Rights in the Digital Age: Japanese Viewpoint

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1 Introduction

This paper provides a brief overview of the recent situation regarding rights in the digital age in Japan. Since the Constitution of Japan has not been amended since its enactment in 1946, it does not, at least explicitly, presuppose the today's ICT society or digital age. However, some provisions of the Japanese Constitution can be interpreted as a basis for expanding constitutional rights and freedoms in order to respond to social changes that have occurred since the Constitution was enacted. For example, Article 13 of the Constitution states, "All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs". Traditionally, this provision has been interpreted by the courts as guaranteeing the right to privacy.

However, it is also true that the rapid development of computer networking and AI has raised issues that are difficult to address with traditional theories of privacy rights. In Japan, the right to privacy has been recognized in case law since the famous Tokyo District Court decision in 1964 ("Utage no ato (After the Party)" case). This decision approved the classic "right to be let alone", which originated from the discussion in the United States in the 19th century. In other words, the invasion of privacy in this context means the exposure of private life by mass media. However, under the new situation based on the rapid development of ICT, it is necessary to expand the discussion to two points: (1) the rights against infringement other than exposure of private matters, and (2) the rights against infringement by entities other than mass media.

2 Rights against infringement other than exposure of private matters

As mentioned above, in Japan, the right to privacy has been recognized as the right against exposure of private matters. But the development of ICT has made it possible to pose potential threats to individual freedom by collecting, storing, and processing personal information. Therefore, it has been argued

that the definition of the right to privacy should be expanded to include the right to control one's own information in order to counter such threats. This is the view proposed by Alan Westin in his "Privacy and Freedom" in 1968.In Japan, since several respected researchers, including Professor Masao Horibe who was the 1st chairperson of the Personal Information Protection Commission of Japan, Koji Sato, Professor Emeritus of Constitutional law at Kyoto University, and others have accepted and developed this theory, it has become very influential in academia.

However, the Supreme Court has been reluctant to apply this theory directly to concrete cases. If this theory is applied as it is, then in principle, the consent of the individual is required in order to use the personal information of others. But, for example, it would be unreasonable for law enforcement agencies to assume that they cannot conduct investigations without the consent of the suspect. Therefore, how to establish exceptions to this principle is an extremely important issue. However, there is a wide gap between those who emphasize the protection of privacy and those who seek to develop society by utilizing personal information, and there is currently no consensus among scholars and practitioners on this issue. Therefore, courts generally grant remedies within the framework of the traditional "right to be let alone," focusing on the fact that the personal information has finally been published or transferred to a third party, rather than on the collection, storage, or processing of the personal information itself.

The Japanese government has adopted a policy of protecting personal information not as a constitutional right, but through a statutory system. Japan's Personal Information Protection Law (Act on the Protection of Personal Information, Law #2003 (Heisei 15)-57) is based on the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data of 1980. In other words, the approach adopted by Japanese law is to seek a balance between the protection of personal information and the appropriate use of personal information. The Act was first enacted in 2003 and has been amended several times. The most important of these amendments were made in 2015, 2020, and 2021. From the beginning, this law has been structured to protect personal information, not the right to privacy. Specifically, while it establishes uniform handling standards for personally identifiable information, regardless of its content, it does not have general privacy protection provisions. However, the 2015 amendment introduced an additional protection system for sensitive information, which partially adds the characteristics of a privacy protection law.

Amendments in 2020 and 2021 extend the rights of individuals to make requests regarding the handling of their own information properly and strengthen regulations on the transfer of personal information across borders. On the other hand, a system has also been introduced that allows personal information to be anonymized and used for industrial or business purposes.

After 2021 amendment, the rights that individuals have under this law are as follows:

(1) The right to request disclosure of one's personal information to a personal information operator;

(2) The right to request that a personal information operator correct, add, or delete one's own personal information that is not true;

(3) The right to request a personal information operator to stop using one's own personal information for purposes other than those specified , or to request that one's personal information be deleted in the case;

(4) The right to request that a personal information operator stop using one's own personal information in a way that is promoting or is likely to induce illegal or unjust acts, or to request that one's personal information be deleted in the case;

(5) The right to request that a personal information operator stop using or delete one's own personal information that has been obtained through deception or other wrongful means;

(6) The right to request that a personal information operator stop using or delete the use of one's own sensitive personal information except that has been collected under the special exceptions approved by the law;

(7) The right to request that a personal information operator stop providing one's own personal information to a third party without complying with the conditions approved by the law;

(8) The right to request that a personal information operator stop providing one's own personal information to a third party overseas without complying with the special conditions approved by the law;

(9) The right to request that a personal information operator stop using or stop providing one's own personal information to a third party when it is no longer necessary; and

(10) The right to request that a personal information operator stop using or stop providing One's own personal information to a third party when one's own rights or legitimate interests are likely to be harmed.

