

University of New South Wales Law Research Series

THE RIGHT TO PRIVACY IN ASIAN CONSTITUTIONS

GRAHAM GREENLEAF

Forthcoming (2020) *The Oxford Handbook of Constitutional Law in
Asia*
[2020] *UNSWLRS* 53

UNSW Law
UNSW Sydney NSW 2052 Australia

E: unswlrs@unsw.edu.au

W: <http://www.law.unsw.edu.au/research/faculty-publications>

AustLII: <http://www.austlii.edu.au/au/journals/UNSWLRS/>

SSRN: <http://www.ssrn.com/link/UNSW-LEG.html>

The Right to Privacy in Asian Constitutions

Graham Greenleaf, Professor of Law & Information Systems, UNSW Australia *

Draft Chapter for *The Oxford Handbook of Constitutional Law in Asia* (Oxford University Press, in publication), 4 March 2020.

Introduction

Privacy is a complex concept, and its constituent elements are often disputed. Decisional privacy, spatial privacy, bodily privacy, and informational privacy are some the dimensions of privacy that constitutional scholars have identified. This Chapter examines how jurisdictions in East and Southeast Asia protect these and other aspects of privacy through their constitutional regimes.¹ This Chapter first surveys East Asian jurisdictions, starting with the jurisdictions that are most protective of privacy rights. Next, the chapter turns to Southeast Asia, again starting with the jurisdictions that are relatively more protective of privacy. The Chapter then concludes by identifying certain patterns and highlights what one sees when viewing constitutional privacy rights in East and Southeast Asian jurisdictions together as a region.

South Korea

The Korean Constitution explicitly provides for the general protection of privacy,² and specifically for the protection of privacy of home³ and in communications.⁴ The Constitutional Court of Korea has elaborated on these constitutional provisions in a robust body of jurisprudence. It has clarified the definition of constitutional privacy rights and shed light on when governmental impingement of privacy can be justified according to the Court's proportionality requirement.⁵

In 2003, in the *Mandatory Seatbelt Case*, the Constitutional Court provided a helpful elaboration on the scope of constitutional privacy rights.⁶ It held that a law requiring drivers to wear seatbelts did not infringe upon drivers' freedom of privacy. Nonetheless, the Court's opinion offered a broad definition of privacy as 'a fundamental right which prevents the state from looking into the private life of citizens, and provides for the protection from the state's intervention or prohibition of free conduct of private living'. Moreover, it explained that the right to privacy includes 'confidential secrecy of an individual; ensuring the inviolability of one's own private life; keeping from other's intervention of such sensitive areas as one's conscience or sexual life; holding in esteem one's own personality and emotional life; and preserving one's mental inner world.'

* Thanks to Distinguished Professor Holning Lau, University of North Carolina School of Law, for valuable advice on both the content and editing of this chapter. All responsibility for content remains with the author.

¹ For a seminal discussion of privacy's various dimensions, see Bert-Jaap Koops et al 'A Typology of Privacy' (2017) 38(2) *University of Pennsylvania Journal of International Law* 483-575.

² Constitution (South Korea), art. 17.

³ Constitution (South Korea), art. 16.

⁴ Constitution (South Korea), art. 18.

⁵ For background on the Constitutional Court of Korea and its proportionality analysis, see [Woo-Young Rhee's chapter in this Handbook].

⁶ *Mandatory Seatbelt*, 2002Hun-Ma518 [2003] 15-2(B) KCCR 185 (30 October 2003).

The Court expanded its recognition of privacy rights in the 2005 *Fingerprint Case*, which articulated the right to data privacy.⁷ Drawing inspiration from the German Constitutional Court's conceptualization of 'informational self-determination', the Constitutional Court said that an individual right 'to personally decide when, to whom or by whom, and to what extent his or her information will be disclosed or used.'⁸ Ultimately, the majority found that the government's collection and storage of citizens' fingerprints for investigation purposes did not excessively violate the right to control personal information. A very strongly dissenting minority believed, however, that the fingerprinting policy was too broad and therefore unjustified.

In reviewing the Constitutional Court's privacy jurisprudence, one finds that the Court has often found that the government's impingement upon privacy to be justified, as in the *Seatbelt Case* and *Fingerprint Case*. Likewise, the Court has held that laws banning cigarette smoking in certain zones did not amount to an excessive restriction on the right to freely smoke cigarettes, which is grounded in the right to decisional privacy as well as the right to pursue happiness.⁹ In some constitutional cases, complainants' privacy claims have failed for reasons other than proportionality analysis. For example, the Constitutional Court upheld a law requiring attorneys to report their caseloads to the bar association.¹⁰ Because the work of attorney's is public in nature, the Court found that the law did not implicate any privacy interests that would trigger proportionality analysis.

In contrast to the cases discussed thus far, there have also been notable cases in which the Constitutional Court found the government in violation of privacy rights. For example, in the 2012 *Real Name Cases*¹¹ the Court held that Korea's online 'real name' statute was unconstitutional.¹² The law required individuals to provide their real names in order to make online postings. The Court considered the legislation's purpose legitimate in its aims to prevent and punish posting of illegal or defamatory messages. However, the law's impingement on privacy was not proportional to those aims.¹³ The Court also struck down a law for violating constitutional privacy rights in the *Disclosure of Military Health Records of Public Officials Case*.¹⁴ The law at issue required certain public servants to report the names of diseases as grounds of their exemption from military service required that such information be made open to the public.

It is worth noting that the Constitutional Court has developed a sophisticated jurisprudence on the privacy rights of convicted prisoners. In three important cases, laws that impinge upon the privacy of convicted inmates have been upheld, but sometimes against strong dissents. In these cases, the Court's majority found the impingement on privacy to be proportionality

⁷ *Collecting and Computerizing Fingerprints and Using them for Investigation Purposes case* (2005) 17-1 KCCR 668, 99Hun-Ma513 and 2004Hun-Ma190 (consolidated) (26 May 2005).

