2006 and again in 2010, a short while after the historic election bringing the party to power in 2009. The party also began to include election campaign reform in its manifestos, updating the language with references to newer technologies and applications as they became available. In 2004, the DPJ manifesto focused on allowing campaigning to take place on websites and e-mail; in 2005, they added smart phones and blogs to the mix. Over time, Japanese politicians and parties began to increase their use of websites to reach voters, posting messages and loading short video clips explaining their policies. Party and candidate websites gradually became more sophisticated, and the newly available tools and applications progressed from chats and blogs to posting videos on YouTube (or Japan's local equivalent, Nico Nico Douga [now, niconico]), placing comments on Facebook, sending short messages on twitter or utilizing Japan's largest social network, LINE. [388] Once an election drew near, however, candidate websites and most of the social media would largely grow silent when candidates and parties had posted what were by then *de rigueur* notices stating that, "in accordance with the POEL," their websites would not be updated and no new information would be provided until after the election.

Given the constraints imposed by the POEL on printed matter, speeches, and

[387] Some Ministry officials and politicians appeared genuinely concerned about the digital divide. In 1996, a fairly large number of Japanese did not have ready access to online information and there was concern that this might create a political divide on top of the existing social one.

[388] Nico Nico Douga is a video sharing website in Japan. In 2012 *Nico Nico Douga* changed its name to niconico. As of November 2015, Niconico is the eighth most visited website in Japan. Another domestic site is "LINE."

other campaign tools, electronic campaigning did not look much different from "offline" campaigning in Japan. As political scientist Gerald Curtis has sarcastically noted in reference to analog campaigning, "Most campaigning in Japan comes to a screeching halt as soon as the official campaign period begins."[389] Nowhere was this truer than in the practice of removing online information or discontinuing the updating of websites or other media once the official campaign period had commenced. This practice continued for 18 years after the MHA's initial interpretation effectively banning online campaigning. It even outlived the ministry itself.[390]

2.6. The Effort to Move Beyond "Pre-modern" Campaigning

"The internet was a technology with which newcomers would be able to break through the established screens and filters, something like door-to-door campaigning on steroids. Thus, like door-to-door activity, the internet too was kept off limits." [391]

The DPJ played the largest role of any single party in keeping the debate about online electioneering on the political agenda throughout the 18-year period that the Internet ban remained in place.[392] Established in 1998 as a result of the amalgamation of a number of smaller parties, the DPJ aimed for the establishment of a genuine two-party system and believed that the better connection to voters provided by the Internet would be useful in achieving this goal. The party had also been a major supporter of the manifesto movement discussed earlier for similar reasons but had never lost sight of its goal to realize online campaigning. In 2005, almost a decade after the 1996 query, a small shift became apparent – both in terms of party and candidate acts of "disobedience" during elections, and also in terms of a general acceptance among Japanese legislators, the public and mass media that the internet and rapidly evolving social media could be useful tools during election campaigns. In truth, by 2005, politicians from all parties

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[389] Curtis

[390] In 2001 Japan introduced a major administrative reform that led to the disappearance of a number administrative units as they were folded into other ministries.

[391] "Policing Political Speech: Japan's Mistrust of the Marketplace," by Dan Rosen, *Michigan State International Law Review*, Volume 22.3 p. 805.

[392] Also prior to 2005 many Diet members were said to have an "internet allergy." See: "Netto senkyo ga kaeru seiji to shakai: nichimeikan ni miru arata kokkyoen no sugata," Edited by Shoko Kiyohara and Kazuhiro Maeshiima, Keio Gijuku Daigaku Shuppankai, 2013, p.4.

were beginning to ignore some of the regulatory constraints imposed on Internet use during elections. During the lower house election in 2005, for example, candidates from both the LDP and DPJ were known to have updated their websites with their stump schedules and other campaign-related information after the election had begun. That year, both parties established committees to discuss POEL reform.[393]

But perhaps the biggest catalyst for change was change itself. In April 2007, the DPJ gained a majority in the upper house, and two years later achieved its historic victory against the LDP, gaining 308 seats and an absolute majority in the lower house. These victories guaranteed a stable arrangement for policy making and finally provided the party with an opportunity to reintroduce the issue of "net reform" from a standpoint of considerable strength. The DPJ had included reform of the POEL in the 2009 party manifesto that brought it to power and it was a promise the party intended to fulfill.[394] The party had gained the attention of Japanese voters by proclaiming the birth of a "new kind of politics;" party leaders believed that the Internet could be an important part of that new politics.[395]

2.7. Achieving a Two-party consensus on POEL Reform

POEL revision had long been hindered by concerns about how to handle two issues: defamation and spoofing.[396] By late 2009, however, the DPJ and LDP had

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[393] The LDP formed the "Working Team on Online Election Campaigning" and the DPJ established a "Net Electioneering Investigation Committee for the Reform of the POEL." Ibid.

[394] According to Nishida, in their 2009 Manifesto, the DPJ noted their stance on election campaigning as follows (See: Netto senkyo: kaikin ga motarasu nihon shakai no henou, by Ryosuke Nishida, Toyo Keizai Shinposha, 2013:

1. They would refuse funding from corporate groups and second-generation politicians;
2. They stated that the goal of this policy was to remove mistrust in politics and create an environment in which a diverse group of people can become politicians.
3. In terms of a concrete policy, they stated that they wanted to work to reform the Political Funds Law, and that three years later would enact a law to prohibit funds from organizations and contributions through the purchase of party tickets. They also wanted to carry out tax reform that would allow individuals to donate during elections.
4. They also pointed out that the party had its own rule of not allowing relatives or spouses of incumbents to continually run for office in the same electoral district.
5. They wanted online campaigning to be legal once a policy was created to prohibit abuse and establish fines for spoofing and impersonation.

[395] Ibid. p.101. There were a number of fairly prominent DPJ members who had been working on this issue for some time, including Kenji Fujimi, Kan Suzuki, and Jun Matsui. Another important player was Mr. Toshiro Ishii, the DPJ lawmaker in charge of a bill submitted in 2010. He had worked hard both within and outside the Diet to get momentum going for change.

[396] "Netto senkyo ga kaeru seiji to shakai: nichimeikan ni miru arata kokkyoen no sugata," Edited by

reached a consensus on these issues and several other key points. Most of the following points of agreement were later incorporated into the law:

> 1) Election campaigning using websites would be limited to candidates, parties and political organizations; third parties and voters would not be allowed to use the web or email to carry out campaigning.
> 2) Anonymity would not be allowed. All websites used for campaigning would have to include contact information and email addresses.
> 3) Information could be updated until the day prior to the election and could remain posted on the day of the election.
> 4) Fines would be established for defamation.
> 5. Twitter would be allowed within current laws, self-control would be exercised until a means for confirming identities was established.
> 6. Only candidates could purchase paid online banners.

Based on these understandings, in May 2010, a draft bill for revising the POEL was submitted during the 173rd Diet session by the "Interparty Council on Online Election Campaigning," a bipartisan deliberation council on revising the law. Given the support from the heads of all of Japan's political parties -- something practically unheard of in Japan – the law was expected to sail smoothly through the legislature in time for the upcoming July 2010 upper house election. On June 4, 2010, however, Prime Minister Hatoyama was forced to resign in order to take responsibility for failed policy in Okinawa, and the bill for POEL revision was tabled. Naoto Kan, a strong supporter of POEL revision became the next Prime Minister, but two things would happen under his watch that led to a further postponement. First of all, the DPJ lost the upper house election that year and with it their stable leadership in the Diet. Secondly, the unthinkable happened on March 11, 2011: the triple disasters (earthquake; tsunami; nuclear accident) at Fukushima. Once the Fukushima disasters occurred, it would be some time before the Diet would be able to regain the momentum on the admittedly less pressing issue of election campaign reform.

