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# The Institutionalization of the Taiwan Personal Data Protection Committee - Triumph of Digital Constitutionalism: A Legal Positivism Analysis



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The Legislative Yuan recently passed an amendment to the Taiwan Personal Data Protection Act, which resulted in the institutionalization of the Taiwan Personal Data Protection Commission (hereunder the “PDPC”)[1]. This article aims to analyze the significance of this institutionalization from three different perspectives: legal positivism, digital constitutionalism, and Millian liberalism. By examining these frameworks, we can better understand the constitutional essence of sovereignty, the power dynamics among individuals, businesses, and governments, and the paradox of freedom that the PDPC addresses through governance and trust.

### I. Three Layers of Significance

#### 1. Legal Positivism

The institutionalization of the PDPC fully demonstrates the constitutional essence of sovereignty in the hands of citizens. Legal positivism emphasizes the importance of recognizing and obeying (the sovereign, of which it is obeyed by all but does not itself obey to anyone else, as Austin claims) laws that are enacted by legitimate authorities[2]. In this context, the institutionalization of the PDPC signifies the recognition of citizens' rights to control their personal data and the acknowledgment of the sovereign in protecting their privacy. It underscores the idea that the power to govern personal data rests with the individuals themselves, reinforcing the principles of legal positivism regarding sovereign

Moreover, legal positivism recognizes the authority of the state in creating and enforcing laws. The institutionalization of the PDPC as a specialized commission with the power to regulate and enforce personal data protection laws represents the state's recognition of the need to address the challenges posed by the digital age. By investing the PDPC with the authority to oversee the proper handling and use of personal data, the state acknowledges its responsibility to protect the rights and interests of its citizens.

#### 2. Digital Constitutionalism

The institutionalization of the PDPC also rebalances the power structure among individuals, businesses, and governments in the digital realm[3]. Digital constitutionalism refers to the principles and norms that govern the relationship between individuals and the digital sphere, ensuring the protection of rights and liberties[4]. With the rise of technology and the increasing collection and use of personal data, individuals often find themselves at a disadvantage compared to powerful entities such as corporations and governments[5].

However, the PDPC acts as a regulatory body that safeguards individuals' interests, rectifying the power imbalances and promoting digital constitutionalism. By establishing clear rules and regulations regarding the collection, use, and transfer of personal data, the PDPC may set a framework that ensures the protection of individuals' privacy and data rights. It may enforce accountability among businesses and governments, holding them responsible for their data practices and creating a level playing field where individuals have a say in how their personal data is handled.

#### 3. Millian Liberalism

The need for the institutionalization of the PDPC embodies the paradox of freedom, as raised in John Stuart Mill's “On Liberty”[6], where Mill recognizes that absolute freedom can lead to the infringement of others' rights and well-being. In this context, the institutionalization of the PDPC acknowledges the necessity of governance to mitigate the risks associated with personal data protection.

In the digital age, the vast amount of personal data collected and processed by various entities raises concerns about privacy, security, and potential misuse. The institutionalization of the PDPC represents a commitment to address these concerns through responsible governance. By setting up rules, regulations, and enforcement mechanisms, the PDPC ensures that individuals' freedoms are preserved without compromising the rights and privacy of others. It strikes a delicate balance between individual autonomy and the broader social interest, shedding light on the paradox of freedom.

### II. Legal Positivism: Function and Authority of the PDPC

#### 1. John Austin's Concept of Legal Positivism: Sovereignty, Punishment, Order

To understand the function and authority of the PDPC, we turn to John Austin's concept of legal positivism. Austin posited that laws are commands issued by a sovereign authority and backed by sanctions<sup>[7]</sup>. Sovereignty entails the power to make and enforce laws within a given jurisdiction.

In the case of the PDPC, its institutionalization by the Legislative Yuan reflects the recognition of its authority to create and enforce regulations concerning personal data protection. The PDPC, as an independent and specialized committee, possesses the necessary jurisdiction and competence to ensure compliance with the law, administer punishments for violations, and maintain order in the realm of personal data protection.

## 2. Dire Need for the Institutionalization of the PDPC

There has been a dire need for the establishment of the PDPC following the Constitutional Court's decision in August 2022, holding that the government needed to establish a specific agency in charge of personal data-related issues<sup>[8]</sup>. This need reflects John Austin's concept of legal positivism, as it highlights the demand for a legitimate and authoritative body to regulate and oversee personal data protection. The PDPC's institutionalization serves as a response to the growing concerns surrounding data privacy, security breaches, and the increasing reliance on digital platforms. It signifies the de facto recognition of the need for a dedicated institution to safeguard the individual's personal data rights, reinforcing the principles of legal positivism.

