RPR Review of Policy Research

Privacy and the New Legal Paradigm: Tradition and Development in Taiwan

Chi-shing Chen
National ChengChi University

Abstract

The right to privacy is relatively new but has ever increasing importance. Different approaches toward its protection do exist at the moment; however, they all face challenges due to rapid technological and global changes. This article presents an idea of a new legal paradigm and its application in privacy protection. This legal paradigm gives equal attention to the forming of state-made law and social norms. It also emphasizes the cooperative relationship between the two lawmaking efforts. The new legal paradigm requires a shift from the traditional internal legal point of view, which overlooks the importance of social normative formation. Such a shift, however, may not be equally difficult in the Chinese-speaking world, where social norms derived from efforts searching for proper relationship among different roles in a society have long been the teaching of the Confucian school. Within the Confucian teaching, this article searches for the traditional Chinese idea of privacy and how it is placed in a series of self-cultivation needed to bring order to the societies, following with a preliminary sketch of the current development of privacy protection in Taiwan to demonstrate its distinctiveness under such Confucian influence, i.e., emphasizing private ordering much more than legislative and administrative lawmaking. Since the success of the Taiwanese approach, or all future successful privacy protection, requires public spheres where concerns of different stakeholders can be reflected and dealt with, this article ends with a critical description of the development of the new research area, i.e., e-participation, and suggests how e-participation can be benefited by the idea of the new legal paradigm.

KEY WORDS: privacy, law, Internet, China, Taiwan, legal paradigm

Introduction

The concept of a right to privacy is controversial. One question that is still awaiting further clarification is whether it is universal or simply cultural, i.e., existing only in Western society where rationality and human dignity is supreme. The protection of privacy rights adds even more complications; a new legal paradigm is needed to successfully address the problem. This article explores the idea that in the Internet age, where network models dominate human relationships, the idea of law as a successful cooperation between public and private ordering is needed.

Differences in the conception can also be easily delineated in regard to the Western idea of privacy. Personal information may be regarded as part of our human dignity and ought to be protected accordingly. A substantive legal right of privacy is provided as a result to determine the legality of any usages of personal information. On the other hand, if one recognizes the fact that the advancement of information technologies brings both benefit and detriment, the question regarding personal information usage becomes one of how and not whether. The German Federal Constitutional Court established a constitutional right of information self-determination in a 1983 case (1983, 1 BvR 209/83). In the United States, a much weaker right of privacy, understood as the penumbra of the right to liberty, was first pronounced in a 1966 decision of the Supreme Court of the United States. After that, a strong and substantive constitutional right of information privacy developed in Germany and most European countries, while a relatively weaker and

more procedurally oriented constitutional right of information privacy dominated U.S. protection. However, the emerging pervasiveness of the challenges to information privacy means that no matter where we are, a new paradigm for a privacy protective scheme is needed, both in theory and in practice.

In the new legal paradigm that Jean Cohen advanced (Cohen, 2002), she borrowed Habermas's idea of co-originality and emphasized mutual empowerment and a mutually effecting relationship between state-made law and social self-regulatory efforts. Sturm further pointed out that neutrality as a basis of impartiality covers only part of the landscape in lawmaking (Sturm & Gadlin, 2007). Social norm derivation is part of the overall lawmaking process. Its legitimacy is not based on neutrality rather the open dialogue and examination by all parties affected, i.e., multipartiality. Privacy protection, under these new paradigms, effectively requires us to be fully reflective of the rich context of each privacy expectation while aiming at reaching a principled response toward each and every privacy expectation.

Taking a closer look, the new legal paradigm rejects a unitary point of view of the law. Law represents neither simply an impartial pubic institution nor the result of private social ordering. All kinds of practical arrangements related to personal information usages are rapidly advancing. The new legal paradigm requires these practices be derived from a process in which everyone affected can participate and raise concern. State-made laws ought to empower such social normative efforts and be responsive to them.

The Internet brings information privacy issues to our immediate attention. At the same time, it is also instrumental in our new legal paradigmatic solution. The resolutions are full of theoretical, institutional, and information technological challenges. The new legal paradigm discussed in this article is not only important for privacy protection, but also points to the basic principle for the future design of an Internet-based public sphere, which would be an indispensable portion of the new legal paradigm.

