

Comments on the Japan–Taiwan International Symposium on “The Intersection of Property Rights and Personality Rights”

Katsumi YOSHIDA*

Abstract

This article comments on six reports from Japan and Taiwan presented at the Japan–Taiwan International Symposium on the “Intersection of Property Rights and Personality Rights” held at Ritsumeikan University on February 16, 2025. It analyzes these reports from the perspectives of the subject theory of personality rights, object theory, theory of protection of legal interests through personality rights, and theory of the right to self-determination, while also considering the fundamental theory of personality rights.

Keywords:

personality rights, subject of personality rights, object of personality rights, protection of legal interests through personality rights, right to self-determination

I. INTRODUCTION

Due to time constraints, I will avoid commenting on each presentation individually. I will organize the topics, state my views on them succinctly,

and then comment on the relevant issues in each presentation from that perspective.¹⁾

II. BASIC UNDERSTANDING OF PERSONALITY RIGHTS

First, let me sum up my understanding of personality rights in a schematic manner.

Here, I would like to reconstruct the civil law system from the perspective of the “law of property” and the “law of persons.” The legal structure of the “law of property” can be understood with a schematic outlining subject, attributional relationship, and object. Property rights fall into this kind of “attributional relationship.” The typical property right is the right of ownership. Personality rights are, of course, related to the “law of persons,” and the structure of the “law of persons” can also be grasped in parallel to the “law of property.” The legal structure of the “law of persons” can also be understood in terms of a “subject, attributional relationship, and object” schematic; personality rights are rights that express this attributional relationship.

As for the “object,” it is appropriate to use the concepts of medium and entity to understand this legal structure. The medium is the direct concrete object of the attributional relationship. As far as the “law of property” is concerned, the individual concrete tangible object is the medium and the object of the rights. As for the “law of persons,” the body, its attributes,

1) The six presentations commented on in this article are as follows. From Japan: Misako Oda, “Protection of Posthumous Personality Interests,” *Ritsumeikan International Affairs* Vol. 21 (2026); Hideki Ishibashi, “On the Establishment of the Tort for Infringing the Feeling of Honor,” *Ritsumeikan International Affairs* Vol. 21 (2026); Seiji Hayashi, “The Structure and Substance of the Right of Self-Determination as a Protected Legal Interest under Japanese Tort Law,” *Ritsumeikan International Affairs* Vol. 21 (2026). From Taiwan (in Japanese, translated by Misako Oda): Sieh-Chuen Huang, “Shisha no jinkakuken to izoku kanjō” [Personality Rights of the Deceased and the Feelings of Bereaved Families], *Ritsumeikan kokusai chiiki kenkyū* [Ritsumeikan Journal of International and Area Studies], No. 61 (2026); Yu-Hung Yen, “Jinkakuken no hogo: hikinsenteki baishō no kyūsai o chūshin ni” [Protection of Personality Rights: Focusing on Non-Monetary Remedies], *Ritsumeikan kokusai chiiki kenkyū* [Ritsumeikan Journal of International and Area Studies], No. 61 (2026); Yi-Wen Chang, “Taiwan no fuhōkōi-hō ni okeru ishi kettei jiyū no hogo: ‘koi matawa kashitsu ni yoru fujitsu no chinjutsu’ o chūshin ni” [Protection of Freedom of Decision-Making in Taiwanese Tort Law: Focusing on ‘Intentional or Negligent Misrepresentation’], *Ritsumeikan kokusai chiiki kenkyū* [Ritsumeikan Journal of International and Area Studies], No. 61 (2026).

and personal identity are the media and objects of personality rights. Additionally, the media possess substantive value. This indicates two types of value: property value and personality value. The objects, which are media of the “law of property,” are basically assigned a property value but may also be assigned a personality value. In the case of the “law of persons,” the opposite is true: they are essentially assigned a personality value but may also be given a property value.

To analyze either of the rights, it is necessary to begin with the object. In the case of personality rights, we can say that “personhood” is the object in the abstract. However, it is premature to assume that the object of personality rights is the same as personhood, and there are several points to keep in mind.

First, “personhood” also refers to the subject of an action, but this subject cannot be made the object of rights as such. This is because it is self-contradictory to equate the subject with the object. Second, if we consider the object of personality rights more specifically, we first bring to mind (a) the body (life and health) and the attributes of the body (likeness, voice, etc.). Moreover, (b) securing the private sphere that contributes to the fulfillment of human life is also an important function of personality rights, and from this perspective, privacy is a natural object of personality rights. From the same perspective, personal information and other information related to personal identity are also the objects of personality rights. (a) and (b) are not personhood itself but the various legal interests that contribute to the fulfillment of personhood, or in other words, to the fulfillment of human life.