⁸ *Census Act Case* (1983) 65 BVerfGE 1 (German Constitutional Court); see W. Kilian 'Germany' in J. Rule and G. Greenleaf (Eds.) *Global Privacy Protection: The First Generation* (Edward Elgar, 2008), p.80.

⁹ *No-smoking Zone and Right to Smoke Cigarette Case*, 2003Hun-Ma457 [2004] KRCC 10 (26 August 2004).

¹⁰ *Report of the Number of Cases Accepted and the Amount of Case Acceptance by Attorneys Case*, 2007Hun-Ma667 [2009] KRCC 26 (29 October 2009).

¹¹ Constitutional Court Decision, 2010Hun-Ma47, 23 August 2012.

¹² Arts. 44-5 of the Act on Promotion of Information and Communications Network Utilization and Data Protection, etc. ('ICN Act') required large-scale portal sites (more than 100,000 visitors on average a day) to record the real name identities of visitors posting comments. One justification was that the poster's details could be disclosed if a victim then wanted to take legal action for defamation or privacy breaches.

¹³ For details see Whon-il Park and Graham Greenleaf, 'Korea Rolls Back "Real Name" and ID Number Surveillance' (2012) 119 *Privacy Laws & Business International Report*, pp. 20–21.

¹⁴ *Disclosure of Military Health Records of Public Officials Case*, 2005 Hun-Ma 1139 [2007] KRCC 4 (31 May 2007).

related to legitimate criminal justice goals. First, the *DNA Identification Case*¹⁵ involved DNA samples being taken compulsorily from certain prisoners. Second, the *Sexual Offenders Register Case*¹⁶ upheld a public registry that discloses the personal information of persons convicted of indecent acts. Third, the *Electronic Tracking Case*¹⁷ upheld legislation which allowed persons convicted of specified sexual offences on more than one occasion to be subjected to wearing an electronic tracking device, coupled with prohibitions on approaching certain places and persons. These decisions provide a well-developed privacy jurisprudence to issues raised by new technologies that are being faced in many jurisdictions, but came within the ambit of a constitutional court earlier in Korea than elsewhere.

Although the cases discussed thus far have involved protection of privacy against the state, the Supreme Court has also clarified that interpretations of the Civil Act (usually by the Supreme Court) are therefore guided by constitutional provisions.¹⁸ The Korean constitution therefore indirectly provides for the protection of privacy rights between citizens.¹⁹

Taiwan

Taiwan's Constitution does not include an explicit clause protecting privacy, other than explicitly protecting 'freedom of privacy of correspondence'. However, beginning with a 1992 decision on the obligations of banks to keep credit records confidential,²⁰ the Taiwan Constitutional Court (also known as the Council of Grand Justices) suggested in a series of cases that a constitutional right to privacy can be inferred from the constitution.²¹ The Court was rather vague about the contours of this implied right to privacy until it offered greater clarity in the *319 Shooting Case* in 2004.²²

The *319 Shooting Case*²³ addressed whether provisions of the Act of the Special Commission on the Investigation of the Truth in Respect of the 319 Shooting²⁴ were unconstitutional. It is difficult to imagine considerations of privacy protection affecting the highest matters of state more starkly. The Court's decision stated that, although the constitution does not explicitly recognize a right of privacy, privacy is an implied constitutional right. The Court found that the law at issue implicated informational privacy, which the Court called 'the freedom of self-control of personal information.'²⁵ The Court ultimately held that two articles of the law impinged upon privacy in ways that did not meet constitutional requirements of proportionality and due process.

¹⁵ *Case on the Act on Use and Protection of DNA Identification Information* [26-2(A) KCCR 337, 2011Hun-Ma28-106-141-156-326, 2013Hun-Ma215-360 (consolidated), August 28, 2014]

¹⁶ *Case on Registration of Personal Information of Sexual Offenders* [26-2(A) KCCR 226, 2013Hun-Ma423-426 (consolidated), July 24, 2014]

¹⁷ *Court's Order of Attachment Electronic Device to Specific Crime Offenders and Imposition of Other Duties* [24-2(B) KCCR 364, 2011Hun-Ba89, December 27, 2012]

¹⁸ *Information Publication Prohibition Case* 2008Da42430 (Supreme Court, Korea), decided 2 September 2011.

¹⁹ Kyungsin Park provided valuable comments concerning Korea.

²⁰ JY Interpretation No. 293 (1992) (concerning confidentiality requirements of banks concerning customer information); See S. Peng 'Privacy and the construction of legal meaning in Taiwan', (2003) *International Lawyer*, No. 37, 1037 at 1042.

²¹ JY Interpretation No. 509 (2000) (concerning criminalization of defamation); JY Interpretation NO-535 (2001) (concerning 'police checks'). See also Peng, 'Privacy and the construction of legal meaning in Taiwan', p. 1042.

²² JY Interpretation No. 585 (15 December 2004) (hereinafter the '*319 Shooting Case*').

²³ *Id.*

²⁴ The '*319 Shooting*' refers to the attempted assassination of Taiwan's President and Vice-President on the eve of the 2004 elections. See Jonathan Manthorpe, *Forbidden Nation: A History of Taiwan* (Palgrave Macmillan 2009), chs. 1 and 20.

²⁵ The Court's discussion of informational privacy seemed inspired by the *Census Act Case* (1983) 65 BVerfGE 1 (German Constitutional Court).

A year later, the Court considered the constitutionality of compulsory fingerprinting for ID cards²⁶ It reiterated the approach it had taken in the *319 Shooting* decision in stronger terms. The Court stated not only that people have the right to decide whether and how to disclose personal information, and the correct inaccurate government records pertaining to personal information. The Court also stated that the right to informational privacy include to right to know how one's personal information will be used.