This article first contrasts the difference between the old and the new legal paradigm toward privacy protection. It then further elaborates the theoretical thinking behind the new legal paradigm. Besides the two dominant Western ideas toward privacy, what the traditional Chinese idea of privacy is, influenced by the Confucian teaching, is discussed next, followed by a description of the current development of data protection practices in Taiwan. Since delicate communication, both in terms of dialogue and argument among stakeholders, is essential for a successful development of the best practices for privacy protection under the new legal paradigm, this article ends with a critical description of the emerging field of research, i.e., e-participation, to emphasize that we all need to facilitate the migration into the new legal paradigm.

Privacy Protection: Old v. New Legal Paradigm

The right of privacy is considered one of the major challenges in this century (Markesinis, 1999).The advent of the Internet age further complicated issues, and there is indeed a need for an effective and sensible right of privacy under a new legal paradigm.[1] This section is an attempt to describe such a right of privacy.

Anderson, in his article titled "The Failure of American Privacy Law" (Anderson, 1999, pp. 139–167), made several criticisms of the way privacy is protected in the United States. Here, I want to emphasize one of his analyses, which I believe is illustrative of a common problem under the current paradigm.

Anderson pointed out that the courts' approach toward privacy is mainly empirical rather than normative because of their reluctance to impose values. As a result, decisions of the court show a strong tendency toward self-erosion since "the more privacy is invaded the less privacy is protected" (Markesinis, 1999, p. 150). In addition, the empirical approach tends to erase individual differences in the value of, and the need for, protection of privacy. It pays insufficient attention to context in the determination of privacy violations.

Using Cope Pubs., Inc. v. Bridges[2] as an example, Anderson pointed out that U.S. laws tend to ignore the value of privacy, especially when that right conflicted with other prevalent values, such as the public's right to know. What is more problematic is that the empirical approach of the U.S. courts overlooked context related to the privacy violation. In one case, a picture used by the news media showing a woman, the appellee, "clutching a dish towel to her body in order to conceal her nudity as she was escorted to the police car in full public view" was not considered a violation of her right of privacy. The court ruled that the "photograph revealed little more than could be seen had appellee been wearing a bikini and somewhat less than some bathing suits seen on the beaches" (Markesinis, 1999, p. 427).

In contrast, another case demonstrates what a decision under the new legal paradigm might look similar to. In Harris v. Forklift Sys. Inc. (Harris),[3] the court approached the issues of sexual harassment very differently. The court basically decided that sexual harassment was an instance of sexual discrimination. The court refused to define sexual harassment and provided an affirmative defense to defendants that implemented effective procedures to prevent sexual harassment from happening and for the settlement of internal sexual harassment claims.

The Harris case was significant in highlighting the new legal paradigm, first because of its principled approach. Establishing the sexual discrimination nature of sexual harassment was in itself a great accomplishment.[4] Even more praiseworthy in the Harris decision was that by not specifying what constitutes sexual harassment, it was substantive on a very high abstract level. One reason state-made laws tend to become impotent in the Internet age is because those laws fail to understand the rich context involved in the network world. Substantive state-made laws usually present surprises to society; at the same time, they are ineffective because of a lack of expectations by the affected communities. For example, there are ever increasing different and innovative usages of digital copyrighted material in the Internet world; unfortunately, instead of empowering the society to reveal and reflect on these usages and encourage the development of best practices to balance the interests of both copyright holders and users, the prevalent legislation tends to focus on the substantive principle: do not circumvent the technical copyright protection measure. This approach not only does not help to ease the conflict between the divided camps of copyright v. copyleft; the society also pays heavy costs in the lost innovation due to insensible copyright rules and regulation (Cohen, 2006).

The first two admirable features of Harris could not shine without its third important element, i.e., its empowering character. Harris left room for normative

innovation by refusing to restrict the meaning of sexual harassment, which was a task doomed to failure. Harris also actively provided incentive for needed normative innovation by granting an affirmative defense to parties that actually took measures to derive public norms for preventing and relieving sexual harassment. As a result, legal intermediaries are sought after by corporations to establish internal infrastructures and education programs to avoid sexual harassment as well as to develop fair dispute resolution procedures. Intermediaries can be institutions, foundations, and nongovernmental organizations specializing in sexual harassment issues or individual, public interest lawyers, psychiatrists, and consultants.[5]

The significance of constructive development in the social sphere is by no means limited to the social aspect: the individual worker benefits from a better working environment that is just; the corporate world benefits from a more equal and vital workforce. State-made sexual harassment laws also indirectly provide benefit by being founded on a much stronger basis. This strength comes from being based on the sexual harassment best practices developed by a process of trial and error as well as experiences shared among the intermediaries working from corporation to corporation.