These various legal interests can be called “personhood-supporting legal interests.” Let us consider these the objects of personality rights. In propositional terms, this equates the object of personality rights with the legal interests that support personhood.

The subject of the “law of property” is the transactional party presupposed within a market, an abstract legal entity. However, the subject of the “law of persons” is different. The subject of the “law of persons,” and thus, the subject of personality rights is the concrete human being who lives in the lifeworld. This person desires to live a full life. The legal interests that contribute to this are the “personhood-supporting legal interests” mentioned earlier. Personhood-supporting legal interests are placed around the human being, the concrete subject living in the lifeworld who

is made the object of legal protection, thereby protecting and developing the life of the subject. The right to ensure this is a personality right.

Now, there are various legal interests that contribute to the support of personhood. Not all of them are eligible for legal protection, and even if they are, the format and strength of these protections are not uniform. Regarding personality rights, a certain typology is necessary. As a minimum categorization, only two major types of personality rights are extracted here: “absolute-right-type strong personality rights,” which require absolute protection, and “balancing-type weak personality rights,” which are relative rights that need to be weighed to determine whether they are legally protected.

Based on the above basic understanding of personality rights, I have some comments on these reports.

III. THEORY OF THE SUBJECT OF PERSONALITY RIGHTS

1. Personality rights of the deceased

The two major issues concerning the subject of personality rights are the personality rights of corporations and the personality rights of the deceased. The Oda and Huang presentations at this symposium deal with the personality rights of the deceased.

Based on the understanding of personality rights presented earlier, the deceased have no personality rights. This is not only for the formal logical reason that rights cannot be vested in a person when the subject of the rights has ceased to exist. For the deceased, the fullness of life cannot matter. After confirming this principle, one might take the viewpoint that the dignity of personhood during life can only be adequately protected if the violation of personhood after death is protected.²⁾ This idea can be called the “posthumous protection expectation theory.” In this regard, certain measures may be taken that appear to protect the personality rights of the deceased. However, the need for their protection is not strong, and

2) See Kiyoshi Igarashi, “Shisha no meiyo” [Honor of the Deceased] (Commentary on the Rakujitsu Moyu Incident First Trial Judgment [Tokyo District Court, July 19, 1977, *Hanrei Jihō* No. 857, p. 65]), *Shōwa 52-nendo jūyō hanrei kaisetsu, Jurist rinji zōkan* [Commentary on Important Cases of 1977, Jurist Special Edition] No. 660 (1978), p. 77; Hiroshi Saito, *Jinkakuken-hō no kenkyū* [Studies on Personality-Rights Law] (Ichiryūsha, 1979), pp. 210–211, etc.

the content of their protection is also different from that of personality rights.

A glance at the problematic situation in Japan shows that there is no Supreme Court ruling on this issue. An important case is the high court-level judgment (Tokyo High Court, March 14, 1979, *Hanrei Jihō* No. 918, p. 21) in a case involving the novel “*Rakujitsu Moyu*”. The two points appropriately considered criteria as indicated by this judgment are: (a) that the exercise of claims based on the personality rights of the deceased lacks a basis in positive law, and therefore, such actions are not permitted (denial of the personality rights of the deceased); and (b) that the possibility of establishing a tort in cases of violation of the “feelings of respect and remembrance” of the bereaved family is recognized. Subsequent court decisions have largely adhered to this standard. Based on the above basic understanding, I believe this is the proper treatment of the issue of the personality rights of the deceased.³⁾

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- 3) There are also certain legal institutions under positive law related to the personality rights of the deceased. I will introduce them briefly.

(1) The first is the crime of defamation of the deceased under the Penal Code (Article 230, Paragraph 2). According to this provision, a person is guilty of defamation of a deceased person only if he defames the deceased person by revealing false facts. There are conflicting theories on how to consider the legal interests to be protected. The theories are summarized as follows: (a) the deceased’s own honor, (b) the bereaved family’s feelings of respect for the deceased, and (c) the general feeling of society toward the deceased (Yoshihiro Matsubara, *Keihō kakuron [dai 2 han]* [Criminal Law: Special Part, 2nd ed.], Nippon Hyōronsha, 2021, p. 155). The problem with regard to (a) is that the deceased cannot be regarded as the subject of legal interest. Regarding (b), if there is no bereaved family, punishment cannot be enforced, but the question is whether the matter can be left at that. In the end, (c) is supported (Matsubara, p. 155). If we organize the views as in (a) to (c), this would indeed be the result. Let me then note the following points. “These feelings toward the deceased should be understood not so much as the feelings of people in society toward the deceased as others, but rather as a generalized desire or expectation that they will not be treated this way after their own death” (Matsubara, p. 155). This is in line with the “posthumous protection expectation theory” mentioned earlier in the text, and seems justified.