The Court found that the legislative provisions in dispute amounted to 'compulsory fingerprinting for the purpose of record keeping' of households, and that fingerprints are a form of personal information subject to privacy protections. Collection of fingerprints must therefore be 'related to the achievement of a compelling public interest, which should also be clearly prescribed by law'. The Court rejected 'crime prevention' as a legislative purpose because Taiwanese law had a strict separation between household administration and police administration. In light of the *319 Shooting* decision, compulsory large-scale collection of other biometrics, such as DNA samples, would likely face high barriers of justification in Taiwan.

The Court referred again to 'self-control of personal information' in 2007 when it considered the one explicit mention of privacy in Taiwan's Constitution: the 'freedom of privacy of correspondence' in Article 12. The Court said that the provision protects 'people's right to choose whether or not, with whom, when and how to communicate and the contents of their communication' without arbitrary 'invasion by the State and others'.²⁷ At issue was the constitutionality of a law that gave prosecutors the authority to issue writs of communication monitoring. The Court held that this legal provision violated Article 12 because the failure to require impartial and independent judges to issue the writs was neither reasonable nor legitimate.

The Court has continued to issue significant decisions concerning privacy issues, for example upholding a law that restricted stalking by journalists.²⁸ The Court invoked freedom of privacy to reject the claim that the law unconstitutionally infringed upon freedom of the press. Although the Court's decisions have involved state actions, the terminology used by the Court leaves open the possibility of horizontal application. Article 195 of Taiwan's Civil Code of 1999 provides for a very general and comprehensive privacy tort. Although there has been very little judicial development of this tort, courts may eventually interpret this tort while guided by Taiwan's constitutional privacy jurisprudence.²⁹

Japan

Article 13 of the Constitution of Japan (1946) protects the right to 'life, liberty, and the pursuit of happiness'. The Japanese Supreme Court has said that this provision includes a right to privacy, but (in accordance with art. 13) only 'to the extent that it does not interfere with the public welfare'. The first Supreme Court decision recognizing the right to privacy under Article 13 involved a 1969 ruling that people have a right not to be photographed by the police without their consent.³⁰ However, applying a reasonableness test, the Court found that, the police in this case were justified in photographing a campus demonstrator due to their urgent need to collect evidence of an offence, and the photographs were taken 'by an appropriate method'.

²⁶ J.Y. Interpretation No. 603 (28 September 2005).

²⁷ J.Y. Interpretation No. 631 (20 July 2007).

²⁸ J.Y. Interpretation No. 689 (29 July 2011).

²⁹ See Greenleaf, *Asian Data Privacy Laws*, pp. 170-1.

³⁰ *Hasegawa v. Japan*, 23 Keishu 1625 (24 December 1969) ('Kyoto Zengakuren Case').

The Juki-net case of 2008 is probably the most significant interpretation of Article 13 to date.³¹ Juki-net is a national government network that links local governments' resident registries and assigns an 11-digit code to each person. Lower courts had held that Juki-net infringed Article 13 by not requiring consent of individuals to be included in it. The Supreme Court reversed, but confirmed that Article 13 protects "private life" and "personal information."

In finding that Juki-net did not violate principles of privacy, the Court took into account factors including the fact that (1) the information contained in Juki-net was quite limited, (2) the information 'cannot be regarded as highly confidential information that is related to an individual's inner mind', (3) Juki-net was operated on the basis of laws and regulations and for justified administrative purposes, (4) there was 'no concrete risk' of unauthorized outside access; and (5) use by the system operators for non-intended purposes (e.g., data matching) was prohibited by law. Given the Court's extremely limited definition of 'highly confidential information that is related to an individual's inner mind', and false assumption (at least in hindsight) of 'no concrete risk' of unauthorized outside access, there seems to be little potential of Article 13 providing significant protections for information privacy if future cases follow the reasoning of the *Juki-net Case*.

Indeed, even before the *Juki-net Case*, the Supreme Court rarely found violations of privacy. In one of the rare examples, the Court limited wiretapping.³² In another example, the Court ruled that a university breached the right of privacy when it submitted to the People's Republic of China (PRC) a list of students, without their consent, who had applied to attend a lecture by the Chairman of the PRC.³³ A notable example of the Court refusing to find a constitutional violation of privacy involved the fingerprinting of foreign residents.³⁴ The Court found that the fingerprinting did raise privacy issues but was justified on grounds of social welfare. In sum, while the Court has protected some elements of 'informational self-determination', such protections are extremely weak and contrast with the constitutional decisions of Korea and Taiwan.

China (People's Republic)

China's Constitution formally lists fundamental rights and duties of citizens,³⁵ but the Constitution itself is generally regarded as non-justiciable. It is a coincidence that the most significant case concerning the justiciability of constitutional rights, *Qi Yuling v Chen Xiaoqi*,³⁶ was a case concerning privacy, or to be more specific, identity theft. Judicial discussion of privacy as a constitutional right appears to have ended with that case.

Plaintiff Qi Yuling, a 28 year-old female from Shandong Province, and the defendant, Chen Xiaoqi, graduated from high school in the same year. Qi did better in examinations, but Chen fraudulently obtained Qi's notice of admission to a business university, and Chen and her father falsified identity documents so that she could pass herself off as Qi and obtain admission in Qi's place. Three years later Chen graduated and obtained employment. Qi found that she could not pursue an education, and commenced action. The lower Shandong courts held that Qi's rights under the General Principles of the Civil Law (GPCL) had been infringed, but Qi was dissatisfied, believing that the

³¹ *Ikuta v. Moriguchi City*, 62 Minshu 665 (6 March 2008) ('Juki-net Case').

³² *Case of narcotics control act violation, fraud, and attempt of aforementioned actions*, 53 Keishu 1327 (16 December 1999).