2.8. Enter the LDP to Take All the Glory

Although the DPJ had been the major proponent of POEL reform for more than 15 years, once it lost its mandate in the Diet, the LDP, one of the most ardent *opponents* of

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Shoko Kiyohara and Kazuhiro Maeshiima, Keio Gijuku Daigaku Shuppankai, 2013, p.4.

reform a decade earlier, took ownership of the issue. The LDP had actually begun preparing for the eventuality of internet campaigns as early as 2005,[397] when it hired a number of PR consulting firms to develop marketing strategies to improve the Party's image and lead the party's belated *entrée* into the information age. By 2009, the Party was working closely with some of Japan's largest advertising agencies and public relations firms, including Dentsu and Prap Japan. These efforts signaled that the LDP was finally ready to breach the door to modern electioneering. Though the final bill allowing for internet- and social media-aided election campaigning would not pass both houses of the Diet until April 2013, by the time of the House of Councillors election in December 2012, it was obvious that change was imminent. By that point, Prime Minister Abe had hundreds of thousands of followers on Facebook, Twitter and the local social network, Line. On the final hour of the final day of the upper house campaign, with uncharacteristic political finesse (and likely coaching from PR consultants), Prime Minister Shinzo Abe made his final campaign appeal in front of 2000 flag-waving Japanese information technology supporters in Tokyo's "electronic hub," Akihabara. The stunt, unusual in Japanese politics, was quickly and widely conveyed on political blogs, uploaded on YouTube and other video sites, tweeted and retweeted. It was even picked up by traditional media.[398] It had taken 18 years, but the LDP had finally signaled that it was ready for the Internet, jumping on board with uncharacteristic gusto. Four months later, the18-year old ban on Internet electioneering was finally removed.

2.9. The POEL and the Power of Path Dependency

"Japan has long lagged behind other developed countries in the use of the Internet for campaigning. It is our hope that the revised election law will strengthen Japanese democracy by boosting the public's participation in the political process."[399]

The Japan Times July 10, 2013

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[397] "Seiji sanka no kasseika to intanetto no kankeisei ni kansure ikkosatsu, [Effects of Internet Election Campaigns on Public Political Participation] by Chisako Tsuji, Shunichi Tsuji, and Shoichi Watanabe, *Josai Daigaku keiei kiyo*, No. 10, p.95.

[398] Details are from Nishida.

[399] "Japan's First Internet Election," *Japan Times* July 10, 2013.

The Japanese public, politicians, voters, and online and traditional media expressed considerable enthusiasm and hope with the arrival of "net elections." But in truth, the reform had not been a sweeping one. As in the case of party manifestos, the change in the law represented only a partial opening, and many restrictions remained. For all their fanfare, the revisions clearly favored the speech rights of candidates and parties over those of the general public, highlighting Diet members' assumptions that elections were *their* domain, not the public's. More importantly, because the POEL had remained essentially intact, the existing ninety-year old restrictions on canvassing and the distribution of printed material would now shape how "internet electioneering" could take place. For example, given extant historical constraints on "the distribution of printed matter to large numbers of individuals" (part of the definition of election campaigning detailed in the POEL), candidates, parties, voters and supporters are still prohibited from printing out handbills and posters from a campaign website or email and distributing them, even though they are permitted to retweet a candidate's tweet. Additionally, although candidates and parties can now use email as a campaign tool, it is illegal for voters and supporters to send campaign-related emails to other voters encouraging them to vote for a particular candidate or party, or to forward campaign-related e-mails they have received from a candidate (See Figure 3, below). Anonymous speech (or false identities) is also prohibited: candidates and parties are required to clearly indicate their names and addresses on any campaign-related correspondence and are also required to keep records of their emails for a specified period of time after the election. Finally, since minors were already prohibited from taking part in electioneering communications under the POEL, they are also prohibited from doing so on the Internet and related social media. As a result, minors cannot retweet or "like" any electioneering tweet or post. In a country with one of the lowest voter rates for those in the youngest age groups, this represents a lost opportunity to instill interest in the political process and lifelong citizen participation in Japanese democracy.[400] Figure 3, below summarizes some of the major changes as well as some of the remaining restrictions (largely targeting voters).

[400] Violations for many of these rules can result in up to two years in prison or a fine of up to Y100,000. The sanction for pre-electioneering and for campaign participation by minors is up to 1 year in prison and a Y300,000 fine.

Figure 3: An Overview of Changes to Online Electioneering

		PARTIES	CANDIDATES	VOTERS (& other non-party, etc.)
Website-based electioneering	Webpages, blogs, etc.	O	O	O
	SNS (Facebook, Twitter, etc.)	O	O	O
	Uploading party platform videos online	O	O	O
Email-based electioneering	Sending electioneering email	O	O	✖
	Sending email w/ electioneering handbill or poster attachments	O	O	✖
	Forwarding electioneering email	O (with minor restrictions)	O (with minor restrictions)	✖
Printing and distributing electioneering handbill or poster attachments from websites or electioneering email		✖	✖	✖
Campaigning against a candidate using websites, etc. or email		O	O	O
Paid web advertisements	Electioneering Ads	✖	✖	✖
	Banner ads directly linked to electioneering websites	O	✖	✖
	Ads intended as 'greetings'	✖	✖	✖

Source: "Kaisei koshoku senkyoho (intaanetto senkyo undo kaikin)" Gaidorain [Guideline] April 26, 2013. *Intaanettto senkyo undo nado ni kansuru kakuto kyogikai*. Somusho.

Given the confusing nature of the reform described here and illustrated in Figure 3, above, the government, mass media, parties, candidates, and national and local election management committees spent considerable energy and resources prior to Japan's first "internet election" in 2013 educating the public through posters and government-prepared "guidelines." These materials provided detailed information about what was allowed -- and more importantly, what was still prohibited -- under the new law, and frequently included *manga* depictions of good and bad online electioneering behavior. A sample of official ministry leaflets aimed at educating youth about the "do's

