

Atheoretical legal policy for privacy protection in Japan

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1 Introduction

There is just less effective privacy protection law in Japan. Whereas the legal regulation scheme to protect personal information covering both the public and private sectors went into effect centred on the Act on Protection of Personal Information (APPI; Act No. 57 of 2003) in April 2005, this act does not incorporate the theoretical understanding of the social significance of privacy protection into the statements. Partly because the concept of information privacy is just an imported idea from the Western world for Japanese citizens [Orito and Murata, 2005], it has been difficult for them to clearly understand the concept. In fact, APPI was implemented aimed for protecting not privacy but personally identifiable information (PII), the definition of which is described in the sentences of APPI though it is not necessarily clear. Moreover, it seems that the

effectiveness of such law regulations has not been discussed among the society well enough.

Unsurprisingly, Japanese society is changing due to the rapid development and widespread use of information and communication technologies (ICT) as many of other industrial countries. Especially, social media such as blogs, microblogs, online bulletin board systems (BBSs) and social networking services (SNSs) are highly influential these days. Many individual Net users are fostered to reveal personal information about themselves and others using social media, and consequently a huge amount of personal information is disclosed on the Net more than ever before. While accidents and troubles related to an invasion of information privacy are often reported as a serious social issue, the law regulation for personal data protection seems not to be adapted for the current situations.

On the other hand, as part of the integrated reformation of social security and taxation systems, the Japanese central government is in attempting to construct a new national code-number citizen identification system, the My Number System, along with developing and improving relevant laws. The revisions of the current personal data protection scheme centred on APPI, which was enforced as a prerequisite for the operation of the *Juki* Net (resident registry network) system, are pushed for as, similarly, a prerequisite for the construction and operation of the new citizen numbering system; the focus of the revisions is not on privacy protection but on successful development and operation of the My Number System. Considering the possibility that the system would function to allow the central government to monitor and control citizens' behaviour, one could argue that Japanese people are caught in a paradox; for the sake of the development and operation of the system to monitor and control citizens' behaviour, the revisions are made under the rubric of personal information or privacy protection.

Under such a paradoxical circumstance, the development of effective legal policies to appropriately protect information privacy which are underpinned by a proper theoretical understanding of the social importance of it is an urgent and crucial concern in Japan. Based on the above understanding, this study discusses what Japanese legal policies for privacy protection ought to be in the current socio-political and technological environment.

The structure of the remainder of this paper is as follows. In section 2, we describe how

Japanese law regulations which related to protection of personal information have been developed, and suggest less effectiveness of these approaches for privacy protection. After that, we examine the meaning of Japanese resident registration systems through describing the historical transition of Japanese residents' registration systems which have been intended to collect residential information at the state level, and discuss issues concerning the national code-number citizen identification system and relevant laws in Japan. In section 4, deterioration of individuals' ability to control their personal information is considered focused on individual users' usage of social media and personal data revelation on the Net. Finally, the policy recommendations for effective use of personal information and proper privacy protection in Japan are devised.

2 Japanese Legal Schemes for Protecting Personal Information

2.1 The Act on Protection of Personal Information

Traditionally, personal information protection in the private sector in Japan had been provided centred on industry-level self-regulation [Orito and Murata, 2008]. In fact, Act on the Protection of Personal Information Held by Administrative Organs and Processed on Electronic Computers (Act No. 95 of 1988) is the first law which dealt with personal information protection, but that covered the public sector only; there had been no legal regulation to protect personal information held by private businesses until the enforcement of APPI in April 2005. APPI is characterised as a basic law for personal information protection covering both the public and private sectors. Strictly speaking, as shown in Figure 1, on the premise of Chapter 1-3 of APPI as a basic law, Chapter 4-6 of APPI (based on the sentences of which private organisations dealing with personal information are regulated), the Act on Protection of Personal Information Held by Administrative Organs (Act No.58 of 2003) which covers public organisations, and Act on the Protection of Personal Information Held by Independent Administrative Agencies, etc. (Act. No.59 of 2003) compose the Japanese legal scheme for protecting personal information.