Furthermore, the institutionalization of the PDPC demonstrates the responsiveness of the legislative branch to the evolving challenges posed by the digital age. The amendment to the Taiwan Personal Data Protection Act and the subsequent institutionalization of the PDPC are the outcomes of a democratic process, reflecting the will of the people and their desire for enhanced data protection measures. It signifies a commitment to uphold the rule of law and ensure the protection of citizens' rights in the face of emerging technologies and their impact on privacy.

## 3. Authority to Define Cross-Border Transfer of Personal Data

Upon the establishment of the PDPC, its authority to define what constitutes a cross-border transfer of personal data under Article 21 of the Personal Data Protection Act will then align with John Austin's theory on order. According to Austin, laws bring about order by regulating behavior and ensuring predictability in society.

By granting the PDPC the power to determine cross-border data transfers, the legal framework brings clarity and consistency to the process. This promotes order by establishing clear guidelines and standards, reducing uncertainty, and enhancing the protection of personal data in the context of international data transfers.

The PDPC's authority in this regard reflects the recognition of the need to regulate and monitor the cross-border transfer of personal data to protect individuals' privacy and prevent unauthorized use or abuse of their information. It ensures that the transfer of personal data across borders adheres to legal and ethical standards, contributing to the institutionalization of a comprehensive framework for cross-border data transfer.

## III. Conclusion

In conclusion, the institutionalization of the Taiwan Personal Data Protection Committee represents the convergence of legal positivism, digital constitutionalism, and Millian liberalism. It signifies the recognition of citizens' sovereignty over their personal data, rebalances power dynamics in the digital realm, and addresses the paradox of freedom through responsible governance. By analyzing the PDPC's function and authority in the context of legal positivism, we understand its role as a regulatory body to maintain order and uphold the principles of legal positivism. The institutionalization of the PDPC serves as a milestone in Taiwan's commitment to protect individuals' personal data and safeguard the digital rights. In essence, the institutionalization of the Taiwan Personal Data Protection Committee represents a triumph of digital constitutionalism, where individuals' rights and interests are safeguarded, and power imbalances are rectified. It also embodies the recognition of the paradox of freedom and the need for responsible governance in the digital age in Taiwan.

[1] Lin Ching-yin & Evelyn Yang, *Bill to establish data protection agency clears legislative floor*, CNA English News, FOCUS TAIWAN, May 16, 2023, <https://focustaiwan.tw/society/202305160014> (last visited, July 13, 2023).

[2] Legal positivism, Stanford Encyclopedia of Philosophy, [https://plato.stanford.edu/entries/legal-positivism/?utm\\_source=fbia](https://plato.stanford.edu/entries/legal-positivism/?utm_source=fbia) (last visited July 13, 2023).

[3] Edoardo Celeste, *Digital constitutionalism: how fundamental rights are turning digital*, (2023): 13-36, [https://doras.dcu.ie/28151/1/2023\\_Celeste\\_DIGITAL%20CONSTITUTIONALISM\\_%20HOW%20FUNDAMENTAL%20RIGHTS%20ARE%20TURN](https://doras.dcu.ie/28151/1/2023_Celeste_DIGITAL%20CONSTITUTIONALISM_%20HOW%20FUNDAMENTAL%20RIGHTS%20ARE%20TURN) (last visited July 3, 2023).

[4] GIOVANNI DE GREGORIO, *DIGITAL CONSTITUTIONALISM IN EUROPE: REFRAMING RIGHTS AND POWERS IN THE ALGORITHMIC SOCIETY* 218 (2022).

[5] Celeste Edoardo, *Digital constitutionalism: how fundamental rights are turning digital* (2023), [https://doras.dcu.ie/28151/1/2023\\_Celeste\\_DIGITAL%20CONSTITUTIONALISM\\_%20HOW%20FUNDAMENTAL%20RIGHTS%20ARE%20TURN](https://doras.dcu.ie/28151/1/2023_Celeste_DIGITAL%20CONSTITUTIONALISM_%20HOW%20FUNDAMENTAL%20RIGHTS%20ARE%20TURN) (last visited July 13, 2023).

[6] JOHN STUART MILL, *On Liberty* (1859), <https://openlibrary-repo.ecampusontario.ca/jspui/bitstream/123456789/1310/1/On-Liberty-1645644599.pdf> (last visited July 13, 2023).

[7] Legal positivism, Stanford Encyclopedia of Philosophy, [https://plato.stanford.edu/entries/legal-positivism/?utm\\_source=fbia](https://plato.stanford.edu/entries/legal-positivism/?utm_source=fbia) (last visited July 13, 2023).

[8] Lin Ching-yin & Evelyn Yang, *Bill to establish data protection agency clears legislative floor*, CNA English News, FOCUS TAIWAN, May 16, 2023, <https://focustaiwan.tw/society/202305160014> (last visited, July 13, 2023).

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