(2) As another provision, the Copyright Act provides the following rules for the treatment of the author’s moral rights after death.

(i) General approach: Even after the death of the author, it is prohibited for a person who makes available or presents the author’s work to the public to engage in conduct that would infringe the author’s moral rights if the author were alive (Article 60 main clause).

(ii) Measures against violations: Survivors, etc. may demand an injunction (Article 112) and compensation for damages plus restoration of reputation (Article 115) (Article 116).

(iii) Survivors: Spouse, children, parents, grandchildren, grandparents, and siblings (Article 116, Paragraph 1). The order of those who may file a request under (i) shall be in accordance with this order or the order specified in the will (Article 116, Paragraph 2).

The situation in China, which the Oda presentation discusses, is diametrically opposed to that in Japan in its treatment of the personality rights of the deceased. This is because Article 994 of the Chinese Civil Code appears to adopt the direct protection theory, which recognizes the direct protection of the personality rights of the deceased. As for the direct protection theory, the issue is how to answer the question of what personality rights exist in the first place, and whether they exist for the fulfillment of life. The “posthumous protection expectation theory” mentioned earlier is a promising answer to this question.⁴⁾ However, if we adopt this answer, since the exercise of survivors’ rights is not based on the personality rights vested in the survivors but is for the deceased alone, the effect should be mainly restoration measures of the consequences of the violation. Granting the survivors the right to claim damages is not an appropriate effect. It is interesting to see how this issue is addressed in China.

On the other hand, the Oda presentation recognizes that recent discussions in China have shifted from the direct protection theory to the indirect protection theory. The latter is said to be synonymous with the theory of protection of the interests of next of kin. Indeed, it is often discussed thus. But are they really synonymous? The theory of protection of the interests of next of kin is essentially a concept that addresses the violation of the legal interests inherent in the next of kin, and not the protection of the (indirect) personal rights of the deceased. The details of the discussions in China in this area are also of interest.

Next is the Huang presentation. The Taiwanese legal situation regarding the personality rights of the deceased, as introduced in the Huang presentation, is very clear in light of the basic understanding of personality rights and the Japanese legal situation presented earlier. It is essen-

(iv) The term of protection is not limited with respect to survivors. However, once those persons die, they will no longer be able to file injunctive demands, etc., so we may say that in practice a term of protection does exist. These provisions do not recognize the survival of the author’s moral rights after death, nor do they recognize the inheritance of such rights. Surviving family members are granted an “inherent right to claim” (Nobuhiro Nakayama, *Chosakuken-hō* [Copyright Law] (Yūhikaku, 2007), p. 414). The basis for this treatment is considered to be the “posthumous protection expectation theory” indicated earlier (Yoshiyuki Tamura, *Chosakuken-hō gaisetsu [dai 2 han]* [Outline of Copyright Law, 2nd ed.], Yūhikaku, 2001, p. 458).

4) In comparative law, German precedents have adopted the direct protection theory (“Mephisto Judgment”). The logic of justification for this seems to be the “posthumous protection expectation theory.” See Saito, *op. cit.* note 2, pp. 212–213.

tially the same as in Japan. I have no doubts or particular questions on this point.

2. Theories of human remains

The Huang presentation then examines the legal treatment of human remains and related matters. I will comment on a few points in this regard.

First, here are some of the key points of my view. The starting point is how to grasp the legal status of the body. Traditionally, an understanding has been adopted that equates the body with personhood. Personhood is nothing other than legal subjectivity. Thus, under this understanding, the body is not the object of legal relations because it is a legal subject. In contrast, I adopt an understanding in which the body is a thing. Thus, the body becomes the object of legal relations. However, this “thing” is different from ordinary things. It is a thing that is the inseparable medium (support) of personhood. Thus, since personhood is not disposable, the body is also not transferable.