However, APPI was created so that personally identifiable information (PII) collected, stored and used by public and private organisations is protected, and the makers of the law deliberately precluded the elements of privacy protection beyond the PII protection on the ground that the concept of privacy was elusive. Japanese people have conformed to traditional social norms with respect to personal/private or public space, social relationships and circulation of personal information. This means that, as Adams et al. [2009] suggest, there is traditionally a strong sense of privacy in Japan. However, due to

its particularistic culture of Japan, the traditional sense of privacy tends to be kept within *seken*; one's *seken* is a small world defined by one's relationships with others whom one recognises a present and/or future connection with and, therefore, considers the need to do one's duty toward and to have human empathy with. In addition, it is also a fact that the word "privacy" was imported into Japanese from the Western world and took root in Japanese society without a clear understanding of it among ordinary Japanese people. Actually, APPI is not endorsed by careful theoretical considerations of the social importance of privacy protection but superficially follows the OECD's [1980] eight principles and EU's [1995] Directive 95/46/EC.

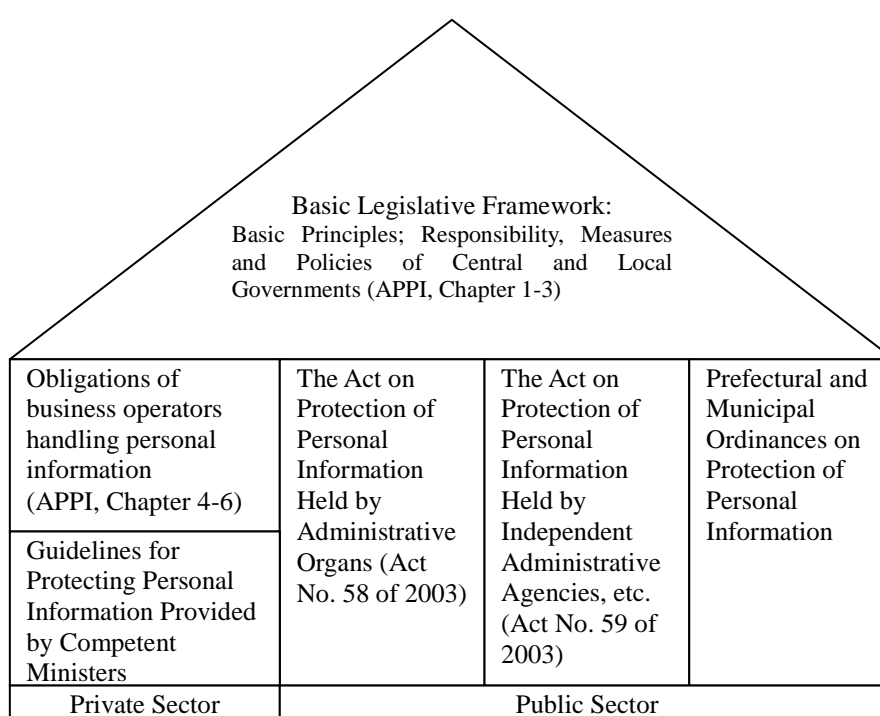


Figure 1. The legal scheme of Japanese personal information protection (source: <http://www.caa.go.jp/seikatsu/kojin/houtaikei.pdf>, translated by the authors)

2.2 Responses to the enforcement of APPI

Since soon after the enforcement of APPI, various problems with it have been pointed out. Especially, due to Japanese people's lack of understating of APPI, excessive responses to it have been reported [Orito and Murata, 2005]. On the individual level, many Japanese do not understand that the major purpose of APPI is to facilitate effective personal information use in society, and the act was often used as an excuse to refuse personal information provision even when that was legitimately required for public purposes such as a census. Some cases demonstrated that even legal

professionals and government workers didn't understand how APPI ought to be applied. For example, after the Great Eastern Japan Earthquake in March 2011, the local governments in disaster areas took different attitudes towards disclosure of personal information of disabled inhabitants to confirm their safety (<http://www.yomiuri.co.jp/national/news/20110604-OYT1T00478.htm>). Ambiguous understanding of the act was an obstacle to prompt assistance for disaster victims, even though a considerable length of time had passed since the enforcement of APPI.

On the other hand, APPI contains penal provisions (Articles 56 and 57), but these provisions have not yet been applied to any entity handling personal information since the Act took legal effect. The procedure for applying the provisions is quite cautious and it seems that the law makers as well as the Japanese government hesitate to impose a punishment on the public or private organisations that violate the APPI. In addition, there are no provisions authorizing compensation to victims of personal information misuse or leakage for damages suffered. In order to receive compensation for damages, the victims have to file civil lawsuits. However, when the time and costs of a lawsuit is considered relative to the amount of compensation typically awarded, they may have little incentive to litigate [Orito and Murata, 2008].