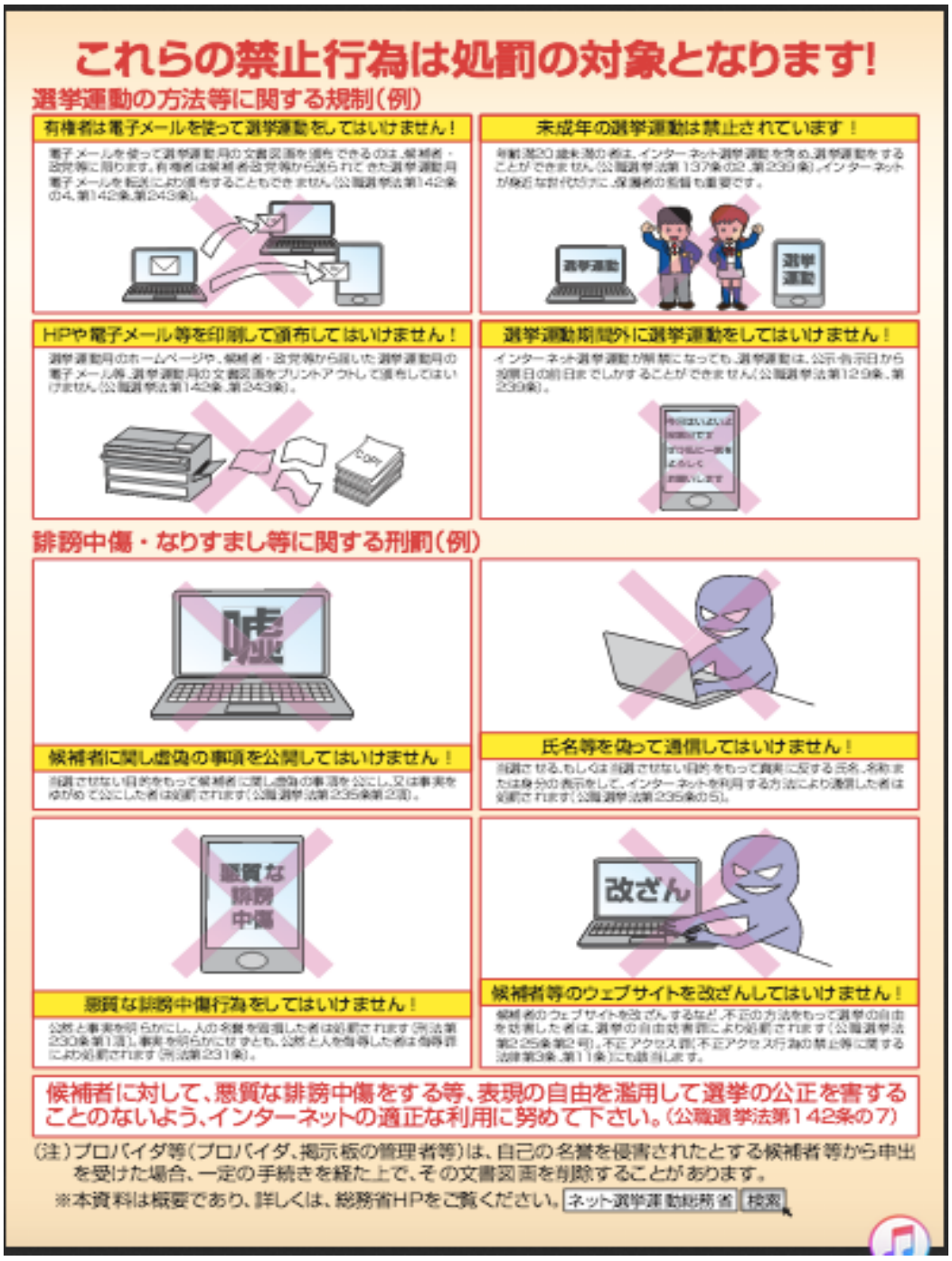
and don'ts" of online electioneering is provided below. The images contained in these documents largely speak for themselves (with no translation needed); the situations portrayed by the *manga* characters, the illustrations, and the large number of cross-outs reveal that the 1925 "law of must nots (bekarazu-ho)," is alive and well and likely to continue to shape Japan's electoral domain well into the future.[401]

Figure 4: "These Prohibited Acts are Subject to Prosecution!"

Title: These Prohibited Acts are Subject to Prosecution!" On the left, the top two images discuss the ban on voters using the internet to campaign and the ban on campaigning by under-aged youth; in the bottom images voters are reminded that they cannot print out and distribute fliers found on a candidates website or received by email, and that it is illegal to campaign except in the limited time frame. Images on the right, depict making false comments about candidates and false identities, libel and hacking

[401]Both leaflets can be downloaded from the Ministry website: http://www.soumu.go.jp/senkyo/senkyo_s/naruhodo/img02/chirashi_kouhou.pdf

Figure 5. “These Prohibited Acts are Subject to Prosecution!”



Title: These Prohibited Acts are Subject to Prosecution!” The items on the left column warn voters against using the internet to campaign, printing out and distributing fliers found on a candidates website or received by email, libel; items on the right warn voters that it is illegal to campaign except in the limited time frame or if you are under-aged, make false comments about candidates and use false identities, libel and hacking.

2.10. A Snapshot of Online and Social Media Electioneering in Japan: 2013-2014

A number of studies and exit polls conducted immediately after Japan's first "internet election" have suggested that in spite of all of the media hype and effort (and money) put into promoting, developing and utilizing online and social media campaign tools, the impact so far has been nominal. Even though the reform of the POEL gave parties and politicians a variety of new technologies and applications to add to their meager electioneering toolkits, the impact on voter turnout and political participation was a disappointment, especially among the age group where it had been expected to have the greatest impact – young voters in their 20s. After the first "net election," in 2013, J-Monitor (a platform for surveying newspaper advertisements) surveyed voters to ascertain what information sources they had used in arriving at their electoral choices. Of those surveyed, 70% chose newspaper articles; 36.6% chose televised broadcasts; 29.8% chose manifestos; 16.8% chose party or candidate websites, 4.3% said they registered for campaign SNS accounts, and a mere 3.3% said that had they registered to receive election-related email.[402]

Another survey conducted by the *Mainichi* and Professor Ryosuke Nishida at Ritsumeikan University examined how candidates had used the new electoral tools.[403] Of the 433 candidates who responded to their survey, 299 had used twitter (69%) and 373 had used Facebook (86%). Of the 121 politicians who had won seats in the election, 80 (66%) had used twitter, and 118 (98%) had used Facebook. Additionally, 76 of the LDP's 78 candidates said that they had used Facebook (97%), while 39 (50%) had used twitter. A separate analysis of all twitter feeds from the beginning of the election on July 4 to the end of the election on July 20 (17 days) better captures how a popular tool, twitter, was used during the campaign. According to this analysis, the most frequently used words on twitter during the campaign period were: "speech" (used more than 10,000 times); "election" (used 9000 times); "station" (used 6700 times); and "stump

[402] J-Monitor, comprised of 13 newspapers, including *Asahi* and *Yomiuri* conducted a survey of 4386 voters aged 20-69 in five regions, including Tokyo, Kinki, and Fukuoka. Data are from: "Seiji sanka no kasseika to intanetto no kankeisei ni kansure ikkosatsu, [Effects of Internet Election Campaigns on Public Political Participation] by Chisako Tsuji, Shunichi Tsuji, and Shoichi Watanabe, *Josai Daigaku keiei kiyo*, No. 10, p 79.
[403] Ibid. p. 94-95.

speech" (used 6200 times). This suggests that the main purpose for which candidates had used twitter was in informing voters about traditional stump speeches that were taking place at their traditional locations throughout Japan – train stations. Additional analysis also revealed that candidates and voters had not used twitter to converse about policy, and found a mismatch between candidate and voter impressions of the usefulness of the Internet in the election campaign. A joint survey carried out by the *Asahi* and Tokyo University Professor Taniguchi asked winning candidates whether they thought that the Internet had been useful in gaining votes: 42% responded that it had. In contrast, an *Asahi* exit poll found that only 23% of voters said that they had relied on information from the Internet in making voting decisions.[404] A survey conducted by Tokyo University Professor Hashimoto had similar results, finding that only 18% of respondents said they had reviewed online information provided by candidates and parties prior to voting. Results of exit interviews conducted by the Kyodo wire service garnered similar results. When asked by Kyodo whether they had relied on information from the Internet to make their voting decisions, only 23.9% of those polled replied affirmatively.[405] The cumulative result of these and other surveys and analysis suggest that online and social media campaigning remain at a preliminary stage in their development in Japan. Given the 18 year history of censorship, this is an unsurprising result.

Although the desire to move Japan more in line with other democratic nations (the U.S. and Korea were frequently cited) was a major reason for removing the ban on online electioneering, other goals were more central, including: 1) reducing money in politics and ameliorating the related problem of electoral corruption; 2) increasing voter turnout, especially among those in the "20-something" generation; and 3) improving two-way communication between voters, candidates and parties.[406] Each of these is briefly evaluated below.