The value attached to the medium of the body is naturally a personality value. Therefore, the attributional relationship of this “thing” to the subject constitutes “personality rights.” However, it should not be overlooked that the body also has property value at the same time. This manifestation of this property value is normatively restrained based on the non-transferability of the body. Yet, its limited manifestation is possible (as in labor contracts). It also manifests itself in fatal accidents or accidents resulting in injuries with permanent disabilities, which violate the integrity of the body and is subject to compensation for damages (compensation for lost earnings).⁵⁾

Human remains are a “thing” that is an extension of the body. As death extinguishes personhood, the corpse loses its character as a medium (support) of personhood. Human remains, however, were once a body, which as a medium of personhood possessed dignity. From this point of view, the remains should be granted a certain degree of dignity. In other words, while human remains are subject to property rights as a thing, they should be seen as possessing property value as a tangible object and

5) For more details on the above, see Katsumi Yoshida, “Shintai no hōteki chii (1) (2 kan)” [Legal Status of the Body, Part 1 and 2], *Minshōhō Zasshi* Vol. 149, Nos. 1, 2 (2013).

– indeed, even more so – personality value.

The Huang presentation describes the situation in Taiwanese court practice in recent years, where compensation for non-property damages has been increasingly recognized for the violation of human remains. This Taiwanese trend is indeed justified in light of the legal grasp of human remains as described above. Although the violation of human remains is a violation of property rights, it infringes on the personality value of the human remains and generates solatiae, which are non-pecuniary damages.⁶⁾

IV. THEORY OF THE OBJECT OF PERSONALITY RIGHTS

The theory of the object is treated by the Ishibashi presentation using the sentiment of honor as subject matter. Honor, which is the premise for considering the sentiment of honor as a protected legal interest, is an explicitly protected legal interest under the Japanese Civil Code (Article 710). Therefore, certain legal interests that can be the object of personality rights have been granted legal protection by borrowing the concept of honor.⁷⁾ Honor here functions as a nominal protected legal interest. These le-

6) There nevertheless remains the question of how to consider the ownership of the remains. It cannot be assumed that personality rights belonging to the deceased are passed on to the surviving family members by inheritance. That said, it is not appropriate to consider human remains as ordinary property and subject to division of the estate. It is appropriate to consider that the property ownership is determined based on custom, as a special object similar to ritual property. Shigeto Hozumi, *Meiji Taishō Shōwa hanrei hyakuwa* [One Hundred Stories of Meiji, Taisho, and Showa Precedents] (Kawade Shobō Shinsha, 2024), p. 52, also explains that the treatment of human remains should be a matter of custom or principles of reason.

7) See, e.g., Nobuhisa Segawa, “Minpō 709-jō (fuhōkōi no ippanteki seiritsu yōken)” [Civil Code Article 709 (General Requirements for Establishment of Torts)], in Toshio Hironaka and Eiichi Hoshino (eds.), *Minpōten no hyakunen III: kobetsuteki kansatsu (2) saiken-hen* [One Hundred Years of Civil Code III: Individual Observations (2) Obligations] (Yūhikaku, 1998), pp. 599, 617 ff, and Miyabi Tatebe, *Fuhōkōi-hō ni okeru meiyō gainen no hensen* [The Evolution of the Concept of Honor in Tort Law] (Yūhikaku, 2014), p. 5 and following. A pre-World War II example is the case of marital infringement. See Daishin’in judgment of March 30, 1908, *Keiroku* Vol. 14, p. 331, and others. The issue was whether the man Y, who committed adultery with the wife A, was liable in tort in relation to A’s husband X (an ancillary private action). The Daishin’in found Y liable in tort, citing the husband’s rights and honor as the legal basis for its finding. While honor was mentioned, the loss of social reputation did not come into question. Honor is merely charged with the function of legitimizing the legal protection of the husband’s interest in family life, symbolized by the term husband’s rights, or more specifically, his right of control over his wife. Husband’s rights, etc., are not a clearly protected legal interest in torts, and bringing up honor can compensate for that weakness. In that sense, honor here is a nominal protected legal interest. A

gal interests gradually move away from defamation as their own legal protection becomes recognized. Through the transitional protection of honor as a nominal protected legal interest, the object of personality rights and its sphere of protection are expanded. The personality rights here are, of course, “weak personality rights.”

The Ishibashi presentation introduces court cases in which defamation is found without satisfying the requirement for loss of social reputation, and points out that the substance of such defamation may be an infringement of the sentiment of honor. This seems to be a legitimate perception.⁸⁾ The sentiment of honor has traditionally been sharply distinguished from reputation and denied protected legal status. This sentiment of honor acquires legal protection while making honor a nominal protected legal interest. By extension, this opens up the prospect of legally protecting the sentiment of honor as a unique legal interest, without having to treat it as honor. This constitutes the recognition of a personality right (a weak personality right) that takes the sentiment of honor as its object. I believe that the Ishibashi presentation also encompasses this perspective.