Of course, when personal information misuse or leakage which brings serious financial loss is exposed, social concern over the malicious or negligent handling of personal information is usually raised for a small amount of time. Even then, however, scepticism about effectiveness of APPI is not expressed. Social concern about protection of information privacy seems to be lacking in Japan, compared to the Western countries. Actually, there is a long tradition that Japanese society has accepted personal data collection and use made by the governmental bodies. Various types of personal information have been collected, stored and used in various ways centred on the family registration systems. The historical background and characteristics of the systems are examined in the next section.

3 Japanese family and resident registration systems

3.1 Origins of family registration systems

Since early times, family registration systems have been operated in Japan. At the end of the 7th century, the allegedly first family register "*Koh-in no nenjaku* (庚寅年籍)" was drawn up. In this document, detailed structure of each household was described as the basis of crop land management and taxation in the ancient agricultural economy.

This also functioned as an original record to determine people's positions in society and underpinned the social classification between commoners and outcaste people.

In the late 1630s, the *Tokugawa Shogunate* (the central government in the *Edo* era (1603-1868)) consolidated the "*Terauke* (寺請)" system which required each commoner to be registered with a Buddhist temple as its parishioner in order to ensure that he/she was not a Christian (Christianity was banned in 1613 by the *Tokugawa Shogunate*). In the late 17th century, the *Terauke* system was integrated with the census system for statute labour imposition called "*Ninbetsu aratame* (人別改)", and based on the integrated system, the Buddhist temple and family registers called "*Shumon ninbetsu aratame cho* (宗門人別改帳)" were drawn up throughout Japan [Tamamuro, 2009]. The registers functioned as original family registers and taxation ledgers, and allowed Buddhist temples to monitor and control their parishioners' behaviour on behalf of the central and local governments.

Those who failed to be entered into the registers were forced to be vagrants called "*Hinin* (非人)" (non-human) and considered as outcaste people. In addition, under the influence of the Buddhist and Shintoist thought of "*Kegare* (穢れ)" (stains), those who were involved with handling human bodies or animal carcasses were recognised as the lower classes called "*Eta* (穢多)" (much stained people). Their class "*Eta*" was clearly described in *Shumon ninbetsu aratame cho*. Consequently, discriminative mentality towards *Eta* and *Hinin* was built in the nationwide family registration system.

3.2 Koseki system: Family registration system in the modern age

In 1871, three years after the Meiji Restoration, the first family registration law in the modern age, the *Koseki Act* (戸籍法; the Family Registration Act; Act No. 170 of 1871), went into force, based on which the *Jinshin Koseki* (壬申戸籍; the family register created in the *Jinshin* year (1872)) was compiled to support promotion of tax, conscription and education policies of the Meiji government. This registration system clearly reflected the samurai family system which was characterised by strong control the head of a household had over other members of the household. In fact, when a family member got married or moved house, he/she needed to have permission from *Koshu* (戸主), the master of his/her household. The registration system institutionalised inequality in power among family members. In addition, the social class of each family was described as one of the official registered items of the *Jinshin Koseki*, and that description of some families from the lower classed in the *Edo* era was *ex-Eta*, *ex-Hinin*

or new commoner. The discriminative mentality towards lower class people in the *Edo* era was inherited by the modern age system.

After WWII, in conformity to the new constitution which declared the sovereignty of the people, the new *Koseki* act (Act No. 224 of 1947) was enforced in 1948 and the *Koseki* system was reconstructed so that a married couple, not a household, was a basic unit of a family registration and social classes were eliminated from the registered items. Whereas some consider the reconstruction was a symbol of the emancipation of family members from the bondage to their households and the democratisation of Japan, Yamanushi [1958] insists that the state power has unalterably attempted to exert control over family relationships, family groups and interpersonal relationships of Japanese citizens through the *Koseki* systems since the Meiji era. According to him, the *Koseki* Act is not only for registering and authenticating citizens' status but also for regulating citizens' lives and supporting promotion of governmental policies regarding childcare, policing, military administration, public finance and so on (pp. 2-3.).