It is true that these rights have been greatly expanded compared to those guaranteed by the original law. As of 2003, the legal guarantee of individual rights was extremely weak, and the Personal Information Protection Law at that time, while adopting the form of a statute, was in reality a guideline with little binding force. The above ten rights are certainly legal ones that do not have constitutional value, but they do reflect the findings from the operation of Japanese law over the past nearly two decades. It can be said that they have been created by learning a lot from two different legal systems, EU law and US law, which have different directions. These rights deserve to be added to the "Charter of Rights in the Digital Age."

However, since the amended law is still not a general privacy protection law, it is necessary to seek legal remedies for general privacy violations under general laws such as the Civil Code and the Constitution. In such cases, it is relatively easy to obtain damages if there are specific monetary damage, but there are difficulties in obtaining other remedies. For example, since there is no constitutional provision or statute in Japanese law that explicitly recognizes the "right to be forgotten," it is necessary to assert this right as the content of the constitutional right to privacy in litigation.

In 2017, the Supreme Court ruled in favor of Google in a case where the removal of google search results was sought on the grounds of invasion of privacy (the right to be forgotten). The decision pointed out that search engines "play a major role as a foundation for the distribution of information," and stated that "the decision should be delivered by comparing and weighing the legal interest in not having facts made public and the various circumstances regarding the reasons for providing URLs and other information as search results. As a result, if it is clear that the legal interest in not having the facts made public is superior, the user may request the search service provider to remove the URL or other information from the search results."

This newly asserted right has a different structure than the ten rights listed above. In the first place, Google is merely organizing and providing access routes to personal information that already exists on the Internet. Google is not an editor or publisher of the personal information. According to the traditional theory of rights, victims of privacy violations on the Internet should sue those who publish their privacy information, not Google.

However, since digital information can be reproduced indefinitely, it is practically extremely difficult to identify all the publishers of personal information on the Internet and file a lawsuit against them. This is why the

"right to be forgotten" was conceived to require a third party, Google, to cut off the access route to personal information.

Whether such a "right to be forgotten" should be added to the "Charter of Rights in the Digital Age" is a difficult question. This is because it is a significant change to the legal system, which has traditionally consisted of a two-sided relationship between right holders and duty bearers. In other words, this issue is a part of (2) the rights against infringement by entities other than mass media, which I presented at the beginning of this paper. Therefore, I will change the section here and continue the discussion.

3 The rights against infringement by entities other than mass media

When the right to privacy was recognized in case law in Japan in 1964, it was not a constitutional right, but merely an addition to the protected interests under tort law.

However, as more private information was used in government activities, it was extended to a constitutional right of privacy to regulate government activities. In 1969, the Supreme Court ruled that since individuals have a public portrait right, there must be a specific reason for the police to take a picture of the face of a person marching on a public street. This is an embodiment of the constitutional right to privacy, and this stance of the Court led to its decision in 2017 that it would be a violation of the constitution to attach GPS to a suspect's car without a warrant to monitor the suspect's activities.

Thus, it can be said that the constitutional right to privacy of individuals against the government is already recognized in Japan, but whether the right to privacy can be extended as a new right in the ICT age against legal entities other than the government, or whether a completely new constitutional right can be recognized, is a matter of debate. Although there are many issues involved, I will limit my discussion to the issue of rights for search engine providers on the Internet, which is a global transnational network.

One answer to this question is as follows. The traditional constitutional relationship of rights and duties applied only between citizens and the state only because the power and influence of the state was exceptionally large in relation to other legal and economic entities. Today, since Internet search engine providers have more power than the state, they should naturally be subject to regulation by the Constitution. Therefore, individuals should be able to assert their constitutional rights against Google. However, this answer seems to oversimplify the situation. Here, in order to consider the issue from a

comparative perspective, I would like to introduce a case involving a conflict between Canadian and U.S. law, rather than Japanese law.

The Supreme Court of Canada ruled on June 28, 2018, in the case of Google Inc. v. Equustek Solutions Inc. The Supreme Court of Canada affirmed a lower court's order to Google to remove search results related to piracy of certain computer-related products, but the order was explicitly worldwide. The traditional legal system assumes the existence of nations and jurisdictions and national laws, and the principle is that each nation or jurisdiction will deal with legal disputes that cross national borders. For example, if a product of a company in country A is defective and causes damage both in country A and in country B, the export destination, the victim in country A and the victim in country B will seek compensation for damages in their respective courts based on their respective laws. Therefore, focusing on the fact that such sites are generally accessed via search engines, it was thought to use an injunction against the search service provider as a third party, not the perpetrator, in order to remedy rights.

One possible solution, then, is for the courts of either country to provide the remedy of "worldwide" control of search results, but this raises other issues. One that immediately comes to mind is the infringement of sovereignty. Still, more importantly, there is the issue of a gap in the law based on cultural differences and differences in social values. It is not a unique case that what is illegal in one country or jurisdiction (for example, certain types of sexual expression are legally restricted due to religious values) is legal in another country or jurisdiction (sexual expression is protected by freedom of expression as long as it is not obscene) or, conversely, encouraged (sexual expression is subsidized as art). In this light, it would be inappropriate for a court in one country to regulate Google's worldwide activities.