³³ *Case concerning whether information on names, addresses, etc., of students who applied for participation in a lecture meeting held by a university can be protected by law*, 57 Minshu 973 (12 September 20013) ('Waseda Kotakumin Case').

³⁴ *Case concerning impression of fingerprints*, 49 Keishu 842 (15 December 1995).

³⁵ Constitution of the People's Republic of China, as amended to 2004, articles 33–40.

³⁶ *Qi Yuling v. Chen Xiaoqi* SPC Gazette, Issue 5, 2001
<http://en.pkulaw.cn/display.aspx?cgid=1970324837041542&lib=case>

remedy did not adequately reflect her loss of a right to an education, and consequent losses. The Shandong Appeal Court referred the matter to the Supreme People's Court (SPC).

The SPC said, in its reply to the Shandong court, that 'Chen Xiaoqi and others have violated the fundamental right to receive education enjoyed by Qi Yuling in accordance with the provisions of the Constitution by means of violating rights in a person's name. This has produced the result of actual damages. Commensurate civil liability applies.'³⁷ The Constitution had not been raised in the lower courts, but the SPC itself raised 'the right to receive education' in article 46 of the Constitution, and based its decision upon it. The decision in effect suggested, perhaps for the first time, that rights stated in the Constitution could be justiciable. Two earlier instructions by the SPC had indicated that courts should not cite constitutional provisions in either criminal or civil judgments,³⁸ so this reply by the SPC was most unusual. However, in 2008 the SPC officially withdrew its reply to the Shandong court, stating only that it was no longer in use (or application), but without giving reasons.³⁹ This is taken to confirm that it is not possible for individuals to raise constitutional rights in China's courts in civil disputes, and to be a return to the position established in earlier cases.⁴⁰ The rights stated in articles 33–40 of the Constitution therefore cannot be used to vindicate privacy interests in civil actions before Chinese courts.

Hong Kong and Macau SARs

Hong Kong's privacy protection has a unique constitutional context arising from Hong Kong's position as a Special Administrative Region (SAR) of the People's Republic of China (PRC).⁴¹ Constitutional protection of privacy occurs in three different ways in Hong Kong. First, the Basic Law (1990) provides for the continued application of the International Covenant on Civil and Political Rights (ICCPR), including its general right of privacy (Article 17) and the right to protection of the law against 'unlawful interference with . . . privacy, family, home or correspondence' (Article XX).

Second, the ICCPR provisions have been replicated in Hong Kong's Bill of Rights Ordinance (BORO), but its provisions are subject to amendment or repeal by the Legislative Council (LegCo), unlike those of the Basic Law. The BORO is binding only on government authorities and cannot be used by individuals to seek protection against actions by businesses or other private bodies.⁴²

Third, the Basic Law specifically provides in relation to privacy that 'homes and other premises of Hong Kong residents shall be inviolable'; that 'arbitrary or unlawful search of, or intrusion into [such homes and premises] shall be prohibited'; that 'freedom and privacy of communication of Hong Kong residents shall be protected by law'; and that '[n]o department or individual may . . . infringe upon the freedom and privacy of communications of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences'. These Basic Law protections cannot be amended by the local legislature.

³⁷ Translation from 'China's *Marbury vs. Madison*?—Direct application of the Constitution in litigation' (*China Legal Change*, 20 September 2001), copy held, no longer available on the Internet.

³⁸ Wang Zhenmin and Tu Kai 'Chinese constitutional dynamics', in A H Y Chen (Ed.) *Constitutionalism in Asian in the Early Twenty-first Century* (Cambridge, 2014), pp. 122-123.

³⁹ 'Decision on Abolishing some Judicial Interpretations (the Seventh Batch) issued before the end of 2007' (Supreme People's Court, 18 December 2008).

⁴⁰ Zhenmin and Kai 'Chinese constitutional dynamics', p. 123.

⁴¹ See [Albert Chen's OHCLA chapter on Hong Kong].

⁴² *Id.*

This third protection became a major public issue in 2005–06. Litigants used this protection to force Hong Kong’s administration to enact a Communications and Surveillance Ordinance in order to end a constitutional crisis.⁴³ The Ordinance repealed the previous power of the Chief Executive to authorize interception and introduced the requirement of judicial authorization for interception of communications and other intrusive types of covert surveillance by law enforcement bodies, while allowing law enforcement agencies to sanction their own use of less intrusive surveillance. The Ordinance also provided for the appointment of a Commissioner on Interception of Communications. As a result, Hong Kong moved from being a jurisdiction with only nominal controls over surveillance, to one with a relatively high degree of accountability and transparency.⁴⁴

This case showed that Hong Kong’s constitutional protections of privacy was of substance, even though rarely applied prior to that point. The Basic Law protections have the potential to play a role in Hong Kong with some similarities to the role that article 8 of the European Convention on Human Rights plays in European countries. Indeed, case law of the European Court of Human Rights on article 8 was influential in Hong Kong cases preceding the Ordinance.⁴⁵

Macau SAR’s Basic Law⁴⁶ provides in article 30bis that ‘Macao residents shall enjoy the right to personal reputation and the privacy of their private and family life’. According to article 32, there may not be infringement of ‘freedom and privacy of communication’ except where ‘in accordance with the provisions of the law to meet the needs of public security or of investigation into criminal offences’. Numerous other provisions refer to rights which could imply also rights of privacy, including that ‘human dignity . . . shall be inviolable’, ‘homes and other premises . . . shall be inviolable’ and protected against arbitrary or unlawful search of, or intrusion.⁴⁷ Such rights also apply to persons other than residents in Macau.⁴⁸ However, unlike in the Hong Kong SAR, constitutional adjudication of privacy rights has not arisen in the Macau SAR.