The new legal paradigm thus emphasizes the provision of rooms for the development of private ordering efforts. However, private lawmaking is by no means isolated from the legislative, administrative, and judicial lawmaking (government lawmaking in short); on the contrary, the new legal paradigm recognizes the importance of the relationship between government and private lawmaking, one of mutual enhancing. It is directly in opposition to the traditional paradigm, which is characterized by its internal legal point of view (Chen, 2011). The impact of a shift of legal paradigm with such a change of perception is potentially huge. It would not be limited to privacy protection or sexual harassment but to all future lawmaking efforts. Harris represents institutional progress in the right direction. What follows are theoretical elaborations to help explore the paradigmatic insight Harris has illustrated.

Theoretical Basis for the New Legal Paradigm

Legal theoretical efforts in search of a new paradigm for privacy protection are not the only contenders; similar pursuits in the philosophical, social, political, and information ethical and philosophical fields are also alive and well. It is not the purpose of this article to survey related developments. I have limited myself to accounting for the essence of such a new legal paradigm. In this section, I have tried to put together a legal theoretical view of the paradigm presented by Harris as discussed in the previous section. Certainly, no single legal theory exists to provide all explanations. A synthesis[6] of modified theories is inevitable. The Dworkian legal principle, the Habermasian co-originality thesis and the Sturm multipartiality for derivation of social norms are the three essential elements elaborated on here.

As stated in the previous section, one reason Anderson considers U.S. privacy law a failure is that the right to privacy consistently and unreflectively gives way to freedom of expression concerns. This is a typical theoretical dispute in Dworkin's terms. In Dworkin's writings, it is quite common to encounter theoretical disagreements in settling legal disputes in an age treasuring value pluralism (Dworkin,

1977, 1986). A better way to settle such disputes is through better arguments: to be exact, arguments of principle.

Arguments of principle recognize the inevitable process of weighing value. In privacy cases, arguments of principle require us to realize that freedom of expression is not necessarily dominant. Argument certainly means that better reasoning ought to prevail. Judges ought to detail the reasoning behind their value weighing. The decision of a case also needs be compatible with all previous similar chains of precedents. Dworkinian judges, therefore, cannot arbitrarily decide cases based on one judge's discretion.[7] A judge needs to first place the case at hand as a continuation of chains of precedents before basing a reading on the judicial records.

When dealing with privacy cases, Dworkinian judges may still coherently weigh freedom of expression above privacy concerns due to a legal systematic bias. This is something no theory can abolish completely, but significant improvement is not out of reach. The discourse theory of Habermas provides such a remedy. As a fundamental improvement on the philosophy of consciousness in the Platonic tradition, discourse theory is based on the Habermasian theory of communicative actions, where real communication within the whole community is essential.[8] Dworkinian judges, as perceived from the discourse theory, are loners who dialogue with no one but conduct monologues only.[9]

One of the topics of Habermas's legal discourse theory is "the central role of public communication." To open up Dworkinian judges to dialogues in order to let in better contextual elements of a case,[10] according to Habermas's theory, we need to reconstruct the idea of "sovereignty of the people" based on "the communicative freedom of citizens," which is supposed to issue from a public use of reason. We therefore need dialogues from various communities to further draw influences through "an interaction of the informal and diffuse communication flows of the public sphere at large with formally organized opinion- and will formation processes first embodied in the parliamentary and the judiciary complex."[11]

In short, Dworkin's idea of law is primarily based on an internal legal point of view, while Habermas perceives law as a continuation of dialogues between law's internal and external points of view. His co-originality thesis is the most direct advocating of such a position.[12] The co-originality thesis points out that an individual has two roles at the same time, and his or her role as the addressor of the law (public autonomy) and his or her role as the addressee of the law (private autonomy) are original to each other. They are complementary, and the defection of one will lead to the defection of the other. The co-originality thesis is very important for the next legal paradigm. It directly challenges the unitary idea of law or the legal positivists' dominance view of state-made law and raises our attention to the core of the bilateral dilemma of the current law: the difference between facts and norms.