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[404] ibid p.95.
[405] "Nihon ni okeru netto senkyo no korekara," Waseda daigaku shakaika gakubu seisaku kagaku kenkyu zemi (www.waseda.jp/sem-fox Miyata;)
[406] "Nihon ni okeru netto senkyo no korekara,"Waseda daigaku shakaikagakubu seisaku kagaku kenkyu zemi (www.waseda.jp/sem-fox Miyata;)

1. MONEY AND POLITICS

To date, it does not appear that Internet electioneering has had much positive impact on the effort to reduce money in politics. In fact, on a number of fronts online electioneering actually adds to the electioneering budgets of parties and candidates, at least initially. Although tweeting a message, posting a comment on a blog or updating a website is inexpensive, to the extent that an online presence gains importance in Japanese electioneering, it is likely that parties and candidates will feel compelled to spend larger portions of their electioneering and party budgets on hiring IT consultants, PR firms, media consultants and related professionals to help devise high-tech online advertisements, videos, games, and other components of an online presence. The fact that the value of Japanese IT and PR consulting firms went up during the period when removal of the ban was under discussion (2012-2013), suggests that there was an assumption, at least, that consulting, marketing and other IT-related firms will play a much greater role in Japanese electoral campaigns and Japanese politics in the future. This is consistent with the experience in other democratic countries as their campaign practices have become professionalized (some say "Americanized") over the last two decades. Where will parties and candidates get the funds for their online, "postmodern," professionalized campaigns? While this is an empirical question in need of further review, evidence suggests that the LDP, at least, is building up its coffers in anticipation of these expenditures. As the nation transitioned to online electioneering during 2012 and 2013 and parties began preparing for the first "net election" (netto senkyo), an editorial in the *Japan Times* reported that "donations by businesses and other organizations surged 43 percent in 2013 from the previous year — [and that] much of [this] went to the LDP and its local chapters." [407] The editorial concluded that the time might be ripe for a regulatory review of Japan's Political Funds Control Law, to see "whether the … law is functioning as intended." Perhaps the Public Offices Election Law should also be a part of that regulatory review.

[407] "Political funding law needs review," Editorial, *Japan Times*. March 5, 2015

2. THE PROBLEM OF TURNOUT

The continuing downward trend in electoral turnout in Japan, especially among the youngest group of voters, has been a major concern among Japanese elected officials and scholars. There were hopes that the introduction of online electioneering would stimulate more interest in Japanese politics and in Japan's political parties from younger voters, but the expected increase in voter turnout has not yet materialized.. Although voter apathy and low voter turnout is a common problem in many democratic nations, including the EU, which bemoans what it calls its "democratic deficit," the Japanese case has its own distinctive twist, owing in large part to the rapid aging of Japanese society. The apathy issue is particularly worrisome among the cohort of Japanese voters in the 20-40-year age group. In fact, in the first "internet election," voter turnout overall fell to 52.61%, the third lowest turnout rate in the postwar period. This low turnout was apparent across the board in all age groups, but generational differences were striking. While turnout for those in their 60-80s still hovered close to 80%, for those in their 20s-40s, it was less than 40% -- an almost twofold difference. The terms "silver democracy" and "silver elections" are now commonly used to describe this imbalance in turnout rates in Japan. In 2014, concerns about this phenomenon and other factors prompted the Diet to lower the legal voting age for the first time in 70 years. Beginning in the summer of 2016, the legal voting age in Japan will be 18 years of age. This is another area where Japan had lagged in comparative perspective. By the time the Japanese government finally changed its law, 167 nations had already set their minimum voting ages at 18. Internationally, Japan was one of only 6 countries with a legal voting age greater than eighteen years. (The others were Taiwan, Cameroon, Bahrain, Nauru and Kuwait). On a happier note, in contrast to the expansion of suffrage that took place in 1900 and 1925, described earlier in this chapter, the extension of the legal voting age to 18 was not accompanied by additional laws curbing free speech (unless one counts the State Secrets Law that went into effect in December 2014).

Figure 6.

The situation depicted here is intended to illustrate the lowering of the voting age to 18 beginning in summer, 2016 and the impact of campaign rules on both youths. The youth on the left is 17 or under; the one on the right is 18 or older. The older youth on the right says, "I am going to re-tweet this candidate's tweet." The younger youth says, "Oh, I guess I am not allowed to re-tweet yet."

3. IMPROVING COMMUNICATION BETWEEN POLITICIANS AND VOTERS

3) One of the great salespoints touted by supporters of online electioneering was the anticipated promotion of interactive, two-way communication between candidates and voters. However, as noted earlier, candidates' use of the Internet and other social media tools has so far been primarily limited to transmission of information about traditional – and non-interactive – campaign speeches and/or related meetings and forums in the non-virtual "real" world. Voters too, have tended to use the Internet for the same sorts of activities they might have carried out in the pre-internet, analog era. A *Nikkei* survey, for example, found a remarkable surge in the number of voters who used the Internet to view candidate websites in the weeks before a Tokyo city election, but on closer inspection it was determined that this behavior was actually quite similar to what had taken place in the analog days of the past, when voters also made efforts to obtain information about parties and candidates in the days prior to the election. The Nikkei found essentially no difference between newer online campaigning and traditional offline campaigning. There was no real qualitative difference or interactivity in either case. At the same time, the removal of restrictions on online campaigning has given voters greater flexibility in terms of when they gather election-related information. Now

voters can go online and obtain information about parties, candidates and issues at any time of day, and even on the day prior to the election, which had been a blackout day in the past. So at a minimum, voters can obtain information with increased ease.

3. Some Concluding Observations on Information Governance, Electoral Exceptionalism and the POEL

"In America…electoral speech has historically been regarded as largely indistinguishable from general public discourse. Unlike the situation with respect to courtrooms, schools, prisons, public employees, candidate debate, and the military, we have not historically thought of elections as institutions in which extensive government regulation of speech is either natural or inevitable."[408]

"Article 21 of the Japanese Constitution does not guarantee freedom of speech and of the press absolutely and without limitation…Unrestricted posting and distribution of printed materials would invite unfair campaign competition and harm the freedom and fairness of elections….the establishment of restrictions on the distribution and posting of printed materials …are intended to protect against such harm during the election period only, and are understood as constitutionally necessary and legitimate restrictions for the protection of the public welfare."[409]

The Supreme Court of Japan

All democratic nations face the same conundrum in trying to design electoral systems that are free, but also inclusive, competitive and fair. For most democratic nations the solution has been to limit the management of the electoral domain to the financing of elections by regulating contributions and/or candidate expenditures and providing government subsidies to finance campaigns. Japan follows a similar practice in regulating the financing of election campaigns through its Political Funds Control Law (seiji shikin kisei, PFCL) established in 1948 (with major revisions in 1974, 1994 and 2007), and a Political Parties Subsidy Law providing roughly ¥30 billion a year in taxpayer money directly to political parties.[410] As in other countries, Japan's campaign

[408] Geoffrey R. Stone, "Electoral Exceptionalism and the First Amendment: A Road Paved with Good Intentions," 35 *New York University Review of Law and Social Change* 665 (2011), pp. 673-674.
[409] "Intaanetto ni okeru senkyou undo kise ni kan suru ikkosatsu , by Hitoshi Ogura, *Sapporo Hogaku,* Vol. 21, no.2, 2010, p.109. Partial summary translation of court opinion by author.
[410] "Political funding law needs review," Editorial, *Japan Times,* March 5 2015. "The PFCL currently bans political donations by companies and organizations within a year after they have received a subsidy from the government. In recent years, however, donations by businesses and other organizations have

finance laws are intended to reduce corruption, establish a level playing field, and enhance public confidence in the legitimacy of Japanese democracy. The country's electoral finance laws are thus unremarkable in comparative perspective. They utilize some of the same mechanisms and underlying logic for managing electoral competition as do those of many other democratic nations, and they suffer the same problems and pitfalls of these laws. Where Japan stands out, however, is in the extent to which the government actively extends its regulatory reach *beyond the issue of campaign finance*, imposing regulations in realms generally considered off limits by many other democratic nations. In so doing, it distorts the democratic process and hinders the growth of a vibrant, discursive electoral public sphere.