The Philippines

The Philippines 1987 Constitution,⁴⁹ based on the US Constitution, includes various protections relevant to privacy including the protections against being ‘deprived of life, liberty, or property without due process of law’; ‘against unreasonable searches and seizures of whatever nature and for any purpose’; against violations of ‘privacy of communication and correspondence. except upon lawful order of the court, or when public safety or order requires otherwise, as prescribed by law’; and the right of access to official records.⁵⁰ These constitutional protections are supported by the Civil Code in articles 26 and 32 which in effect gives individuals the right to take civil actions against private persons (not only government) for violating constitutional privacy protections.

Philippines case law⁵¹ recognizes many types of privacy interests, including informational privacy and decisional privacy.⁵² This chapter highlights just a few examples from this rich body of case

⁴³ Koo Sze Yiu and Another v. Chief Executive of the HKSAR [2006] HKCFA 75.

⁴⁴ For details, see McLeish and Greenleaf, ‘Hong Kong’, chapter, section ‘Constitutional protections of privacy and the crisis over surveillance laws’, in Rule and Greenleaf (Eds.), *Global Privacy Protection* (Edward Elgar, 2008), pp. 234–5.

⁴⁵ See for example numerous references in *Leung Kwok Hung and Others v. HKSAR* [2005] HKCFA 40.

⁴⁶ Basic Law of the Macao Special Administrative Region of the People’s Republic of China

⁴⁷ Basic Law (Macao), arts. 30 and 31, respectively.

⁴⁸ Basic Law, art. 43.

⁴⁹ Constitution of the Republic of the Philippines (1987) (Official Gazette) <<http://www.gov.ph/the-philippine-constitutions/the-1987-constitution-of-the-republic-of-the-philippines/>>.

⁵⁰ Constitution of the Republic of the Philippines (1987), art. III Bill of Rights, ss. 1, 2, 3, and 7, respectively.

⁵¹ JJ Disini has provided considerable assistance in the selection of decisions mentioned in this section, and provision of texts which have been paraphrased, which assistance is gratefully acknowledged.

law. One of the earliest privacy cases was *Morfe v. Mutuc*.⁵³ The Court stated that the constitution's protection of freedom provides more than only freedom from unlawful restraint, and also protects privacy. However, it ultimately upheld requirements on public officials to disclose assets because of the rational relationship between the requirements and the anti-corruption objective of the disclosure law.

In another landmark case, *Ople v. Torres*, the Supreme Court in 1998 struck down President Ramos's administrative order seeking to implement a national identification card. The court held that the administrative order violated the constitutional right to privacy, and could not be implemented without legislation that includes appropriate protective measures.⁵⁴ However, in *Kilusang Mayo Uno (KMU) v National Economic Development Authority (NEDA)*,⁵⁵ an executive order requiring all government agencies and government-owned corporation to adopt uniform identification systems was upheld. The Court noted that, unlike the identification cards in *Ople*, the data collected and printed on the identification cards in *KMU* was very limited, and the executive order prescribed safeguards. In addition, privacy protections in other jurisdictions did not bar the adoption of reasonable government ID systems.

A group of conjoined cases in 2008 were the first time the Court ruled on the constitutionality of random drug testing, in light of the constitutional protections against unreasonable search and seizure.⁵⁶ Following US precedents, the Court held that legislative provisions requiring mandatory random drug testing of students was constitutional. Minor students have less privacy rights than adults, and are subject to the supervision of schools standing *in loco parentis*, which may impose conditions that are fair, just, and non-discriminatory, and reasonably necessary to safeguard children's health and well-being. Legislation requiring similar random testing of employees, in both the public and private sectors, was also deemed constitutional, due to 'the reduced expectation of privacy on the part of the employees, the compelling state concern likely to be met by the search, and the well-defined limits set forth in the law to properly guide authorities in the conduct of the random testing'.⁵⁷

The Court has also held that the privacy of public figures is narrower than that of private individuals. When one of the main figures of the EDSA revolution objected, on privacy grounds, to a film's portrayal of him, the Court held⁵⁸ he had become a 'public figure' due to his role in the change of government, and after seeking publicity in that role he could not complain about receiving it.⁵⁹ In this privacy case, and most others from the Philippines, US constitutional decisions have a very strong influence on the Court's jurisprudence while decisions from other legal traditions are cited far less frequently.

An unusual aspect of Philippines' constitutional privacy protection is the Writ of Habeas Data. In a 2008 case,⁶⁰ the Supreme Court ruled that this protection stems from the constitutional right to privacy and the Court's power to promulgate rules concerning protection of constitutional rights.

⁵² *Disini et al v Secretary of Justice* GR 203335, 11 February 2014 citing *Whalen v Roe* (1977) 429 US 589.

⁵³ *Morfe v Mutuc* GR L-20387, 31 January 1968 citing *Olmstead v United States*, (1928) 277 US 438.

⁵⁴ *Ople v Torres* GR 127685, 23 July 1998; see Graham Greenleaf and Nigel Waters, 'Philippines Supreme Court cans ID card' (1998) 5 *Privacy Law & Policy Reporter*, p. 80.

⁵⁵ *Kilusang Mayo Uno v National Economic Development Authority*, GR 167798, 19 April 2006.

⁵⁶ *Social Justice Society v. Dangerous Drugs Board & Phil. Drug Enforcement Agency* [2008] PHSC 1190

⁵⁷ *Ibid.*

⁵⁸ *Ayer v Capulong* GR 82380, 29 April 1988; See also *Lagunzad v Vda. de Gonzales*.

⁵⁹ *Ayer v. Capulong* *ibid.* citing *Strykers v Republic Producers Corp*, 238 P. 2d 670 (1952), *Nixon v Administrator of General Services*, 433 US 425 (1977), and *Smith v National Broadcasting Co*, 292 P 2d 600 (1956).

⁶⁰ *Rule on the Writ of Habeas Data*, AM 08-1-16- SC, 22 January 2008.