Sturm also challenged the unitary concept of law and its associated idea of legitimacy (Sturm & Gadlin, 2007). She believes the prevalent notion of detached neutrality should not be the only criteria for legitimacy. In the process of derivation of social public norms, detached neutrality simply does not work. Instead, we ought to grant multipartiality its fair share as the basis for legitimacy, particularly in development of social norms through human interaction. Multipartiality is based

on the concept that we are all partial so the only way to evolve a public rule everyone can expect and accept is through open participation and candid communication, which aim to achieve multipartiality as a result (Sturm & Gadlin, 2007).

After a failed attack on a flight from Amsterdam to Detroit on Christmas day 2009, the United States started adopting hundreds of body scanners in airports all over the country to elevate passengers' security checks; a lawsuit relating to the constitutional right to privacy was filed by Electronic Privacy Information Center (EPIC) against the Transportation Security Agency. This is indeed a hard case. However, it is more difficult if one realizes that no matter whether the case is for the plaintiff or not, the need for developing airport safety practices acceptable to privacy rights still exists.

Balancing personal right to privacy and public security interests is never easy since different ideas and interests of many sectors of the society are involved. The passengers, the airlines, the airport administrative authorities, the contracted security companies, the interests groups such as EPIC, the consumers' group, the groups for the security concern, and so on, are all stakeholders and have their voices. The relationships formed by these groups are complex but need to be understood before reflective thinking and decisions can be formulated to lead to the improvement of such relationships. This is why the next legal paradigm will place the airport and all groups at stake at the center and not the constitutional or any other laws and regulations. Dialogue among all stakeholders is vital to lead to better airport safety practices. These communications also provide better context for the court to decide cases involving substantive issues of privacy right violation.

The public norms reached through subjecting one's analysis to the scrutiny of one's peers and explaining and justifying one's choice can take many different forms. The best practices reached among intermediaries actively bringing infrastructures and institutional norms to organizations in all corners of the society, as discussed in the previous section, is one prime example. This is especially pertinent to privacy protection, where substantive norms may not be effective if they are not transformed into rules for practice. Again, according to the new legal paradigm discussed in this article, such practices must be developed under several layers of scrutiny, i.e., multipartiality, co-originality, and principled legal arguments.

Traditional Chinese Idea of Privacy

Compared with the West, where giving social norms and their legitimate derivations appropriate room to grow is a fairly recent development (Lobel, 2004), social norms in China, such as family rules, have prevailed for a much longer period. What is missing here is the converse: principled argument and reasoned justifications based on a society-wide point of view where individual rights can be better expected.[13] The new legal paradigm, in this sense, is not urgently needed simply for privacy protection or derivation of law in the Internet age; it also seems to be a model capable of reflecting the complementary needs of the traditions of both West and East. Since there is really no such difference between East and West on the Internet in terms of accessibility, the new paradigm may also represent the needed mindset to bridge the difference and ought to be taken seriously in order to serve as a platform for the emerging world of multiculturalism.

The "Great Learning" is considered the first lesson of virtue to be mastered in the Confucian school. The idea of "*shen du*" is brought up, where a "superior man must be watchful over himself when he is alone." Here, what is indicated is an idea similar to Kantian autonomy, in the sense that when someone is alone and has no need to respond to the outside world, how he or she behaves himself or herself is a critical indicator of the virtue of the individual. That is why a better man will take even greater care in conducting himself when he is alone. Although this is not decisive proof of the existence of the Chinese idea of privacy, it provides a good clue that the differences between Eastern and Western ideas of privacy may be mainly conceptual and that the concept of privacy does exist in both cultures.

The Great Learning is one of the first Confucian teachings everyone needs to learn in order to enter a Confucian school and pursue virtue.[14] The Great Learning reveals how a man in the Confucian school can better reach excellence through a series of investigations, virtuous pursuance, and public service. The reason for this article to focus on the Great Learning was to point out that privacy is the first step of the step-by-step efforts to reach excellence. The second reason was to point out that the bottom-up Confucian approach is contrary to and yet complementary with the traditional Western approach as exemplified by a top-down approach of the philosopher king in Plato.