As for the “sentiment of honor” thus separated from honor, we may ask whether this wording adequately describes the reality. There is no need to adhere to “honor.” This sentiment may rather derive from human or individual dignity. Thus, it might be appropriate to call it, for example, “self-respect.”

postwar case is the Takamatsu District Court judgment of November 7, 1957, *Fuhō Kaminshū* Vol. 1957 (Part 2), p. 745. This is a case in which Y seduced X's wife A, leading to sexual intercourse through aggressive advances. The relationship between Y and A continued, with A leaving home with her child. The court found that defamation had been established and ordered solatium and the posting of a letter of apology. Again, there is no issue here of the loss of social reputation. In addition to the above, similar cases can also be found involving ostracization in a village and expulsion from a labor union.

- 8) As such, there have long been court cases other than those cited in the Ishibashi presentation that could be understood as protecting the sentiment of honor by treating honor as a nominal protected legal interest. In a prewar case, the court found that defamation was established by stating defamatory facts to several people in a lounge for priests and others at a funeral (Daishin'in judgment of December 15, 1923, *Keishū* Vol. 2, p. 988), and in an early postwar case, the Tokyo District Court ordered state compensation for wrongful arrest (Tokyo District Court judgment of October 8, 1952, *Kaminshū* Vol. 3, No. 10, p. 1407, etc.); in another case, state compensation for verbal abuse by a police officer was approved (Tokyo District Court judgment of March 24, 1958, *Kaminshū* Vol. 9, No. 3, p. 492), among others.

V. THEORY OF PROTECTION OF LEGAL INTERESTS THROUGH PERSONALITY RIGHTS

1. Requirements for protection

As for “weak personality rights,” the key issue is the requirements for their protection. Since the definition of “weak personality rights” is that they are balancing-type rights, whether their protection exists should depend on the overall weighing of the various circumstances of the case in question. In fact, it is traditional Japanese case law to determine whether protection is available or not based on the totality of the circumstances (doctrine of tolerable limits).⁹⁾ The “social tolerance limits” presented by the Ishibashi presentation on the sentiment of honor is one variation of this concept.

In this regard, the Yen presentation explains that for some personality rights that have not reached a mature and stable stage (“weak personality rights” as referred to in this commentary), the conduct wrongfulness theory should be adopted in determining their illegality.¹⁰⁾ How are we to consider this?¹¹⁾

First of all, it is important to confirm that in civil tort liability, where the issue is recovery for violation of the legal interest, it should not be possible to question the establishment of liability apart from the violation of

9) The question of whether or not to adopt the doctrine of tolerable limits when judging the illegality of the perpetrated act has been a major issue in pollution cases (typically, airbase pollution cases where the issue is noise, etc.), where the main issue is living environment infringement that does not go as far as life and health infringement. The victims strongly criticized the doctrine of tolerable limits and demanded protection as a “strong personality right,” similar to the four major industrial pollution lawsuits where life and health infringement was an issue. Supporting this claim was the expansion and deepening of the concept of health. However, the court did not readily accept it and consistently adopted the doctrine of tolerable limits. The same is true in decisions on “weak personality rights” protection in other areas.

10) However, with regard to stable and mature personality rights such as the right to life and the right to the body (“strong personality rights” as referred to in this commentary), illegality should be determined based on the result wrongfulness theory.

11) However, the “conduct wrongfulness theory” in the Yen presentation is presented as a framework for determining the illegality of conduct based on a comprehensive consideration of relevant factors, perhaps taking a stance similar to the Japanese doctrine of tolerable limits, which equates to comprehensive balancing. That said, the name “conduct wrongfulness theory” is still understood as a decision-making framework that places considerable emphasis on the act rather than the result. These comments are based on this understanding of the Yen presentation.

the legal interest. In this sense, the result wrongfulness theory should be adopted in civil torts. It is in the realm of criminal law that the issue of conduct wrongfulness (wrongfulness of conduct) arises.

Having confirmed this, I would further note that areas may be emerging in civil torts where conduct wrongfulness should be an issue. First, there are problem areas where the sanctioning function of the tort should be emphasized because of the malignant nature of the conduct. Hate speech based on ethnic discrimination and slander on the internet may be cited as examples. Here, it is preferable to recognize punitive solatium.