Previously, this issue has been discussed around the so-called "right to be forgotten" decision of the European Court of Justice (ECJ) on May 13, 2014. In that case, the ECJ ruled that the search engine operator Google was obliged to delete certain past information that individuals wished to be forgotten, based on Article 12(b) and Article 14(1)(a) of the EU Data Protection Directive. Since the ruling is based on EU law, Google is, in principle, taking action to delete the information within the EU. On the other hand, in a different context of intellectual property rights, the Supreme Court of Canada has ordered the exclusion of a company's site from the worldwide Google search results in order to provide practical relief to the affected company, Equustek. In other words, it

was determined that most of the pirated goods were sold outside of Canada, and that restricting the search results in Canada alone would not stop the damage to the company. Google reacted immediately to the ruling. Google immediately responded to the ruling by filing a lawsuit against Equustek in the U.S. District Court for the Northern District of California, arguing that Google was not obligated to follow the Canadian ruling in the United States. On November 2, 2018, the court accepted Google's claim, reasoning that the Canadian ruling violated the Communications Decency Act, an act of the United States Congress. Therefore, the company next filed a lawsuit in the Superior Court of British Columbia, Canada, based on this ruling, seeking to revoke the Canadian court order itself, but the Court rejected this argument.

In the above, I have examined the recent Canadian and US court decisions over google search results. What is at stake here is the question of how the courts of traditional sovereign states can intervene in expressions on the Internet that cross national borders, and at the same time, how to regulate people and companies that operate on the Internet. Since the Internet has no global law or administrative body to govern it in its entirety, we must ultimately turn to the courts of each country and jurisdiction to challenge expression on the Internet. The problem is the jurisdictional scope of the decision. According to the logic of traditional international law, judgments rendered by the courts of each jurisdiction are enforceable only in that jurisdiction, and in order to enforce them in other jurisdictions, it is necessary to obtain a judgment of enforcement of the foreign judgment in that country. In Japanese law, this is provided for in Article 118 of the Code of Civil Procedure.

By the way, when applying this traditional mechanism and concept to the regulation of expression on the Internet, several difficult problems arise. For example, the location of the search index (server) is completely unknown to anyone other than Google, and at the same time, it can be moved out of the country at any time, and moreover, there is a possibility that distributed processing is conducted across national borders. Thus, it is futile to discuss "cross-border" by focusing on its physical location. "The Internet transcends borders" does not just mean that network lines are connected. It means that it is difficult to determine “domestic or foreign” based on the location of the "object" (in this case, data). In this sense, the first BC Superior Court decision ordering the removal of the index "worldwide" is different in nature from the enforcement of a foreign judgment in the traditional sense. Google's arguments in the U.S. District Court and in the Superior Court of BC are not appropriate

in terms of stating international comity and infringement of sovereignty.

Apart from that, however, the validity of a decision made by a court in one country, Canada, to control the content of search results displayed outside of Canada is an independent question. For example, the permissibility of sexually explicit material or privacy protections often raises cross-border issues due to significant cultural or religious differences. Similar issues arise in cases where there is a statutory basis in one jurisdiction but not in another, such as the right to be forgotten. In this respect, the Canadian courts' decision in the Equustek case was "well done" in narrowing the scope of the decision. In other words, in the Equustek case, the court ordered the global deletion of the index by limiting it to the issue of intellectual property right infringement, which is easily understood globally and has less potential to conflict with freedom of expression in terms of content, and by focusing on the fact that Google search results promote the activities of infringers as a result. In my opinion, this form of limited globalization is reasonable from the viewpoint of equity. On the other hand, ordering the deletion of sexual expression or privacy information itself based on a specific value is highly problematic. It is hazardous that a decision by a court in a specific country or jurisdiction (including, unfortunately, courts in jurisdictions where the rule of law and democracy are still underdeveloped) that ignores the differences in values among jurisdictions will cause a global information blockage. These issues must still continue to be dealt with by judgments that are confined to that jurisdiction.

Then, the immediate solution to this problem may be to focus on the infringing interest, categorize it, extract those that should be allowed to order the removal of the index worldwide, and incorporate them into international treaties or contribute to the formation of "transnational" case law. The former approach, which requires negotiations between states, takes a certain amount of time and involves non-negotiable values for which negotiations themselves are impossible, so the latter approach will be extremely important from a practical standpoint.

4 Conclusion

Today's "Digital Age" is based on the convergence of computers and communications. Therefore, as discussed in this paper, there are many legal issues to be considered that are impossible or difficult to be solved by the traditional legal and rights protection system of sovereign states. Therefore, when considering the "Charter of Rights in the Digital Age," it is necessary to

discuss what topics and constitutionally entrenched rights can be proposed as common to each country while assuming the laws of traditional sovereign states.

In this sense, the ten rights included in Japan's amended Personal Information Protection Law, as described in Section 2 of this memo, could be considered to be common as statutory or entrenched rights in many countries. On the other hand, as shown in Section 3 of this memo, for issues that involve differences in social values, it is necessary to carefully examine the acceptability of each country or jurisdiction.