According to Confucian principles, taught in the Great Learning, if students want to be able to "illustrate the illustrious virtue" throughout the kingdoms, they need to go through a series of tests: to investigate things, to extend knowledge, to be sincere in their thoughts, to rectify their hearts, to cultivate their personalities, to regulate their family, to order their states well, and finally, to illustrate illustrious virtue throughout the kingdoms.[15]

The concept of privacy in the Great Learning does exist. In discussing the step of being sincere in one's thoughts, the Confucians point out that "what truly is within will be manifested without." The better person, therefore, must be watchful over herself or himself when she or he is alone.[16] For Confucians, when one is alone, his or her true virtue is revealed because when no one else knows how he or she conducts or behaves himself or herself, then he or she really reflects his or her true self. Hence, privacy is the state in which a better man will be the most careful since that is when one really cultivates oneself, and such cultivation will eventually be manifested in front of others.[17] In short, privacy is highly related to sincerity, which is located at the root of self-cultivation.

Bringing morality to everyone in the world is one of the primary objectives taught in the Great Learning for all Confucians. The sequence one follows to achieve such an objective, as demonstrated earlier, is also worthy of special attention. Basically speaking, one needs to first accomplish the rule of morality in a smaller community, starting with oneself, and then one can proceed to attempt the prevailing of morality in a bigger community. In other words, one must be virtuous oneself before proceeding to the regulation of one's family, one's own state, and finally, everyone throughout the kingdoms.

In contrast to Confucius, Plato equally emphasized the education of the philosophers. The primary difference though, lies in the preparation of the philosophers to be public-minded by getting rid of private influences. Potential philosophers therefore needed to be borne into one big family, sharing parents with all other

potential philosophers. They also did not possess private property since owning property would hinder their focusing on the happiness of the people as a whole and not only on their personal happiness.[18] In terms of migrating to the next legal paradigm, these discussion of the traditional Chinese idea of privacy and its contrast to its Platonian counterpart illustrate that, conceptually speaking, the Chinese idea of law may not stick to the internal legal point of view as heavily as the West under the current legal paradigm.

The Contemporary Development of Privacy Protection in Taiwan

Such contrast in concept is more meaningful if one examines further the fact that private ordering dominates contemporary Taiwanese data protection laws. Although conceptual linkage between the traditional Chinese idea of privacy and its contemporary legal protection has not been intellectually established, there does exist significant coherence in thought and practice worthy of our attention. In Taiwan, a data protection law was first enacted in 1995. This was primarily in response to the European Union Data Protection Directive requiring all European trading partners to have comparable data protection laws in order to receive *trans*border personal data from European countries.

There were very few cases associated with the first Taiwanese data protection law. No new administrative agency was created to be in charge of the data protection regulation. It was not until the last few years when information privacy violation incidences increased tremendously and became a serious social controversy that legislative debates on information privacy attracted media attention. As a result, the data protection law in Taiwan went through a major revision; its new version was finalized in 2010.[19]

Again, the new law created no new administrative agency responsible for its regulation. For the first time, however, the new data protection law in Taiwan looked to the private sectors, primarily the nonprofit organizations, to provide and accumulate the needed expertise for data protection. These foundations can bring class actions related to personal information privacy violations to the courts.[20] Charitable groups can also be appointed to assume the prescribed data protection duties of central, county, and city governments.[21]

In practice, real action to realize the new data protection law is undertaken at the level of compliance assurance for the private sectors. Again, a public interest foundation, the Foundation of Information Industry (III),[22] is responsible for the establishment of a certificate program. Industry by industry, the certificate program is planned to raise the compliance of data protection practices for all companies in Taiwan up to an international level through intensive international cooperation under the framework of the Asia-Pacific Economic Cooperation.[23]

Private ordering seems to characterize Asian response to the information privacy challenges of the 21st century.[24] This development should be well-received by the new legal paradigm discussed in the article. What is needed is ongoing dialogue among different parts of the world to facilitate the circulation of better data protection practices. This brings us to the last issue this article will address: how the Internet could serve as the indispensable public sphere needed by privacy protection and the new legal paradigm.

Conclusion: The Needed e-Participation for the New Legal Paradigm

As a public sphere, the Internet, theoretically speaking, is not only unrestricted by time and space; it is also capable of providing new opportunities and ways for social interaction. People with different perspectives, professions, or social roles can be connected through the Internet as never before. The great public value associated with this new public sphere has prompted researchers all over the world to focus on this emerging field of e-participation.[25] No best practice of e-participation has been adopted as the common practice. Few e-participation applications could even claim success in terms of acceptability by the general public. In light of the new legal paradigm discussed in this article, I believe that overcoming the great hurdle to involving public participation to an Internet-based public sphere requires a conceptual fine-tuning.