On the other hand, Sato [1991] points out that the true substance of the *Koseki* system is discrimination and exclusion of aliens including foreign residents, naturalised citizens and illegitimates. Based on the belief that citizens cannot be alive without state care, the state declares, through the operation of the *Koseki* system, they are willing to protect Japanese citizens, whose family information is registered in *Koseki*. Those whose data are not stored in the *Koseki* databases are not Japanese citizens, and thus their lives and social opportunities inside Japan are considerably constrained in various ways. Therefore, he suggests, as long as the *Koseki* system keeps its discriminatory characteristics, its stability can be ensured. The system also promotes unconscious mutual monitoring among family members and relatives. However, these characteristics of the *Koseki* system have not been known well to ordinary Japanese.

3.3 Basic resident registration system

Originally, the *Koseki* system assumed that the majority of residents settled down in one place. However, the progress of industrialisation and urbanisation in Japan made the assumption not match the reality. In 1952, in order to authenticate citizens' residency and promote the convenience of their everyday life, each municipal commenced the operation and management of the *Jumin-hyo* (住民票; resident card) system, which was legitimatised by the enforcement of the Resident Registration Act (住民登録法; Act No. 218 of 1951) in the same year. In 1967, the revised resident registration act, the Act of

the Basic Resident Registers (住民基本台帳法; Act No. 81 of 1967) went into force. Based on this, family information registered in *Koseki* was connected with residential information in *Jumin-hyo* and the basic resident register databases were built (for more details, see Sato [1991], pp. 132-133).

Enami [2003] explains the nature of the basic resident register system as follows.

"Basic resident registers are officially a basis for municipalities' providing their inhabitants with good administrative services, but some fields of the records of their basic resident register databases are connected with the corresponding fields of *Koseki* records including date of birth, date of death, marital status and so on. Therefore, the central and local governments can administer Japanese citizens through using the *Koseki* system, which is used to grasp citizens' nationality and blood relationships as the basis of inheritance, and the basic resident register system, which is used to grasp the state of family units as a subject of administrative services." (Enami [2003], p. 6; translated by the authors).

On the other hand, the article 14 of the Enforcement Order of the Resident Registration Act prescribed that the Emperor, the Imperial Family and foreigners were exempt from the act. Foreign residents' information has been registered and managed under the Alien Registration Act (Act No. 125 of 1952). However, following the revisions of the Act of the Basic Resident Registers and the Immigration Control Act, their personal information will be described in the basic resident registers from July 2012 (http://www.soumu.go.jp/main_sosiki/jichi_gyousei/c-gyousei/zairyu.html). This means that foreign residents will also become subject to the nationwide registration system.

3.4 The *Juki* Net

In the wake of the rapid advancement of digital network society, the Ministry of Internal Affairs and Communication (MIC) insisted the necessity of the integration of basic resident registers, which had separately been maintained by municipalities, using Internet technology in order to promote administrative reform and improve administrative services. In 1998, the Act of the Basic Resident Registers was revised so that municipalities could legally share the resident information they managed with each other via the Internet.

Consequently, the *Juki* Net system, the online national resident registry network, was implemented in 2003. However, the road to the implementation was not smooth. Assigning an eleven-digit resident register code number (*Jumin-hyo* code) to each citizen for effective operation of the system induced social anxiety that the system would substantially function as a national code-number citizen identification system, which had actually been a long-cherished dream of Japanese bureaucrats since the late 1960s, and be used for governmental surveillance on citizens. Mass media as well as more than a few municipal mayors expressed their concern about information security of the system, and resultant personal information leakage and an invasion of privacy. The cost-effectiveness of the system was also called into question (for more details, see Adams et al. [2010]). After the implementation, a lot of constitutional and administrative litigations against an invasion of privacy caused by the *Juki* Net have been brought.

In fact, one big issue of the *Juki* Net was recognised as a lack of proper legal scheme to protect information privacy in 1998; even when *Jumin-hyo* codes leaked were utilised by private organisations in a socially inappropriate way, there was no legal regulation on such usage of the data. Thus, in order to gain social acceptance of the implementation of the *Juki* Net, it was required to set up new privacy protection laws covering the private sector. As a result, APPI was passed in 2003. That is to say, the enactment of APPI was a necessary condition to construct and operate the *Juki* Net system, or was a means to operate the system.