Individuals can use the Writ of Habeas Data to seek remedies against, or to restrain, misuse of personal information by government or private entities, but as this protection has rarely been used.⁶¹

Indonesia

Indonesia's Constitutional Court stands outside the normal court hierarchy. It is entitled to decide on the constitutionality of statutes, but not of various forms of delegated legislation or administrative actions.⁶² Nevertheless, it has intervened in privacy-related issues arising from statutes.

Although Indonesia's constitution does not explicitly protect privacy, Indonesian courts have recently found an implied protection of privacy through interpretation of article 28G(1) of the Constitution,⁶³ which states: 'Each person is entitled to protection of self, his family, honor, dignity, the property he owns, and has the right to feel secure and to be protected against threats and fear to exercise or not exercise his basic rights'. In the landmark case of *Anggara v Kominfo*⁶⁴ the Constitutional Court annulled part of the Electronic Information and Transactions Law because it authorized the government to issue a regulation concerning wiretapping, and this was inconsistent with Article 28G of the Constitution. The Court stated that wiretapping restricts the fundamental right to privacy; accordingly, can only be restricted under limited circumstances.⁶⁵

Anggara ruled that the Ministry of Communication and Information Technology (MoIC) must draft a comprehensive bill on wiretapping instead of regulating wiretapping through mere regulation. Such legislation should describe among other things who has the authority to issue an order for wiretapping and recording of conversations, and whether the order may only be issued after adequate initial evidence is obtained.⁶⁶

Personal information protections – Timor Leste and Thailand

Two Asian constitutions provide specific privacy protections for personal information in addition to other privacy rights. Timor Leste's Constitution, Part II, states that '[e]very individual has the right to honour, good name and reputation, protection of his or her public image and privacy of his or her personal and family life',⁶⁷ and provides strong protections for the 'inviolability' of the home, correspondence, and other means of private communication, except under judicial warrant.⁶⁸ This part of the Constitutional also recognizes a right of access to a person's own data. It requires the law to define 'personal data' and the conditions of its processing, and prohibitions on processing of various categories of sensitive data without consent, applying against both the public and private sectors. The government is required to take positive actions, such as the enactment of legislation to guarantee the fundamental rights and freedoms of citizens,⁶⁹ but this has not yet occurred.⁷⁰

⁶¹ See Greenleaf *Asian Data Privacy Laws*, pp. 340-1.

⁶² Bell, ch. 8 in Black and Bell (Eds.), *Law and Legal Institutions of Asia*, pp. 279-81.

⁶³ This section is derived, with permission, from Sinta Dewi, 'Balancing Privacy Rights and Legal Enforcement: Indonesia Practices' (2012) 5 *International Journal of Liability and Scientific Enquiry*, pp. 238-9.

⁶⁴ Case Number 5/PUU/2010.

⁶⁵ *Anggara* reaffirmed two previous decisions which held that privacy rights are derogable rights that can be limited only under limited circumstances. See *KPKPN v KPK* Case no. 006/PUU-I/2003, and *Mulyana v KPK* Case no. 012-016-019/PUU-IV/2006.

⁶⁶ For this section, Sinta Dewi Rosadi Andin Adit Rahman provided valuable comments.

⁶⁷ Constitution (Timor-Leste), s. 36.

⁶⁸ Constitution (Timor-Leste), s. 37.

⁶⁹ Constitution (Timor-Leste), s. 115.

Thailand's 2017 Constitution⁷¹ protects rights of 'privacy, dignity, reputation, and family'. It also recognizes a right against 'the use of personal information for benefit by any means', but this right may be infringed by a law 'specifically enacted as deemed necessary for the public interests'.⁷² This balance between rights protection and limitation is reflected in the data protection law under legislative consideration in 2018. While specific protection of personal information is rare among constitutions, such protection has been included in previous Thai constitutions.⁷³

Singapore, Malaysia and absent Indian influence

Singapore's Constitution has a number of provisions relating to protection of individual liberties,⁷⁴ but none of them refer specifically to privacy. The most relevant is the provision in art. 9(1) that '[n]o person shall be deprived of his life or personal liberty save in accordance with law',⁷⁵ a provision derived from art. 21 of the Indian Constitution.⁷⁶ Thio has noted that in *Malcomson v Mehta*,⁷⁷ a 2001 case concerning harassment, Lee CJ 'opined that the time had come in Singapore to find such privacy rights, whether at common law or possibly, though the learned judge did not so declare, as implied constitutional rights.'⁷⁸ Subsequent decisions have only discussed this case in the context of a possible tort of harassment, not in terms of constitutional rights.⁷⁹

In *Lim Meng Suang*⁸⁰ in 2014, Singapore's Court of Appeal considered the constitutionality of s. 377A of the Penal Code, which criminalises male homosexual conduct (also derived from a colonial Indian statute), in relation to both art. 9(1) and art. 12 (equal protection of the law). Although the art. 12 arguments primarily concerned discrimination (a 'reasonable classification' test), the art. 9(1) arguments related directly to privacy, namely that 'the right to life and personal liberty under Art 9(1) should include a limited right to privacy and personal autonomy allowing a person to enjoy and express affection and love towards another human being'.⁸¹ The Court held that such a right to privacy and personal autonomy should not be read into the phrase 'life or personal liberty' for three reasons. First, established Singapore jurisprudence dictates that the phrase 'personal liberty' in art. 9(1) 'refers only to the personal liberty of a person from unlawful incarceration or detention' and 'life' should be given a similarly narrow interpretation. Second, the structure of art. 9 indicates that the whole article is only about unlawful detention. Third, Art 21 of the Indian Constitution (from which the Singapore provision derives) focuses on unlawful detention.

⁷⁰ It is possible for the Supreme Court to consider failures to enact legislation to be unconstitutional. Constitution (Timor-Leste), s. 151: 'The President of the Republic, the Prosecutor-General and the Ombudsman may request the Supreme Court of Justice to review the unconstitutionality by omission of any legislative measures deemed necessary to enable the implementation of the constitutional provisions.'