The most important mindset change has to do with abandoning the unitary legal point of view. If government, as well as state-made, law is treated as primary, i.e., the focal point of the lawmaking process, and the participating public is only added attachments whose opinions are only sought after in order to improve the lawmaking process, then the social context related to the law will be lost. This is an issue of great concern in the new legal paradigm discussed in the article.

In addition, what would be even more unbearable is the weakening of the social normative derivation process, which is the norm of the current legal paradigm with the decisions of Harris as the few greatly needed exceptions. Innovative practices to protect personal privacy in all corners of the society can only be empowered if we abandon the unitary idea of the law. Likewise, e-participation must be understood as mutual engagement and participation between the processes of state-centered lawmaking and social public norms derivation. The Internet-based public sphere makes such mutual reflection both effective and transparent potentially. Hence, it raises both the epistemic and legitimate horizon of the process.[26]

To recognize the importance of the legal intermediaries and the interaction among them is also strategically essential. The interactions among these legal intermediaries involve the activities of information sharing, knowledge diffusion, dialogue, and serious argumentation, which are all crucial for the derivation of normative innovation. This interactive process could be greatly facilitated by the Internet-based web technologies, as various e-participation researches have ably demonstrated (Macintosh, 2004; Pratchett, 2007).

Paradigm shifts are never easy. Hopefully, with the advent of the Internet, both as a source of great pressing challenges and grounds for innovative institution building, we have better chances to weather the storm which is here and now. Privacy protection serves both as a test and yardstick for us in seeing how well we perform and whether we can meet the challenges.

Notes

1 See Lessig (2000). This need for a paradigm shift is not limited to the privacy law. Other information laws face similar challenges. See Fiss (1995); Katsh (1989); Goldstein (1997); and Balkin (2004).

2 423 So.2d 426 (Fla. App. 1982). In this case, the appellee was forced by her estranged husband into their former apartment. Under gun point, the appellee was disrobed to prevent her from escaping.

Upon hearing a gunshot, the police stormed the apartment and rushed the appellee outside to safety. The appellee was clutching a dish towel to her body in order to conceal her nudity as she was escorted to the police car in full public view. The issue was whether the photograph of the appellee provided by the news media violated her right of privacy.

3 510 U.S. 17 (1993). Here, the author was primarily enlightened by Sturm (2001).

4 For the development and struggle for a sexual harassment law in the United States, see Cohen (2002), especially chapter 3, Sexual Harassment Law: Equality vs. Expressive Freedom and Personal Privacy?

5 See the empirical studies Sturm conducted for three U.S. corporations: Deloitte & Touche, Intel Corporation, and Home Depot, in Sturm (2001).

6 Teubner's reflexive law is a synthesis of theories in a similar direction. He used Luhmann's system theory and the putting together of Habermas's discourse theory and Nonet and Selznick's responsive law as the core for his reflexive law theory; see Teubner (1983). Later, Cohen, in her new legal paradigm, tried to improve Teubner's reflexive law by placing Habermas's discourse theory in the center and emphasizing more on principle such as Selznick; see Cohen (2002). Here, my approach can be considered a further improvement on Cohen's new legal paradigm. I believe that Dworkin provides a better theory of legal principle. Cohen's adoption of Habermasians discourse theory, especially his co-originality thesis, can serve as a basis to successfully connect law and society and thus avoid the Dworkinian internal legal point of view. Sturm's multipartiality idea catches the essence of needed criteria for legitimacy for social public norm derivation.

7 Dworkin also further developed the idea of vertical coherence and horizontal coherence, first in Dworkin (1993), and again in Dworkin (1996). Dworkin defined vertical coherence with the following assertion: "A judge who claims a particular right of liberty as fundamental must show that his claim is consistent with the bulk of precedent and with the main structures of our constitutional arrangement." Dworkin defines horizontal coherence with the following assertion: "A judge who adopts a principle must give full weight to that principle in other cases he decides or endorses."

8 Habermas (1996), chapter 1, Law as a Category of Social Mediation between Facts and Norms.

9 See Habermas (1996), chapter 5.3, The Theory of Legal Discourse.

10 To reach coherence by a dialogical community instead of a single judge, Alexy and Peczenik developed the idea of discursive coherence, based on the structure of the statements of the dialogical community; see Alexy and Peczenik (1990).