3.5 The My Number System

The integrated reformation of social security and taxation systems is recognised as an urgent political issue to address the coming aging society with fewer children and secure adequate financial resources. What is considered the most necessary thing to successfully perform the reformation is the development and operation of the My Number System, an integrated national code-number citizen identification system across the office and ministries, which assigns a unique "my number" to each citizen. MIC explains that the operation of the My Number System would be useful for realising a fair tax system, stable and efficient social security programmes, improved administrative services, and efficient and consumer-friendly e-government.

On the other hand, reasons the introduction of the My Number System is required have been discussed in various ways [e.g. Enami, 2010; Maeda and Matsuyama, 2011]. For

example, the state's attempt to control over citizens using the basic resident registration system has already failed, because computer systems could not fully support *kanji* (Chinese character) that is used to describe individual names in the traditional registration systems. Thus, the state expects that the new numbering system which enables them to manage personal information of each citizen in an integrated fashion through using a unique code number, instead of his/her *kanji* name, for personal authentication would be useful for them to exert power on citizens.

It is a fact that the development of the My Number System and relevant law enforcement are controversial. However, this paper does not discuss whether the introduction of the system is socially justifiable or not. Rather, what we want to emphasise is that there are few discussions about how to protect citizens' information privacy, or how to incorporate the theoretical understanding of the social significance of privacy into the overall policies for personal data protection, even as the new numbering system is going to be implemented in Japan. Practical system architecture and technical measures for protecting PII are talked about, but it has rarely been discussed how APPI should be revised so that people's information privacy is properly protected.

From a historical perspective, Japanese family and resident registration systems have been used for discrimination without clear explanation to citizens, based on continual usage of family information since the *Edo* era. On the other hand, as aforementioned, the effectiveness of APPI for privacy protection has not been recognised and discussed among the society. Moreover, the current revision of APPI may be considered just a measure to realise the implementation of the My Number System by bureaucrats.

4 Current situations concerning personal data use in Japan

4.1 Distortion of individuals' ability to control personal data

In Japan, like in other countries, social media have become widespread among Net users. Under such current situations, it has already become very hard for individual users to control the flow of their personal information. Using a social networking service or microblog, individuals can easily reveal and share their as well as others' personal information including photos and location information online without any permission. For example, soon after the final of the FIFA Women's World Cup 2011, a university student tweeted about a joint party with one of the world champions, and he reported inappropriate or uncertain information concerning the champion team and its members with photos of his touching her and biting the gold medal she won. His tweets gathered

considerable attention, and he was subjected to harsh criticism from many Net users. They considered such tweets were unscrupulous and his behaviour stained the national team's great honour. Then, many Net users investigated and reveal his personal information including his real name, university name and facial photos, despite he used a screen name on Twitter (for more details, see <http://www.japantoday.com/category/sports/view/soccer-star-kumagai-in-hot-water-twitter-remarks-during-party>). One may consider this case is extreme, but it's not an exceptional one in Japan in these days. There have been many similar cases in which information about celebrities and ordinary people (especially people who have committed illegal activities like underage drinking or gambling) is disclosed by others.

According to the survey conducted by a Japanese software company in March 2012, nearly a half (47.4%) of the 900 respondents feel or often feel stressed when using Facebook. The top answer (34.3% of the 616 respondents) to the question “what kind of stress do you feel when using Facebook?” was “human relationships are revealed overtly on the site and there is no privacy”, and the second most common answer (33.8%) was “I should be very careful not to publish indiscreet remarks on the site, because I don't understand to what extent they would be shared” (http://dls02.justsystems.com/download/fastask/biz/report/fa_reportfacebook_20120405.pdf). Thus, many users may feel uneasy about their inability to control their personal information and to properly maintain their online images.

On the other hand, many business organisations have collected various kinds of users' information they can acquire when they provide users with customised-online services using dataveillance systems [Orito, 2011]. It includes information on users' activities such as access history, search keywords and location information. Some applications installed on smart phones or iPods automatically collect personal information of their users, and the information can be merged with other information stored in the devices. Considering such situation where many kinds of information are collected in various ways without users' clear awareness, gaining PII is not necessary for individuals or organisations to commit infringement of the right to privacy. For them, the information that a person who has a device with a certain number is enough to infringe his/her privacy, because a unique number or code which is assigned to, say, each smart phone or personal networking device can be used as a user identifier. In this regard, it is urgently necessary to examine the nature of "sensitive" information in the current Net environment.