Furthermore, malignancy of the act may be incorporated as a factor in determining illegality based on the current doctrine of tolerable limits, and this may be reflected in the solatium. Second, due to the seriousness of the social impact of an act, there may be an increasing number of areas in the future where its sanctioning should be recognized without necessarily addressing the violation of legal interests. Portrait “resurrections” of the deceased made by generative AI, as pointed out in the Oda presentation, can be seen as such a problem area.

It appears useful to view the focus on civil conduct wrongfulness in the Yen presentation as a response to this trend in tort law.

2. Effects of protection

This issue was dealt with in detail in the Yen presentation, which is extremely informative on the current state of Taiwanese law. As pointed out there, protection against infringement of personality rights can be broadly divided into (a) the right to injunction, which is a future-oriented remedy to remove the cause of the infringement and prevent future damages, and (b) the right to damages, which targets damages that are the negative consequences arising from the infringement and restores the state in which they do not exist. Although they are remedies of a different nature,¹²⁾ both are necessary as remedies for the violation of personality rights, and they go hand in hand.

With regard to (a), the specific cases in which the right to demand an injunction is recognized, as pointed out in the Yen presentation, are all plausible. In addition, other than those, I am interested in how Taiwanese

12) See Katsumi Yoshida, *Bukken-hō III* [Property Rights Law III] (Shinzansha, 2023), pp. 1547 and 1549, for a summary of the dissimilarities between the two remedies.

law deals with the possibility of requesting search engine operators to delete search engine results. This is a matter of the so-called “right to be forgotten.”¹³⁾

As for (b), the Japanese Civil Code, while setting monetary compensation as a general rule (Article 722, Paragraph 1), allows in exceptional cases the restoration of original conditions for defamation (Article 723). According to the Yen presentation, although there is some debate, it should be understood that restoration to the original state is the principle and monetary compensation is the exception in Taiwanese law, taking into consideration the fact that German law has been adopted with regard to the method of compensation for damages. What differences will arise in the two countries as a result of this difference in thinking?

The structure of damages in defamation can be viewed as follows. The act of defamation causes damage to the social reputation of the victim, which in turn causes the victim to suffer damages in the form of emotional distress. On that basis, first, (a) monetary compensation is intended to relieve this emotional distress. In principle, the loss of social reputation goes unaddressed.¹⁴⁾ In contrast, (b) the restoration of original conditions means the restoration of honor. In other words, we consider that restorative measures would restore the loss of social reputation¹⁵⁾ and thereby relieve the victim’s emotional distress. Only when it is recognized that this is not enough to resolve the emotional distress may monetary compensation also be awarded for its resolution.

If the difference between monetary compensation and restoration to the original state is viewed in this way, the restoration priority method

13) A notable development on this issue can be found in the EU. In Japanese law, the Supreme Court decision of January 31, 2017, *Minshū* Vol. 71, No. 1, p. 63 deals with this issue. In short, the decision denied the request for removal as a result of the totality of the circumstances. This decision does not speak of the “right to be forgotten,” but the Saitama District Court decision of December 22, 2015, *Hanrei Jihō* No. 2282, p. 78, expressly affirmed the “right to be forgotten” in the case’s preservation objection hearing. Subsequently, a Supreme Court judgment has also appeared that allows a request to delete tweets on Twitter (regarding the facts of a person’s crime). See Supreme Court judgment of June 24, 2022, *Minshū* Vol. 76, No. 5, p. 1170.

14) Under Japanese law, the acceptance of restoration measures, such as a published apology, is limited to cases where there is a special need for such measures. This is a consequence of restoration being considered an exceptional remedy.

15) Therefore, this restoration measure could at the same time signify an injunction to eliminate future causes of infringement. See Yoshida, *op. cit.* note 12, pp. 1643–1644, for the possibility of this situation and its specific examples.

adopted by Taiwanese law is superior in terms of effectiveness in providing relief to victims. The experience of Taiwanese law will be helpful for Japanese law.

The specific measures taken to restore the original conditions are also an important issue. In Japanese law, published apologies are common. However, this approach is problematic in relation to freedom of conscience (Article 19 of the Constitution of Japan). This is because the apology is forcibly made public. In fact, the unconstitutionality of published apologies has been challenged in court. The Supreme Court Grand Bench upheld its constitutionality (Supreme Court Grand Bench judgment of July 4, 1956, *Minshū* Vol. 10, No. 7, p. 785). However, there are dissenting opinions attached to this judgment, and views holding it unconstitutional are not uncommon in academic circles. Negative views of published apologies promote, for example, the publication of the fact that a court judgment affirming defamation has been issued.