American legal scholars refer to the kind of temporal and communicative "bounding" of elections that takes place in countries such as Japan as "electoral exceptionalism." Simply put, electoral exceptionalism means establishing a discrete realm of electoral speech that is distinct from the constitutionally protected discursive realm of the public sphere, and then subjecting that domain to 'exceptional,' albeit temporally constrained, rules that under normal circumstances might be considered unconstitutional. [411] According to, Frederick Schauer and Richard Pildes, who are among its earliest proponents in the U.S., in nations applying this kind of logic, "elections should be constitutionally understood as (relatively) bounded domains of communicative activity." [412] Japan clearly follows this logic, making a concise

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surged, raising concerns about corruption and demands that the Diet close loopholes in the law to halt unethical and illegal contributions and expenditures. Given these and other loopholes, politicians and parties in Japan have rarely been held liable for the inappropriate use of political funds, though there are a number of infamous exceptions."

[411] For a definition of "electoral exceptionalism," See Frederick Schauer *&* Richard H. Pildes*,* "Electoral Exceptionalism and the First Amendment*,* 77 *Tex. L. Rev.* 1803*,* 1805-06 (*1999*). "Elections as a Distinct Sphere Under the First Amendment," by Richard Pildes, *New York University Public Law and Legal Theory Working Papers*, July 2011 Published in Money, Politics, and the Constitution: Beyond Citizens United (M. Youn, ed., 2011); They state that while the government cannot constitutionally prohibit speakers from expressing their views, an exception can be/should be made when the speech takes place in the context of an election. For a counter argument see: Geoffrey R. Stone, "Electoral Exceptionalism and the First Amendment: A Road Paved with Good Intentions," 35 *New York University Review of Law and Social Chang*e 665 (2011). University of Chicago Law School.

[412] Schaer and Pildes, 77 Tex. L. Rev. 1803, p.2—; "Operationally, therefore, the most common version of electoral exceptionalism would permit restrictions on communicative activity in the context of elections that would not be permitted in other contexts." p.2; "As numerous debates about public access to the press and press access to government have made clear, "it is not self-evident that the values of democratic deliberation, collective self-determination, guarding against the abuse of power, searching for truth, and

conceptual distinction between "regular" political activities (seiji katsudo) that can legally take place on a daily basis (except during the campaign period, and with certain restrictions), and "election campaigning" (senkyo undo), which can legally take place only during the designated time frame for the election and only according to the rules contained in the POEL. By creating two distinctive types of political speech, each taking place during its own discrete time frame, the state is able to tightly control one of them -- here, election campaigning -- while continuing to provide all other political activities with the full range of constitutionally-protected free speech guarantees.[413] Perversely, the same activity – making a speech, handing out a brochure, going door-to-door, etc., is protected under one time frame (e.g. the period during which political activities are allowed -- as long as they are not deemed "pre-electioneering"), but can be illegal or very tightly constrained under the other (the campaign period).[414] Figure 7, below depicts this highly-institutionalized process in Japan.

Figure 7.

Professor Matsuda Explains Electioneering: "According to the POEL, the orange circle on the right is defined as "political activities" and the pink circle on the left is "election campaigning." When we put the two circles together, we get "political activities" in the broad sense.

even self-expression are better served by treating government intervention as the unqualified enemy than by allowing the state a limited role in fostering the proliferation of voices in the public sphere or of increasing the importance of message and effort by decreasing the importance of wealth."p.2

[413] Manga diagram is from Senkyo dotcom, August 26, 2015, "Somosomo senkyo undoitte nanda!?"(Miki Koike no shita kara senkyo nyuumon 8).

[414] All "pre-electioneering" is strictly prohibited and closely monitored by a nationwide network of election management authorities and the police.

Though the bounding of elections in this way might not raise eyebrows in many countries with parliamentary systems of government, it is hard to imagine the American public submitting to this muzzle. However, a number of prominent American constitutional scholars, including those discussed above, have advocated the expansion of state managerial authority in the electoral domain as a way to counteract the anarchy of American electoral campaigns, (especially in the wake of Citizens United), improve deliberative democracy and protect electoral integrity.[415] Japan represents the perfect embodiment of the kind of electoral exceptionalism they describe, albeit in its most extreme form. Believing that the source of electoral corruption lies in the frenetic efforts of competing politicians to woo voters in an unconstrained, "excessively competitive" political arena, and fearing the power of alternative points of view (communist, socialist and radical, in particular), ninety years ago the designers of Japan's electoral system intentionally – and successfully – permanently bounded the electoral domain. Once they had established a clear electoral arena, they quickly severed and circumscribed almost all potential paths connecting candidates to voters within that domain, introducing rigid restrictions on financing and the means and modes of electioneering, and establishing a state electoral management regime that remains deeply embedded in Japanese electoral practice today. Although Japan's electoral regulators stopped short of completely disenfranchising Japanese voters, they severely diminished the opportunities for voters to become informed, active participants in an inclusive, democratic and discursive electoral process. Today, large segments of the potential public sphere in Japan remain eerily comatose -- and not only during election campaigns. Whether or not this results entirely from the constraints of the POEL and the adoption of electoral exceptionalism is an empirical question needing further review. Still, at a minimum, the Japanese historical experience suggests that a degree of caution should be exercised when adopting an

[415] The following articles discuss the pros and cons of instituting 'electoral exceptionalism' in the United States: "Elections as a Distinct Sphere Under the First Amendment," by Richard Pildes, *New York University Public Law and Legal Theory Working Papers*, July 1, 2011 p. 1-31; "Electoral Exceptionalism and the First Amendment: A Road Paved with Good Intentions," by Geoffrey R. Stone, *New York University Review of Law and Social Change 665* (2011 p.665-680); "Electoral Exceptionalism and the First Amendment," by Frederick Schauer and Richard H Pildes, *Texas Law Review*, June 1999, 77 Tex. L. Rev 1803. p. 1-26; "Representative Democracy: The Constitutional Theory of Campaign Finance Reform," *The Tanner Lectures on Human Values*, by Robert Post, Delivered at Harvard University May 1-3, 2013; p.199-332; "The (Un)Informed Electorate: Insights into the Supreme Court's Electoral Speech Cases," by Raleigh Hannah Levine; *Case Western Reserve Law Review*, Winter 2003, 54 Case W. Res. 225 p. 1-51.

information regime predicated on the expansion of state managerial authority in the electoral domain as a way to improve deliberative democracy, protect electoral integrity, or counter electoral anarchy.

There are three major areas where Japan's electoral information governance regime extends further than it does in most other democracies: 1) electoral timing and duration; 2) citizen participation in the campaign process; and, most importantly, 3) the means and modes of electoral communication used by candidates, voters and third parties. Each of these is discussed below:

1) Elections as Temporally Bounded Spheres

The POEL provides for a fixed period during which election campaigning may legally take place. This official campaign period begins on the date candidates are allowed to submit their applications for candidacy (notification of candidature) and ends on the day before the election. No campaigning is permitted before this date and only very heavily "choreographed" campaigning in accordance with the rules of the POEL is permitted during it. Although a number of other parliamentary democracies "bound" their electoral domains in similar ways by clearly specifying the duration of the campaign period, Japanese campaigns are comparatively and notoriously short, lasting between five days (for mayoral and city council elections) and seventeen days (for Upper House and prefectural gubernatorial elections).[416] As indicated in figure 8 below, the duration of Japanese election campaigns became remarkably shorter over the early part of the postwar period and is currently so brief that it is difficult to imagine voters being able to gain a sufficient understanding of policy issues, candidate proposals and the various party manifestos to make the informed choices required of them as democratic citizens. This would be the case even without Japan's restrictive electoral speech domain.