4.2 The curse concept of the right to information privacy

If infringement of the right to privacy can be done without using PII as mentioned above, APPI which focuses on protection of PII is not effective for privacy protection nowadays. In fact, Japan Federation of Bar Associations [2012] points out that in accordance with the advancement and proliferation of ICT, not only PII but non-PII should legally be protected (p. 406). The current socio-political and technological environment puts individuals' privacy in jeopardy.

Even though the individuals' ability to control the flow of their personal information deteriorates in the current situations and the law regulations for personal information protection do not work effectively, the proponents of the My Number System, including one of the key members of the relevant governmental committee, often provide the groundless allegation that the system would enhance the individuals' capacity to control circulation of their personal information. It seems that the concept of the right to information privacy as a right to control the flow of personal data is utilised like a slogan for realising the introduction of the new system; the concept of “the right to information privacy” has wings in Japanese society having no connection to reality.

The concept was introduced in the mid-1980s. For instance, Horibe [1988] took an important role for settling the concept in Japan and setting up legal schemes to protect the right. However, even though more than 20 years have passed since its introduction, the concept still remains a central idea in many aspects of relevant legal schemes and policy making processes in Japan. One of the possible reasons of this is that academic professionals and policy makers just utilise the elder authority of information law in the culturally authoritarian and conservative society.

Paradoxically, however, the reason the concept of the right to information privacy as a right to control the flow of personal information concerning him or her have repeatedly been utilised may be that there is a lack of social needs to theoretically understand the importance of information privacy in Japan. The concept may have become a curse to leave the Japanese legal schemes for privacy protection ineffective.

5 Proposal of legal policies for privacy protection in Japan

Whereas the effectiveness of the existing law regulations and the social importance of the right to information privacy have not been examined well in Japan, the

controllability of own personal data certainly deteriorates in the current Net environment. Moreover, development of an integrated national code-number citizen identification system which may inherit discriminatory characteristics of the traditional resident registration systems is going to be started, and it is probable that the Japanese would accept the new system as they have before.

Under such circumstances, will the social importance of privacy protection be acknowledged or neglected by the Japanese? The authors don't have a clear-cut answer. However, in any of these cases, it is necessary to think back why the right to privacy is socially important, and what value should be respected in current society where the existing legal approaches for privacy protection are ineffective and governmental control over citizens would insidiously be strengthened through usage of the new numbering system. Then, sticking to the concept of "a right to control the flow of personal information" is harmful; this curse concept may make us stop thinking about effective measures to protect the right to information privacy beyond PII protection. It is necessary to reconsider why we want to protect our personal information. The reconsideration would require us to clarify the followings: a real sense of PII and sensitive information, and how personal data ought to be utilised in public and private organisations.

Needless to say, the concept of the right to privacy is elusive. However, one of the promising ways of substantively protecting the right to information privacy in the current Net environment may be to develop a legal scheme to maintain and enhance human values which have been considered the protection of the right can maintain and enhance [e.g. Rachels, 1975; Introna, 1997], even though Jarvis [2011] suggests the importance of redefining the concept of privacy as follows.

"Note that these notions focus on the use of information, not on technologies. We need principles that can adjust to any new tool. They should apply to individuals, companies, and governments alike - through the more one knows about another and the more one can do with it, the heavier the responsibility (thus lovers, doctors, Facebook, Google, and government bear greater weight). Whether and how such guidelines are codified in laws and regulations – and how they are enforced- are questions that can be answered only after we first try to grapple which adapting society's norms in the new age. If we can't define privacy, how can we expect to legislate it? (pp.112-113.) "

6 Conclusions

In this paper, we discuss about Japanese law regulations for personal information protection referring to the historical progress of resident registration systems which have contained discriminatory characteristics, and suggest recommendations for policy making toward effective personal data use and protection suitable to the current socio-political and technological situations in Japan.

ACKNOWLEDGEMENTS

This study is supported by the MEXT (Ministry of Education, Culture, Sports, Science and Technology, Japan) Programme for Strategic Research Bases at Private Universities (2012-16) project "Organisational Information Ethics" S1291006, the MEXT Grant-in-Aid for Scientific Research (C) 22530378 and the MEXT Research Grant-in-Aid for Young Scientists (B) 24730320.

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