11 See Habermas (1999), which is a concise introduction to his book *Between Facts and Norms* (1996).

12 However, one must point out that Habermas is still inconsistent on this point. His theory of adjudication does not follow fully his basic idea of the central role of public communication and his co-originality thesis since Habermas still relied solely on procedural norms in the court for his discursive theory of adjudication. See Chen, C., *A Co-Original Approach toward Internet and Law Making*, from the 2011 IVR World Congress in Frankfurt, Germany.

13 Based on personal first-hand observation, I can report that Dworkin's legal theory is highly regarded in Taiwan. It is probably the legal theory that has been studied in most detail by most legal scholars in jurisprudence, including myself. At this moment, when our legal philosophy means Western legal philosophy with almost no exceptions, Dworkinian value weighting and the reasoned justification specified in his ideas of legal principle seem to provide us with what we lack culturally. Neutral detachment and principled approach seem to be the common need in the East to complement our prevalent uncritical social norms. Inoue (1993) also criticized the emphasis of communality in corporate Japan with personal right and dignity as its sacrifice.

14 Here, the translation is based on: Confucius (1959).

15 "The ancients, who wished to illustrate illustrious virtue throughout the kingdom, first ordered well their own states. Wishing to order well their states, they first regulated their families. Wishing to regulate their families, they first cultivated their persons. Wishing to cultivate their persons, they first rectified their hearts. Wishing to rectify their hearts, they first sought to be sincere in their thoughts. Wishing to be sincere in their thoughts, they first extended to the utmost their knowledge. Such extension of knowledge lay in the investigation of things" (Confucius, 1959, p. 2).

16 Watchful over oneself when one is alone is called "*sheng du*" in Chinese.

17 Here, it needs to be pointed out that to have the concept of privacy in Confucian thought does not mean to have the idea of right of privacy.

18 See Bai (2009). (The English version of the book is to be published. The English manuscript of chapter 6 of the book, comparing the understanding of the public and private in the Confucian Analects and Plato's Republic, is available from the author.)

19 The Personal Information Protection Act (PIPA) in Taiwan was amended in May, 26, 2010. Its English version can be downloaded at: http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=I0050021.
20 Article 32 of PIPA states: "A business juridical person or a charitable juridical person that brings a case to the court in accordance with this Chapter should fulfill the following conditions: 1. The total registered assets of a business juridical person should reach NT$10 million or more, or the total number of members of a charitable juridical person should be 100 or more; 2. The protection of personal information is set in its charter; 3. It has been established for more than 3 years after its approval."
21 Article 52 of PIPA states: "The competencies prescribed to the government authority in charge of the subject industry at the central government level, municipality directly under the central government, or county or city government may be appointed to the subordinate agencies, other agencies or charitable groups. The personnel of such agencies should fulfill the obligation of confidentiality for all the information obtained during the job-undertaking. The charitable groups prescribed in the preceding Paragraph should not be authorized by the Party in accordance with Paragraph 1 of Article 34 for litigation rights and should proceed to the action for damages in its own name."
22 III was established in 1979 through the joint efforts of public and private sectors, as a non-government organization, to support the development/applications of information industry as well as information society in Taiwan, http://web.iii.org.tw/english/introduction.asp.
23 There are frequent meetings among Asia-Pacific Economic Cooperation (APEC) members discussing privacy protection issues and its institution building in Asia. It is expected to have an Asian *trans*-border personal data certificate system built on top of each member's own privacy assurance program. For APEC Cross-border Privacy Enforcement Arrangement, see http://www.apec.org/Groups/Committee-on-Trade-and-Investment/Electronic-Commerce-Steering-Group/Cross-border-Privacy-Enforcement-Arrangement.aspx. Japan has shared its experience of a privacy certificate system, the so-called personal information management system, with Korea, and Taiwan. At present, III is training the appraisers who can evaluate the internal privacy protection practices and build Taiwan's own privacy assurance programs (Chiu, Ying-Hsi, Senior Manager at the Science & Technology Law Center of the III presented the development of Asian Personal Information Management at the FP7 RISE Taiwan Conference held in Taipei, Taiwan on October 21, 2011).
24 An industrial self-regulation body, the Data Security Council of India, was also responsible for developing the privacy protection scheme for India's personal identification system project.
25 For a survey of the contemporary development of e-participation, see Ergazakis, Metaxiotis, and Tsitsanis (2011).
26 Here, we enter an emerging area of research. The author recently presented a draft article, dealing with the general approach toward e-participation. See Chen, C., *Toward a General Design for e-Participation: Multi-partiality, Context Reflection, and Dialog Management*, presented at the 2011 Law and Society Association LSA Annual Meeting in San Francisco, USA.

