論　　説

# Non-Economic Losses under Japanese Law from a Comparative Law Perspective (2)

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## Ⅰ. CHAPTER 3: NON-ECONOMIC LOSSES UNDER JAPANESE LAW

Previous chapters examined the concepts of harm and loss under Japanese law through scholarship regarding Articles 709, 710, and 711 of the Civil Code. The influence of German ideas regarding these concepts caused scholarship and case law to divert from the drafters' intended model to favor a monetary approach to legal losses.

By contrast, this chapter is mainly concerned with non-economic interests and losses. The concept of loss in Japan is strongly associated with monetary value; courts, scholars, and lawyers tend to approach the issue of non-economic losses from the perspective of the monetary award, or *isharyo*. As a result, and in contrast with other countries that follow the French model, there is no abstract concept of *dommage moral* in Japanese law. There is, however, a strong tradition of grouping protected legal interests into *jinkakuken*, or personality rights, though these rights do not necessarily correspond with the concept of personality rights held in other jurisdictions.

Scholarly discussions regarding *isharyo* tend to focus on their nature and function. Indeed, these discussions arguably run parallel to

discussions regarding delictual liability in general. However, that is not to say that there has been no attempt to engage with the concept abstractly. Instead, these approaches typically assume a secondary role with discussion focusing on monetary awards and their nature.

However, it can be argued that this monetary approach means that scholars examine the issue in a manner more reminiscent of the law of torts of common law traditions than of the law of delicts of the continental law style. This method contrasts with the general position of non-economic losses under the view of *dommage moral*, wherein the existence and nature of the loss are independent of their monetary valuation. Furthermore, delictual comparative law tends to abandon defining non-economic losses as those opposed to economic losses and instead locate some commonalities among all legal interests that fall within that category.

This chapter introduces *isharyo* and how this concept influenced courts, scholars, and lawyers' approach to non-economic losses. The following sections delve into Articles 710 and 711 of the Japanese Civil Code, which establishes general rules of non-economic losses for the victims and their relatives. Next, each section examines the drafting process of its corresponding article. Lastly, the chapter concludes with a case law survey of several non-economic interests.

## Ⅱ. THE CONCEPT OF APOLOGY MONEY OR *ISHARYO*

Japanese law does not have a concept analogous to the French *dommage moral*; claims under Article 710 are described as non-pecuniary claims. There is an extensive body of scholarly and practical discussion on monetary compensation, also known as *isharyo*. However, the term is not found in any statute. During the drafting process, remedy for non-economic losses was referred to as "pain-money" (*itami kin*),[1] and

[1] Nobuhige Segawa, *Minpo 709 Jo (Fuhokoi no Ippanteki Seiritsu Yoken), in* III

the courts utilized various terms during the Meiji period.[2]

Regardless, any study of non-economic losses in Japan must cover the topic of *isharyo*. Most books and papers about non-economic losses either engage with the doctrinal issues of *isharyo* or its liquidation for specific claims, such as defamation or medical malpractice. The traditional view is that *isharyo* is a remedy for emotional suffering or spiritual losses (*seishinteki songai*).[3] However, since the courts also recognize non-economic losses in the case of defamation of legal entities, the discussion has since shifted from treating *isharyo* as remedies for spiritual losses to treating them as remedies for intangible losses.[4] While traditional theory considers *isharyo* as a form of private sanction, some scholars argue that this view undermines the division between criminal and civil liability in mainstream delictual liability.[5]

## A. THE NATURE OF ISHARYO

Discussions concerning *isharyo* tend to focus on their nature and function. During the period immediately after the promulgation of

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Minpoten no Hyakunen Kobetsuteki Kanstatsu (2) Saiken Hen 559, 641 (Toshio Hironaka, Eichi Hoshino eds., 1998).

[2] Daishin'in [Great Ct. of Jud.] Nov. 10, 1903 Mei 36 (re) no.2053 Keiroku 9-1699 (Japan) Ianryo,

Daishin'in [Great Ct. of Jud.] Oct. 16,1906 Mei 39 (o) no.277 Minroku 12-1282 (Japan) Ishakin,

Daishin'in [Great Ct. of Jud.] Mar. 26, 1908 Mei 40 (o) no.491 Minroku 14-340 (Japan) *Isharyo*.