According to the Yen presentation, precedents appear to have established that, under Taiwanese law, a statement that does not constitute an apology should be made as a restorative measure. This trend has major implications for Japanese law in the direction claimed by recent influential theories in Japan.¹⁶⁾

16) The Yen presentation further mentions the “forced commercialization of personality rights” and discusses the possibility of their restitution under the doctrine of unjust enrichment. It is common to see the phenomenon of attributes of a person (e.g., likeness, name, etc.), which are the subject of personality rights, acquiring property value in social reality. As long as the property value belongs to the subject, it makes sense that those who have profited from its wrongful use should return their profits. In Japan, a person’s right of publicity is a major problem area, and the possibility of protection by tort law theory has been discussed. The Supreme Court judgment of February 2, 2012, *Minshū* Vol. 66, No. 2, p. 89 (the Pink Lady case) affirmed this possibility of protection. On this issue, see Katsumi Yoshida, *Bukken-hō I* [Property Rights Law I] (Shinzansha, 2023), pp. 109–112. However, it is certainly possible to discuss this as a matter of unjust enrichment. But the strength of the attribution of property value seems to become an issue in comparison to the tort. In the case of a tort, it is possible that legal interests may be attributed to the subject as a result of the recognition of the tort’s formation. This is a “situation-dependent attribution” of legal interests. In contrast, in the case of unjust enrichment, restitution of gain seems to assume that the attribution of legal interests is fixed.

VI. ON THE RIGHT TO SELF-DETERMINATION

1. Organizing problem areas

The right to self-determination is an important problem area of personality rights. However, its theoretical elucidation is a difficult task, owing to the wide variety of issues involved and to the differing legal structure of the right of self-determination from that of personality rights in general. To deal with these difficulties, it is advisable to organize the problem areas in advance. I once classified self-determination into three broad categories according to function. (1) The right to self-determination as a principle relativizing public order, (2) the right to self-determination as the right to freedom, and (3) the right to self-determination as a support measure.¹⁷⁾

Among the various presentations here, the Hayashi and Chang presentations deal squarely with the right to self-determination. Positioned in light of the above organization of problem areas, the right to self-determination at issue in both reports is the right to self-determination as a support measure. The Huang presentation also dealt with the freedom of decision concerning reburial. Whether this should be considered a matter of the right to self-determination is a point of contention.

2. Right to self-determination as a support measure

The right to self-determination as a support measure is inextricably linked to the duty to explain. X's right to self-determination emerges when Y's duty to explain is assumed on the basis of the relationship of the parties in a contractual relationship between X and Y. Under this framework,

17) Item (1) is, for example, the right to self-determination which serves as a basis for relaxing public order rules concerning marriage, such as selective separate surnames for married couples. The right to self-determination used as a basis for allowing same-sex marriage, recently a major issue, is also this type of self-determination. (2) is the right of self-determination to secure various freedoms in private life in relation to the state and to private powers within society. This right to self-determination becomes an issue in relation to the freedom of dress in companies and the permissibility of hair restrictions under school rules. (3) is the right to self-determination which is at issue in the informed consent theory to ensure patient self-determination and in the theory of the duty to explain in support of consumer self-determination. See Katsumi Yoshida, "Jiko-kettei-ken to kōjo: kazoku, sein-en kōken, nōshi" [Self-Determination and Public Order: Family, Adult Guardianship, and Brain Death], in Nobuhisa Segawa (ed.), *Shihōgaku no saikōchiku* [Reconstruction of Private Law Studies] (Hokkaidō Daigaku Toshō Kankōkai, 1999), pp. 250–251.

the issue is the infringement of rights and interests (“inherently protected legal interests” as the Hayashi presentation calls them) that occurred with respect to X and the recovery of damages caused thereby.

In many cases, the inherently protected legal interest is protected on the basis of breach of the duty to explain. In such cases, the right to self-determination does not come to the fore. However, for reasons such as the difficulty of proving a causal relationship, it may not be possible to protect the inherently protected legal interest on the basis of breach of the duty to explain. In this case, the right to self-determination becomes apparent. It is possible that solatium may be awarded for violation of the right to self-determination. The right of self-determination in this case functions as a means of protecting inherently protected legal interests. I call this the “right to self-determination as an instrumentally protected legal interest.” It is not “the right to self-determination as an inherently protected legal interest” where protection of the right to self-determination itself is at issue. Therefore, solatium based on the violation of this instrumental right to self-determination may include a portion of the damages for the violation of an inherently protected legal interest.