⁷¹ *Draft Constitution of the Kingdom of Thailand*, 2016 United Nations (Thailand) (unofficial English translation) <<http://www.un.or.th/2016-thailand-draft-constitution-english-translation/>>; the final version as adopted has some amendments in relation to the role of the King.

⁷² Constitution of Thailand 2017, s. 31.

⁷³ For example, Constitution of Thailand 2007, s. 35.

⁷⁴ Constitution of the Republic of Singapore (1985), pt. IV.

⁷⁵ Constitution of the Republic of Singapore, art. 9(1).

⁷⁶ *Lim Meng Suang and another v Attorney-General and another appeal and another matter* [2014] SGCA 53 [47].

⁷⁷ [2001] SGHC 308; [2001] 4 SLR 454 [57]; the case is sometimes mis-cited as *Bertram v Mehta*.

⁷⁸ Thio, Li-ann 'We are feeling our way forward, step by step: The continuing Singapore experiment in the construction of communitarian constitutionalism in the twenty-first century's first decade' in A H Y Chen (Ed.) *Constitutionalism in Asian in the Early Twenty-first Century* (Cambridge, 2014), p. 289.

⁷⁹ *AXA Insurance Singapore Pte Ltd v Chandran s/o Natesan* [2013] SGHC 158.

⁸⁰ *Lim Meng Suang and another v Attorney-General and another appeal and another matter* [2014] SGCA 53

⁸¹ *Lim Meng Suang* [43]

The Court advanced the proposition regarding Art 21 of the Indian Constitution without any support from Indian case law. Indeed, this claim was disputable in 2014, but it has now become untenable in light of the Indian Supreme Court's 2017 *Puttaswamy* decision recognizing privacy as a fundamental and inalienable right in India.⁸² However, perhaps for more abundant caution, the court in *Lim Meng Suang* added that 'foreign cases that have conferred an expansive constitutional right to life and liberty should be approached with circumspection because they were decided in the context of their unique social, political and legal circumstances.'⁸³ One can only speculate how the Singaporean court would characterise what is unique about India in 2017. However, *Lim Meng Suang* is consistent with the history of Singapore's courts resisting arguments influenced by foreign constitutional decisions, including those from India.⁸⁴ Despite whatever logic might suggest, it is unlikely that Singapore's courts will find art. 9(1) to imply a right of privacy.

Also inspired by the Indian Constitution, Malaysia's federal Constitution includes article 5(1) concerning 'life or personal liberty' with the same wording as in Singapore,⁸⁵ and also does not include any explicit reference to privacy in its list of 'fundamental liberties'.⁸⁶ The most explicit reference to an implied privacy right was made by the High Court of Johor Bahru⁸⁷ in a case involving five closed-circuit television (CCTV) installed by the defendant, one pointing directly at the plaintiffs' house. The Court held that the plaintiff's right to privacy, as implied by the Constitutions, had been violated. More significant is that Malaysia's Federal Court stated in 2010, although only in dicta, that it is 'patently clear from a review of the authorities [from India] that "personal liberty" in Article 5(1) includes within its compass other rights such as the right to privacy'.⁸⁸ This line of argument is now stronger, in light of *Puttaswamy*, so it is possible that the Malaysian judiciary will develop some protection of privacy if it is more open to foreign influences than that of Singapore. Following the 2018 change of government in Malaysia, there have also been significant changes of judicial personnel.⁸⁹

Other Southeast Asian countries – Absent protections

In other Southeast Asian countries, where there are potential constitutional privacy rights, there are no institutions capable of enforcing the rights. Nor are such institutions likely to develop under present constitutional and political arrangements.

For example, Vietnam's Constitution⁹⁰ has a few clauses relevant to privacy, stating that citizens will enjoy inviolability of the person and his domicile, and the protection of the law with regard to his life, health, honour, and dignity.⁹¹ There are various protections concerning privacy of forms of

⁸² *Puttaswamy v Union of India*, Supreme Court of India, 24 August 2017 (Writ Petition (Civil) No. 494 of 2012); A nine judge 'constitution bench' of India's Supreme Court unanimously decided that India's Constitution recognizes an inalienable and inherent right of privacy as a fundamental constitutional right. Privacy protection is implied, and 'emerges primarily from' the provision in art. 21 that '[n]o person shall be deprived of his life or personal liberty except according to procedure established by law' (from which the near-identical Malaysian and Singaporean provisions are derived), and is also protected by other constitutional provisions providing procedural guarantees.

⁸³ *Lim Meng Suang* [43] - [48].

⁸⁴ See Arun K. Thiruvengadam, 'The Use of Foreign Law in Constitutional Cases in India and Singapore: Empirical Trends and Theoretical Concerns', Interest Group on the Use of Foreign Precedents by Constitutional Judges, unpublished manuscript, 2010.

⁸⁵ Constitution of Malaysia, art. 5(1).

⁸⁶ Constitution of Malaysia, pt. II.

⁸⁷ *Lew Cher Phow & Lew Cha Paw v Pua Yong Yong* [2011] MLJU 1195; reference provided by Abu Bakar Munir.

⁸⁸ *Sivarasa Rasiiah v Badan Peguam Malaysia* [2010] 2 MLJ 333. See also Munir and Yasin, *Personal Data Protection in Malaysia*, pp. 14–15.

⁸⁹ For this section, Abu Bakar Munir and Sonny Zulhuda provided valuable comments concerning Malaysia,

⁹⁰ Constitution of Vietnam (1992).

⁹¹ Constitution of Vietnam, art. 71.

communications.⁹² However, the Constitution does not provide for any independent institution responsible for implementing such rights, and constitutional interpretation is left to the National Assembly and its Standing Committee.⁹³ Constitutional amendments adopted in 2013 have not strengthened these or other clauses protecting human rights.⁹⁴ Although there has been debate for many years concerning the need for some type of constitutional court, this has not occurred.