[3] Isharyo Santei no Jitsumu 1 (Chiba ken Bengoshi Kai ed., 2013) (Japan)

Osamu Saito, *Soron, in* Isharyo Santei no Riron 1 (Osamu Saito ed., 2013) (Japan),

Hirobumi Ito, *Isharyo no Seishitsu wo Meguru Giron ni Tsuite*,7 Bulleting of Toyohashi Sozo College 141,142 (2003) (Japan).

[4] Chiba Ken Bengoshi Kai *supra* note 3.

[5] Saito *supra* note 3 at 5.

the Civil Code, Ume did not refer to the function or nature of *isharyo* directly, mainly stating that Article 710 protected non-economic losses.[6] Afterward, there was no discussion of the nature of *isharyo*; instead, discussions centered on the distinction between criminal and civil liabilities.[7]

One view, known as the compensation theory, posits that *isharyo* fulfills a compensatory role, decreasing the estate of an aggressor while increasing that of the victim. Hiroshi Uebayashi advanced the view that since *isharyo* remedies losses, courts should not consider the defendant's specific circumstances when determining the amount. He argued that *isharyo* offers victims the possibility to obtain essential items for everyday life, save money, and experience the joy of receiving money, which could help alleviate suffering. These three points, he posited, should be the basis for calculating *isharyo*. He was also critical of the private sanction theory, arguing that it opposed the public order; since punishment and compensation are concepts that were at odds with each other, the result would be the victim receiving more than their actual loss.[8]

In contrast to the compensation theory, the private sanction theory positions the punitive nature of *isharyo* in a central role. Santaro Okamatsu[9] opined that damages were not to repair the losses suffered by victims of a delictual act but rather to punish the aggressor. Following this approach, Michikata Kaino has argued about the punitive function of delictual liability, stating that it was a punishment for unlawful conduct.[10] Concerning non-economic losses, he considered that the difference between civil and criminal liability

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[6] Kenjiro Ume, Minpo Yogi 883-885 (1912) (Japan).

[7] Ito *supra* note 3 at 146 .

[8] Hiroshi Uebayashi, Isharyo Santei Ron 131-132 (1962) (Japan).

[9] Santaro Okamatsu, Minpo Riyu Gemakiji 467 (1897) (Japan).

[10] Michitaka Kaino, Saiken Kakuron 420 (1945) (Japan).

reflects the ideology of the period, which conceptualized civil liability as a sort of criminal liability but covered in a different tint.[11]

Beginning in the 1950s, Munehiko Mishima reintroduced the idea of *isharyo*'s punitive nature. He argued that Article 710 established two types of *isharyo*: those that compensate emotional losses and those that serve to punish the aggressor. Mishima based this on the reasoning that if delictual liability could not be considered a private punishment, it would lose its function as a deterrent.[12] He further argued that, although the purpose of *isharyo* was to measure the satisfaction of a victim, they also served as a condemnation of the aggressor's conduct and as a social deterrence. Therefore, when calculating *isharyo*, the focus should not lie solely on repairing the victim's loss but also on the motives, negligence or intent, wealth, and other factors of the wrongdoer.[13]

### B. THE FUNCTION OF *ISHARYO*

Another point of discussion is the function *isharyo* fulfills. In contrast with debates regarding the nature of *isharyo*, traditionally focused on its goals and social objectives, arguments on their nature are typically supported by – or rather, sourced from – case law. In other words, scholars analyze court decisions and seek to infer the "role" that damages fulfilled in those cases.

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[11] Michikata Kaino, *Fuhokoi ni okeru Mukei Songai no Baisho Seikyuken 1*, 50(2) Hogaku Kyoukai Zasshi, 18 (1932) (Japan), Michikata Kaino, *Fuhokoi ni okeru Mukei Songai no Baisho Seikyuken 2 Kan*, 50 (3) Hogaku Kyoukai Zasshi,116 (1932) (Japan).

[12] Munehiko Mishima, *Isharyo no Honshitsu*, 5 (1) Kanazawa Law Review 1 (1959) (Japan).

[13] Munehiko Mishima, *Songai Baisho to Yokuseiteki Kino 1*, 105-106 Ritsumeikan Law Review 666 (1972) (Japan), Munehiko Mishima, *Songai Baisho to Yokuseiteki Kino (Tsuzuki)*, 108-109 Ritsumeikan Law Review 112 -113 (1973) (Japan).