[416] In contrast, in Canada the *minimum* length for a campaign is thirty-six days, while in Australia it is thirty-three days.

Figure 8. The Gradually Shrinking Japanese Election Campaign: 1950-1994

	1950	1951	1952	1956	1958	1962	1969	1983	1992	1994 ~2016
House of Representatives	30 days	---	25 days	---	20 days	---	---	15 days	14 days	12 days
House of Councilors	30 days	---	---	25 days	---	23 days	---	18 days	17 days	17 days
Prefectural Governors	30 days	---	25 days	---	---	---	---	20 days	17 days	17 days
Designated City Mayors	20 days	---	---	---	---	---	---	15 days	14 days	14 days
Prefectural Assemblies	20 days	20 days	---	15 days	---	---	12 days	9 days	---	9 days
Designated City Assemblies	20 days	---	---	15 days	---	---	12 days	9 days	---	9 days
Members of Assemblies and Mayors (City)	20 days	---	15 days	10 days	---	---	---	7 days	---	7 days
Members of Assemblies and Mayors (Town/Village)	20 days	---	10 days	7 days	---	---	---	5 days	---	5 days

(Source: Koshoku senkyoho no kaishi – saa, hajimeyou shimin no senkyo undo, p.90, Seikatsusha, 2009.)

The issue of time frames is rarely raised in Japan, but in 2013 a Japanese rights group, the Japanese Association for the Right to Free Speech, filed a complaint with the UNHRC explaining that, given the short time frames of Japanese elections, Japanese voters have very little opportunity to learn about candidates and their policy goals and to make informed choices at the polls. The Association noted that this was especially true in the case of general elections, "like that of last December, which was held near the year-end, following the sudden dissolution of the House of Representatives. The election was announced 12 days in advance, and during these 12 days, voters had to choose a candidate from among those representing 16 parties. The turnout was the lowest since WWII (59.32%)."[417] Of course, the unlimited campaign period of an American presidential election stands in dramatic relief to the Japanese case and naturally has its own set of deleterious effects on American democracy. In the most recent presidential election cycle (2016), for example, Vice President Joe Biden announced 384 days before the election that he would not run because it was too late for him to be competitive.

[417] Grammatical errors in original; From: "Revised Alternative Report To the Sixth Periodic Report of Japan on the International Covenant on Civil and Political Rights －Suggested List of Issues to Country Report Task Force on Japan," submitted for 109th Session of the Human Rights Committee, Geneva 14 October ~ 1 November, 2013, by the Japanese Association for the Right to Freedom of Speech(JRFS). Submitted first on 9 August, 2013.

While this system would be inappropriate for most parliamentary democracies, and is highly problematic in the U.S., given its impact on the cost of campaigning, no American voters can rightfully say that they did not have sufficient opportunity to learn about presidential candidates and their policies prior to casting their ballots.

Electoral exceptionalism as it is practiced in Japan largely benefits existing parties and incumbents at the expense of independent candidates and neophyte politicians. How so? One of the advantages in establishing an electoral domain is that it makes it easier to highlight the period prior to the start of the campaign and to ban "pre-electioneering" in the name of electoral equality. But teasing out the difference between "legitimate" and "illegitimate" activities and discourse taking place in the pre-campaign period can be difficult. This is especially the case when it comes to existing political parties and incumbents, who can potentially claim that any action or event is merely a party promotional activity or an incumbent's meeting with supporters to explain policies, and therefore unrelated to any upcoming election. The problem, of course, is that non-party politicians and political newbies cannot make the same sorts of claims. In short, the electoral boundaries that were created to simplify state management of electoral discourse in the interest of maintaining a level playing field, have been especially advantageous for Japanese politicians and candidates already having the three main sources for vote gathering: a network of supporters (jiban) name familiarity (kanban) and funding (kaban), but not for the group of players for which they were initially proposed. Obviously, the shorter time frames for Japanese elections only exacerbate this situation for first-time candidates and independents who necessarily require more time (and resources) to gain name recognition and voter awareness of their policies. With limited means to connect to voters, and a very brief timespan in which they are legally permitted to sell themselves, it is virtually impossible for non-incumbents and smaller parties to gain recognition against resource-laden, seasoned politicians and their parties who can "legitimately" act with impunity during the lengthy non-campaign.

In the same way, determining that an activity is "pre-electioneering" rather than a "political activity" is an especially tricky business under parliamentary systems, where the exact timing of a campaign cannot be specified until the parliament is dissolved and

elections are called.[418] Efforts to disentangle "election campaigning"(senkyo undo) from other "political activities" (seiji katsudo) in Japan have often brought mystifying results. In a recent case in December 2014, for example, Prime Minister Abe called a snap election soon after the State Secrets Act was rammed through the Upper House against mounting public opposition. Knowing that an election was pending, but not knowing when it might actually be called, a group of lawyers in the Kanazawa City Bar Association scheduled a street demonstration to express their opposition to the Secrets Act, informing supporters of their plan. As chance would have it, the date specified for the demonstration, December 10, 2014, ultimately coincided with the period selected by the government for the election campaign. When this became known to local electoral management authorities in Ishikawa prefecture, they informed the Kanazawa Bar Association that its planned demonstration and distribution of fliers might be in violation of electoral laws banning political activities during election campaigns.[419] Given the 100,000-yen fine, and not wanting to potentially run afoul of the law, the Association decided to exercise "self-restraint" and cancelled the demonstration. Their decision was widely condemned by lawyers and others in Tokyo and throughout Japan. Bar associations in other cities held demonstrations on the day in question and were not subsequently charged with violating the POEL. One expat law professor succinctly summarized this predicament as follows: "Talk about political issues during an election? Preposterous!"[420]

2) Electoral Exceptionalism and the Right to Participate in Election Campaigns

A second boundary created by the POEL (and the National Public Service Personnel Law, NPEL) constrains the electioneering activities of 5 million civil servants

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[418] In most parliamentary systems, an election may be precipitated by an event such as parliamentary vote of no confidence.

[419] "Kanazawa bengishikai hantai katsudo chushi; Saitama de wa jisshi," *Tokyo Shimbun*, December 10, 2014.