Likewise, Cambodia, and Myanmar lack legal institutions that enforce privacy rights, although their constitutions make certain references to privacy principles. Cambodia's Constitution provides in article 40 for the right to privacy of residence, secrecy of various forms of communication, and requirements that searches be made in accordance with law. Myanmar's 2008 Constitution⁹⁵ includes guarantees of numerous civil and economic guarantees, including that the state 'shall protect the privacy and security of home, property, correspondence and other communications of citizens'.⁹⁶ These rights are supposed to be justiciable by application to the Supreme Court,⁹⁷ rather than the Constitutional Tribunal (which has uncertain powers), but there has been no case law concerning privacy rights.

Finally, Laos and Brunei lack any apparent constitutional protection of privacy. The Lao PDR Constitution of 2003 does not provide express or implied protection of privacy, although it does state that the 'right of Lao citizens in their bodies, dignities and residences are inviolable'.⁹⁸ Brunei, one of the world's few remaining absolute monarchies, has a Constitution that does not recognize any constitutional rights of citizens, let alone a right of privacy.

Conclusions – An essential and often-used protection of privacy

Of the jurisdictions considered in this chapter, only two do not provide any apparent constitutional protection of privacy (Brunei, Laos), but constitutional protections are not justiciable in at least three others (China, North Korea, and Vietnam). Protections are of uncertain existence in Malaysia and Singapore, and untested in the courts in four jurisdictions (Timor Leste, Thailand, Cambodia and Macau SAR). That leaves six North and Southeast Asian jurisdictions where constitutional privacy protections have been enforced by the courts (South Korea, Taiwan, Japan, Hong Kong SAR, Indonesia and the Philippines). The decisions of the Taiwan Constitutional Court, the Korean Constitutional Court, and the Philippines Supreme Court are the most detailed articulations of the protection of privacy by constitutional courts in Asia. All three courts have recognised strong privacy protections, particularly as they are based primarily on implied privacy rights, but on different issues.

In the six jurisdictions where courts have found legislation to be in violation of privacy rights, the subject matter of the legislation struck down has included ID card schemes (the Philippines, Taiwan), government requirements of information disclosure (South Korea, Taiwan), data matching (Taiwan), telecommunications interception (Hong Kong, Indonesia, Japan), compulsory fingerprinting (Taiwan) and 'real name' Internet requirements (South Korea). Constitutional

⁹² Constitution of Vietnam, art. 73.

⁹³ Bun Ngoc Son 'Constitutional developments in Vietnam in the first decade of the twenty-first century', in Albert Chen (Ed.) *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge, 2014).

⁹⁴ Human Rights Watch 'Vietnam: Amended Constitution a Missed Opportunity on Rights' (3 December 2013) <<http://www.hrw.org/news/2013/12/02/vietnam-amended-constitution-missed-opportunity-rights>>.

⁹⁵ Constitution of the Republic of the Union of Myanmar (2008, Printing & Publishing Enterprise, Ministry of Information)

⁹⁶ Constitution (Myanmar), art. 377.

⁹⁷ Constitution (Myanmar), art. 377: 'In order to obtain a right given by this Chapter, application shall be made in accord with the stipulations, to the Supreme Court of the Union.'

⁹⁸ Amended Constitution of the Lao People's Democratic Republic 2003 <<http://www.asianlii.org/la/legis/const/2003/1.html#C004>>.

decisions have also endorsed the constitutional validity of legislation creating ID cards (Japan); concerning drug testing of prisoners, students and employees (the Philippines); public registers and electronic tracking of sex offenders (Korea); and sampling and retention of DNA of offenders (Korea).

The positive use of constitutional rights to found new actions for privacy remedies is potential rather than actual. In Korean and Taiwan (and possibly Macau), however, the scope of constitutional protection of privacy guides the courts in their interpretations of privacy civil action provisions in their Civil Codes. In the Philippines, the Writ of Habeas Data has a constitutional base.

Despite being influenced by quite different legal traditions (English common law, German civil law, ECtHR jurisprudence, and American common law), Asian courts with the most developed privacy jurisprudence frequently use similar language to protect privacy. Courts have found privacy to be an implied right based on protections of dignity and autonomy interests, such as personality development and informational self-determination. In defining valid restrictions on the constitutional right of privacy, the courts have adopted strikingly similar legal tests, with recurring tripartite requirements: (i) a legislative basis; (ii) a legitimate state aim; and (iii) ‘proportionality’ or some similar restraint.

Given the similarity in wording among many Asian constitutional provisions, and the similar concepts employed across courts, one might expect interpretations made by a constitutional court in one Asian country on privacy issues to influence decisions in others. However, despite there being a wealth of privacy jurisprudence from some Asian courts, there are no instances of these courts citing each other’s decisions as valuable sources of arguments about privacy. David Law has noted the phenomenon of Asian constitutional courts not citing decisions of foreign courts outside the ‘traditions’ of their own legal systems, and privacy cases bear this out.⁹⁹ In the civil law jurisdictions, decisions from Korea, Taiwan and Japan do not refer to each other’s decision, let alone those from common law jurisdictions. The only significant Asian decision in the English common law tradition, India’s *Puttaswamy* decision, although drawing on decisions from numerous common law jurisdictions, and from ‘European’ (ECtHR and EU) jurisprudence, did not refer to the well-developed body of decisions from Korea, Taiwan, or the Philippines. It will be interesting to see whether this lack of regional cross-fertilization of privacy jurisprudence will continue to hold as comparative constitutionalism in Asia continues to grow as a field.

⁹⁹ David Law ‘Judicial Comparativism and Judicial Diplomacy’ (2015) 163(4) *University of Pennsylvania Law Review* 927.