About the Author

Chi-shing Chen is Distinguished Professor at the College of Law, National ChengChi University, Taiwan. He received SJD and LLM degrees from University of California at Berkeley; and an MS in Computer Science from University of North Texas. Law and the Internet is his specialty, including data protection or information privacy issues, issues related to digital copyright, and e-participation.

References

Alexy, R., & Peczenik, A. (1990). The concept of coherence and its significance for discursive rationality. *Ratio Juris*, *3*, 130–147.

Anderson, D. (1999). The failure of American Privacy Law. In B. Markesinis (Ed.), *Protecting privacy* (pp. 139–167). New York: Oxford University Press.

Balkin, J. (2004). Digital speech and democratic culture: A theory of freedom of expression for the information society. *New York University Law Review*, *79*, 1–55.

Bai, T. (2009). *New mission of an old state, classical Confucian political philosophy in a contemporary and comparative relevance context*. Beijing: Peking University Press.

Chen, C. (2011). Greek idea of justice and the contemporary need to expand the internal legal point of view. In S. Liu & U. Neumann (Ed.), *Justice—Theory and practice* (pp. 41–59). New York: Nomos.

Cohen, J. (2002). *Regulating intimacy, a new legal paradigm*. Princeton, NJ: Princeton University Press.

Cohen, J. (2006). Pervasively distributed copyright enforcement. *Georgetown Law Journal*, *95*, 1–48.

Confucius. (1959). *Four books: The Great Learning, The Doctrine of the Mean, Confucian Analects, The Works of Mencius*. English translation and notes by James Legge, Taipei: One-Hing.

Dworkin, R. (1977). *Taking rights seriously*. Cambridge, MA: Harvard University Press.

Dworkin, R. (1986). *Law's empire*. Cambridge, MA: Harvard University Press.

Dworkin, R. (1993). *Life's dominion*. New York: Vintage Books.

Dworkin, R. (1996). *Freedom's law*. Cambridge, MA: Harvard University Press.

Ergazakis, K., Metaxiotis, K., & Tsitsanis, T. (2011). A state-of-the-art review of applied forms and areas, tools and technologies for e-participation. *International Journal of Electronic Government Research*, *7*(1), 1–19.

Fiss, O. (1995). Emerging media technology and the first amendment: In search of a new paradigm. *Yale Law Journal*, *104*, 1613–1618.

Goldstein, P. (1997). Copyright and its substitute. *Wisconsin Law Review*, *1997*, 865–871.

Habermas, J. (1996). *Between facts and norms*. Cambridge, MA: MIT Press.

Habermas, J. (1999). Introduction. *Ratio Juris*, *12*(4), 329–335.

Inoue, T. (1993). The poverty of rights-blind communality: Looking through the window of Japan. *Brigham Young University Law Review*, *1993*, 517–551.

Katsh, E. (1989). The first amendment and technological change: The new media has a message. *George Washington Law Review*, *57*, 1439–1494.

Lessig, L. (2000). Symposium: Cyberspace and privacy: A new legal paradigm? Foreword. *Stanford Law Review*, *52*, 987–1001.

Lobel, O. (2004). The renew deal: The fall of regulation and the rise of governance in contemporary legal thought. *Minnesota Law Review*, *89*, 342–470.

Macintosh, A. (2004). Characterizing E-participation in policy-making. Proceedings of the 37th Hawaii International Conference on System Sciences, 5–8 January, Hawaii.

Markesinis, B. (Ed.). (1999). *Protecting privacy*. New York: Oxford University Press.

Pratchett, L. (2007). Local e-democracy in Europe: Democratic X-ray as the basis for comparative analysis. International Conference: Direct Democracy in Latin America, 14–15 March, Buenos Aires.

Sturm, S. (2001). Second generation employment discrimination: A structural approach. *Columbia Law Review*, *101*(3), 458–568.

Sturm, S., & Gadlin, H. (2007). Conflict resolution and systemic change. *Journal of Dispute Resolution*, *2007*(3), 1–63.

Teubner, G. (1983). Substantive and reflexive elements in modern law. *Law and Society Review*, *17*, 239–286.