[420] "With last year's Upper House election fresh in the memory, you are probably also aware that 'allowed' finally includes use of the Internet and social media for campaigning, though subject to counterintuitive restrictions that are backed by criminal penalties. (For example, candidates and parties can use email to distribute campaign information but members of the general public cannot.) Given that the decades-old restrictions described above remain in place, it is like being allowed to have sat-nav on your ox cart but only being allowed to use a single buggy whip." "Electoral dysfunction leaves Japan's voters feeling impotent," by Colin P.A. Jones, *Japan Times*, Dec 10, 2014; See also: *Mainichi Shimbun*, December 9, 2014; "Kanazawa bengishikai: himitsu-ho hantai undo wo jisshuku," *Tokyo Shimbun*, December 10, 2014.

and educators. This group of Japanese voters is subject to rigorous restrictions on allowable political activities, even as private citizens on their off-duty hours. The following represent the types of government employees who are prohibited from taking part in election campaigning and many other political activities in Japan:[421]

> *Judges, Prosecutors, Auditors, Police officers, and National and local tax collectors;
> *Members of the Central Election Management Committee and METI staff who work with them;
> *Members, staff, and secretariats of prefectural and local Election Management Committees;
> *Members of public safety commissions;
> *Educators

Apart from exercising their right to vote, national public employees (and by extension most local employees) are prohibited from engaging in a large number of political activities proscribed by the Rules of the National Personnel Authority (NPA). In addition to the usual prohibitions related to the abuse of power and bribery that one might expect to find elsewhere (for example, 'purdah' in the U.K.), NPA rules also prohibit employees from participating in seventeen different types of political activities. Among these are the following: supporting or opposing a candidate for public office, or a political party, cabinet or policy of the government; forming a political party or group; and publishing, editing, or circulating newspapers or magazines of a political party or group, or assisting in such activities.[422] These restrictions apply to all national (and by

[421] Under the National Public Service Personnel Law, political activities are almost entirely prohibited for all national government personnel (Art. 102 of the Law); Restrictions are also imposed on educators, minors (persons under 20 years of age), those whose suffrage is suspended due to election crimes or violation of the Political Funds Control Law (Art. 137: 137-3 of the Election Law). "Restrictions on political campaigns prohibit participation in signature campaigns, planning, organizing or leading a parade or a demonstration, or assisting therein, expressing political opinions publicly by loudspeaker, radio or any other means; publishing, circulating, or distributing literature and drawings or posting them on a public bulletin board or other public facilities, and making or distributing flags, stickers or badges that show a certain political contention, or displaying, putting up or wearing them during office hours. These regulations are applicable to all public employees, even during off-duty hours. Consequently, public employees are banned under Rule 14-7 from almost all political activity except for exercising their right to vote. Local public employees are subject to similar rules under the LPEL." *Local Public Employees Law*," Law No. 261, 1950.3. NPA rule 14-7, 1949.4. Id. 6. Vol.53 No 2.

[422] "[P]lanning, leading, or participating in signature campaigns; planning, organizing, or leading a parade or a demonstration, or assisting therein; expressing political opinions publicly by loudspeaker, radio, or any other means; publishing, circulating, or distributing literature and drawings, or posting them on a public bulletin board or on other public facilities; and making or distributing flags, stickers, or badges that show a certain political contention, or displaying, putting up, or wearing them during office hours." Restrictions on Political Campaigns in Japan," by Masahiro Usaki, *Law and Contemporary Problems*, Volume 53, No. 2. Duke University Law Review, p.134-135.

extension, local) public employees, even when they are not working. These measures were first introduced in 1947 based on recommendations from SCAP, which at the time "was concerned about a rise in anti-government activities among public employees." [423] The problem is that the laws have been strictly enforced throughout the postwar period, even though they were never sufficiently deliberated in the Diet. Professor Usaki argues that "many of these restrictions originated from the policies of the GHQ during the military occupation after World War II. The restrictions on political and civil rights under the Occupation should have been exceptions to the Constitution and therefore repealed at the time of the Occupation's termination. It was extremely unfortunate for the Constitution and for democracy in Japan that the enactment of the Constitution and the formation of the basic framework of the government after World War II took place under a military occupation." [424] Given that these rules were enacted seventy years ago during a period of foreign occupation, domestic instability, and concern about the rising appeal of communist ideology among the Japanese public, it might be time for regulatory review. It is unlikely, for reasons explained earlier, that this kind of review would get support from the Supreme Court.

Several court cases have already challenged the constitutionality of these free speech restrictions in the POEL and the National Public Service Law. Following its usual pattern, the Supreme Court has consistently found them constitutional.[425] In one case in 2004, a government employee, Akio Horikoshi, was arrested and charged with violating the National Public Service Law and National Personnel Authority regulations banning public employees from participating in political activities after he distributed fliers for the Japanese Communist Party during an election in 2003. Even though he was taking part in political activities on his own time, he would later learn that he had been placed under surveillance and that special undercover police had taken videos of him

[423] Ibid. p.135
[424] Ibid. p.155-56.

[425] "Tokyo police on Wednesday arrested a civil servant employed by the central government on suspicion of distributing fliers on behalf of the Japanese Communist Party last year. Such behavior would violate a law restricting political activities by civil servants, police said. Akio Horikoshi, a 50-year-old employee of the Social Insurance Agency, was arrested Wednesday. Horikoshi allegedly distributed JCP fliers at more than 100 locations in Tokyo between Oct. 19 and Nov. 3 last year, ahead of the Nov. 9 general election for the House of Representatives." "Civil servant held for campaigning," *Japan Times*, March 4, 2004.

handing out fliers in his own neighborhood. His case was not finally resolved until six years later when the Tokyo High Court finally reversed a lower court decision and acquitted him in March, 2010.[426]

Although public servants in other democracies, including Britain, France, and Germany are prohibited from participating in certain types of activities during the campaign period, political activities carried out by civil servants *as private citizens*, or other activities unrelated to their work, are not subject to control. In the U.K., for example, a practice known as "purdah" (a Persian word for "veil") prohibits the government from introducing any new policies and limits civil service employees and ministers from making statements in the 28 days prior to a vote or referendum.[427] A civil service employee or minister found to have violated purdah would receive some form of disciplinary action, not the kind of criminal charges administered in Japan. In the case described earlier, acquitting Mr. Horikoshi, the Tokyo High Court acknowledged that the restrictions placed on the political activities of civil servants were much harsher in Japan than in other nations. The Court also found that lower court rulings against Mr. Horikoshi had violated his right to free speech as provided for in Article 21 of the Japanese Constitution.[428] Perhaps there is some hope for a less restrictive future in this area.

Civil servants are not the only Japanese citizens prohibited from electioneering. Those under 20 years of age (to be lowered to 18 years of age in June 2016) are also prohibited from taking part in election campaigns. This effectively means that Japan's youth have limited opportunities for active engagement in the political process prior to the first time they are eligible to vote. The recent changes to the POEL to allow for "internet electioneering" incorporated and extended these restrictions to the digital realm, proscribing a number of online and social-media based campaign activities by minors, including "re-tweeting" official campaign materials or forwarding them via email,

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[426] An *Akahata* article notes that, "Article 102 of the National Public Service Law and regulations of the National Personnel Authorities prohibit political activities of civil servants to be regarded as criminal acts without showing any relation to fair performance of official duties. Such action is in violation of the Japanese Constitution and the International Covenant on Human Rights in the first place." *Akahata,* March 30, 2010.

[427] "The purdah controversy – setting the rules of the referendum game," Professor Sara B. Hobolt, Sutherland Chair in European Institutions, London School of Economics, September 7, 2015; accessed November 1, 2015.

[428] *Akahata* March 30, 2010.

among other activities.[429] Japan is one of the few democracies to have restrictions on the electioneering activities of those not yet eligible to vote, as well as strict sanctions in place for violators. In a recent case in India, the Election Commission in Mumbai told the Bombay High Court that it intended to "derecognize" parties that continued to use children in campaigns. But the issue in that case had to do with child labor laws, not with some abstract notion of creating a level playing field or prohibiting corruption; and the children themselves would not have been sanctioned. In the U.S., the BCFR prohibits minors from making contributions to federal candidates or donations to political parties' committees, but this is a far cry from prohibiting a teenager from retweeting a campaign slogan.