The above is my own understanding,¹⁸⁾ but I believe the understanding of the Hayashi presentation is basically the same. The Hayashi presentation then emphasizes that the nature of the inherently protected legal interest affects the nature of the protection of the right to self-determination. When the inherently protected legal interest is a personality interest that requires strong protection, it is justified to advance the line of defense of the right in the form of a violation of the right to self-determination. In contrast, this is not necessarily the case regarding property interests. — I believe that this is a legitimate perception. Since the right of self-determination at issue is instrumental, it is only natural, in a sense, that the manner of its protection is dictated by the nature of the inherently protected legal interest.

18) For details, see Katsumi Yoshida, “Torihiki-teki fuhōkōi to jiko-kettei-ken” [Transactional Torts and the Right to Self-Determination], in Itaru Nemoto et al. (eds.), *Rōdō-hō to gendai-hō no riron: Nishitani Satoshi sensei koki kinen ronshū (jō)* [Labor Law and the Theory of Modern Law: Festschrift for Prof. Satoshi Nishitani’s 70th Birthday (Part 1)] (Nippon Hyoronsha, 2013), pp. 179 ff., and idem, “Torihiki-teki fuhōkōi to jiko-kettei-ken, jinkaku-teki rieki” [Transactional Torts and the Right to Self-Determination and Personality Interests], *Sakimono, shōken torihiki higai kenkyū* [Futures and Securities Trading Damage Studies], No. 46 (2016), pp. 10 ff.

This perception also leads to the understanding that, since personality interests as inherently protected legal interests are also diverse, the form of protection based on the violation of the right to self-determination should also take such diversity into account and be made concrete. Here, it is squarely recognized that solatium based on violation of the right to self-determination includes damages for inherently protected legal interests. I look forward to further development of these points. I also look forward to the consideration of issues such as how the right of self-determination, which is an inherently protected legal interest that is not instrumental, should be considered in terms of the need for protection — although this will probably be denied.

Unlike the above, the Chang presentation deals with the legal treatment of a case in which X enters into a contract based on incorrect information provided by the other party Y and suffers damages. The issue is when the provision of misinformation took place through negligence on Y's part rather than deliberately. The question is whether X's "freedom of decision-making" should be constituted as a right and X's protection should be granted in this case. The Chang presentation examines the issue on the premise of the legal situation in Taiwan, where German-type tort law makes a sharp distinction between rights and interests as the protected legal interest of a tort. However, the issue is equally raised in Japanese law, where the general tort law is French-style.

In considering Y's liability in this case, whether Y owes a duty to explain is of fundamental importance. If it is understood that Y owes a duty to explain based on the relationship between X and Y, Y should provide accurate information, and therefore, if Y provides misinformation, it should be understood that Y is liable for breach of the duty to explain even if it is based on negligence. In contrast, if Y has no duty to explain, it is in principle X's responsibility to gather information regarding the conclusion of the contract. It should also be X's responsibility to determine whether the information provided by Y is incorrect or correct. However, if Y intentionally provides misinformation, then Y's conduct is evaluated as an illegal act of fraud. Thus, X's manifestation of intention is found to be defective, and Y's tort liability is also affirmed.

The Chang presentation draws the same conclusion as above, in line with the logic of Taiwanese law. That conclusion is both justified and can be considered a conclusion that is not specific to Taiwanese law, but one

that has a more general scope.

3. Freedom of decision concerning reburial

Finally, the Huang presentation deals with the freedom of decision concerning reburial. The problem here is how to make decisions on various matters related to reburial. As the Huang presentation points out, there is no reason to prioritize the wishes of one surviving family member in the name of the right to self-determination. However, it is not appropriate for the situation to rely on the co-ownership provisions of property law. This is because a decision by majority vote, according to the concept of management of common property, may be impossible. It is appropriate to consider special decision rules. As the Huang presentation suggests, perhaps the usual idea would be to give priority to the wishes of the deceased, and in the absence of such, to use the provisions of the Senior Citizens Welfare Act.

Thus, the issue here is not one of self-determination. While emphasizing the importance of the right to self-determination in today’s society, it is also imperative to avoid its abuse.

On the other hand, the right to self-determination addressed in this symposium is only part of the problem area. It is hoped that research will be expanded to other problem areas of the right to self-determination indicated earlier.

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