3) The Exceptionally Bounded Electioneering Toolbox

A third and final area governed by the POEL pertains to broadly defined "public speech" and has been the central focus of this chapter. This domain is the most important in terms of its impact on the electoral public sphere and Japanese democracy because it involves regulating the means and methods or tools of electioneering and not merely its financing, the age of participants (youth) or the source of their employment (civil servants). As discussed elsewhere, these rules restrict the speech activities of candidates, parties, voters, youth, and civil servants, first by prohibiting a broad range of potential campaign activities, and then by micromanaging the few that remain.[430] Most of the rules regulating political discourse were originally drafted in 1925 by an undemocratic regime, yet have been judged constitutional by the Japanese Supreme Court. Articles 142-147 of the POEL are largely responsible for regulating the distribution of printed materials, and impose strict controls on the use, display, distribution, makeup, size and number of posters, handbills and postcards, the only forms of printed material allowed during the campaign period in Japan. In the cyber age, these restrictions were extrapolated to electronic and digital media and severely restricted and/or banned the use of the internet, email,

[429] Those under 20 years of age (soon to be 18 years of age) are also prohibited from taking part in electioneering activities. This effectively means that Japan's youth have no opportunity to be actively engaged in and learn about the political process before attaining the legal voting age.

[430]"Other than the act of voting, the POEL does not allow for significant voter involvement during the official campaign period. In actuality, it generally prohibits grassroots election efforts by voters including online activism, canvassing, and document circulation." It also hampers voters' rights, voters' participation in the political process, and grassroots activities." Matthew J. Wilson, "E-Elections: Time for Japan to Embrace Online Campaigning," 2011 *Stan. Tech. L. Rev*., 4 (2011), p.3.

Facebook, twitter, and other social media during the campaign period (partially revised in 2013).[431] In contrast, while many countries ban financial donations, few countries impose prohibitions on the types of electioneering tools and practices that candidates, voters and supporters can use in the electoral speech domain. The television advertising bans found in a small number of countries are an exception.

The POEL affects electoral processes, political speech and political participation in Japan in a number of important ways. To begin with, it circumscribes the way the mainstream broadcast and print media are permitted to cover elections, limits the number and kinds of campaign advertisements, and severely restricts the number, makeup, location and sponsorship of public debates among contenders for political office. It also places additional constraints on the few remaining informational means that candidates and voters have for learning about one another, including limitations on the number of loudspeaker cars, posters, and arm bands candidates may use. In addition, many of the campaign tools regularly used in other democracies are banned outright: including signature campaigns, popularity polls, and "'activities intended to raise ardor' such as running a procession of cars, marching a large group of people, using a siren, playing in a band or 'making clamor for the purpose of attracting the attention of the voter.'" [432] With very limited means at their disposal for providing voters with information about substantive issues during the campaign period, Japanese politicians resort to some of the more intrusive and mind-numbing means known for gaining name familiarity: loudspeaker trucks (actually a single truck per candidate that can be used between the hours of 8 a.m. and 8 p.m.), bull horns and telephone calls. But even these are tightly circumscribed and micromanaged: bans against making a speech in a moving vehicle, for example, mean that the only legitimate behavior is to drive through city streets incessantly repeating a candidate's name. As in the case of the canvassing ban, the Japanese Supreme Court has consistently found these regulations constitutional, arguing that they are necessary to preserve the freedom and fairness of elections and to "maintain the public welfare."[433]

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[431] Election bulletins describing the candidates are issued by prefectural election management committees and distributed to voters.

[432] Curtis, p. 214. Also see his classic book Election Campaigning in Japan, 1971, section on the POEL.

[433] "Restrictions on Political Campaigns in Japan," by Masahiro Usaki, *Law and Contemporary Problems*, Volume 53, No. 2. Duke University Law Review, p133.

The Japanese Public Offices Election Law so severely restricts the repertoire of campaign activities available to voters, candidates, and their supporters, that "modern" election campaigns do not look that different from those that took place ninety years ago.[434] These are not simply token regulations; those who do not follow the rules, including independent voters and other third parties, can find themselves charged with violations or even arrested. This was the experience of one campaigner in the Tokyo gubernatorial election held in December 2012 who was arrested for placing fliers in mailboxes at a condo complex. His experience is not that uncommon – more than 90,000 Japanese citizens have been arrested in the postwar period for violating the POEL. According to the Association for Promoting Fair Elections, in 2009, 570 people were arrested for allegedly violating articles of the POEL during the general election. [435]More recently, after the conclusion of the House of Councillors election in July 2013, the Police Agency announced that it had received information about a total of 908 violations of the POEL nationwide, and that approximately 60% of them had involved violations taking place on the Internet.[436]

3.1. Blurring the Boundaries of the Japanese Electoral Domain?

Proponents of electoral exceptionalism in the United States, such as Professors Richard Pildes and Frederick Schauer, should not be condemned for proposing the establishment of clear electoral domains in the U.S. and the possible expansion of state managerial authority in the electoral domain. Their goals are noble—to improve campaign discourse, lessen voter alienation, focus on party building, attract better candidates, and of course to remove the utter anarchy that exists in the post Citizens United era. Japan, on the other hand, is truly an exceptional case of electoral exceptionalism. This suggests that the prescription for what ails Japanese democracy may require a reduction in the level of government intervention in the electoral process,

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[434]Details are taken from: Senkyo seido no shikumi, [Details of the Election System] edited by the Senkyo seido kenkyu iinkai, Natsumesha, 2001; and Gendai nihon seiji shojiten, [Dictionary of Contemporary Japanese Government and Politics], edited by Uchida Mitsuru, Bureen Shuppan, 2001.

[435] Twenty-five of the violators received warnings but no one was arrested "Campaign Do's and don'ts: Some election campaign rules outdated, quirky," by Setsuko Kamiya, the *Japan Times* December 11, 2012.

[436] "Seiji sanka no kasseika to intanetto no kankeisei ni kansure ikkosatsu, [Effects of Internet Election Campaigns on Public Political Participation] by Chisako Tsuji, Shunichi Tsuji, and Shoichi Watanabe, *Josai Daigaku keiei kiyo*, No. 10, p.94.

not its expansion or even the maintenance of the status quo. Given the broad range of institutional constraints, and path dependence described here -- including a Supreme Court characterized as the "most conservative court in the democratic world," and a right-leaning parliament, it is unclear where the catalyst for such a change might arise. However, there is hope, and some theoretical evidence, suggesting that change may be provoked as an unintended consequence of the 2013 revisions to the POEL. Though it is too early to tell, the recent liberalization of online and social media tools during Japanese election campaigns may accelerate an ultimate blurring of the boundaries of the electoral domain, especially the distinction between "political activities" and "election campaigning." Such blurring could potentially force a reduction in state managerial authority over the electoral domain. The fact that incumbent candidates and parties can now use IT marketing techniques, the internet, Facebook and twitter not just during the temporally-bounded electoral domain, but also in the pre-electioneering and post electioneering periods (while taking care not to run afoul of restrictions) suggests that a greater blurring of the distinction between "political activities' and "election campaigning" is inevitable. University of Tokyo Professor Masami Honda has recently proposed this argument.[437] Honda suggests that the introduction of online electioneering, and the ongoing encroachment of other information technologies into the electoral domain is likely to erode the mechanisms put in place in 1925 to bound election campaigning in Japan. Given that such boundary making is the first step in establishing and asserting managerial control over the means and mechanisms used for electioneering, its "withering away" could eventually require substantial changes in electioneering rules in the interest of electoral fairness and integrity and lead to the much needed overhaul of the POEL. Though as yet an early attempt to theorize the possible impact of post-modern technologies on the POEL, this suggestion provides us food for thought as we await the next "post-modern," internet- and social media- aided election campaign in Japan.

[437] "The dissolution of distinction of political activity and election campaign with removal of ban of net election campaign [sic],"(Netto senkyou kaikin ni tomonau seiji katsudo to senkyo undo no kubetsu no kukai," *Information Processing Society of Japan SIG Technical Report*, Vol. 2015-EIP-68 N0.13, May 29, 2015.