Consequently, scholars have inferred various functions from case law[14]: compensatory, punitive, satisfactory, a symbolic valuation of a victim's emotions, as a way to overcome the loss, and – in the case of Japan – a complementary function.[15] Complementary *isharyo* is used in cases where economic harm has been established but quantifying the resulting losses is especially difficult. Therefore, a judge can fill the gap in damages a victim should receive under the guise of *isharyo*.[16] The Supreme Court employed this approach in 1973 when recognizing a single claim for both patrimonial and emotional losses that result from a physical injury.[17]

*Isharyo* has also been used to bridge the income gap between sexes, especially in cases of small children[18], when the victim suffered a physical disfigurement[19] or sequelae, regardless of any actual effect on income.[20] In addition, courts have also recognized *isharyo* if a victim could have earned a work promotion but failed to receive it because of an injury[21] and to adjust for inflation when this was not accounted for under lost wages.[22]

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[14] Saito *supra* note 3 at 14 - 17.

[15] Ibid.

[16] Saito *supra* note 3 at 17.

[17] Saiko Saibansho [Sup. Ct.] Apr. 5, 1973 Sho 43 (o) no. 943 Minshu 27-3-419 (Japan).

[18] Tokyo Koto Saibansho [Tokyo High Ct.] Nov. 25, 1980 Sho 53 (ne) no. 2758 Ge-minshu 31-9-12-953 (Japan), Saiko Saibansho [Sup. Ct.] Oct.,8, 1981 Sho 56 (o) no. 498 Saihan Minshu 134-39 (Japan).

[19] Saito *supra* note 3 at 17.

[20] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Aug. 23, 1976 Sho 49 (wa) no. 8606 Hanji 855-84 (Japan).

[21] Osaka Chiho Saibansho [Osaka Dist. Ct.] Mar. 23, 1972 Sho 46 (wa) 152 Kotsu Minshu 5-2-451 (Japan).

[22] Tokyo Koto Saibansho [Tokyo High. Ct.] May, 11, 1982 Sho 56 (ne) no. 2374 Hanji 1041-40 (Japan).

### C. CALCULATING *ISHARYO*

Neither the Japanese Civil Code[23] nor the Code of Civil Procedure[24] contain any provisions for the liquidation of non-economic losses. Thus, just as with economic losses, plaintiffs must prove the existence of a non-economic loss, although they do not need to prove that the amount claimed is adequate.[25]

The Supreme Court has ruled that judges have complete discretion when calculating damages and are not required to explain how they decided on a specific amount.[26] However, the amount must not be arbitrary, and if it varies drastically from an amount commonly considered adequate, it could be ruled illegal.[27] Consequently, judges

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[23] The Civil Code does have a general provision for calculating damages, but it makes no mention of non-economic damages. The general provision for calculating damages in the Japanese Civil Code is Section 416, which refers to damages in case of failure to perform an obligation, but which has also been applied to torts.

Article 416 (1) The purpose of the demand for damages for failure to perform an obligation shall be to demand the compensation for damages which would ordinarily arise from such failure.

(2) The obligee may also demand compensation for damages arising from any special circumstances if the party did foresee, or should have foreseen, such circumstances. Unless otherwise stated, all English translation are from: http://www.japaneselawtranslation.go.jp/.

[24] The Code of Civil Procedure does have a section that addresses damages that are quantifiable. Article 248 states that "where it is found that any damage has occurred, if it is extremely difficult, from the nature of the damage, to prove the amount thereof, the court, based on the entire import of the oral argument and the result of the examination of evidence, may determine a reasonable amount of damage."

[25] Daishin'in [Great Ct. of Jud.] Dec. 20, 1901 Mei 34 (re) no.1688 Keiroku 7-11-105 (Japan).

[26] Saiko Saibansho [Sup. Ct.] Apr. 5, 1973 Sho 43 (o) no. 943 Minshu 27-3-419 (Japan).

[27] Isamu Goto, *Saikin ni Okeru Isharyo no Shomondai*, 145 Hou no Shihai 31,

are not bound by the amount requested by a plaintiff and are free to grant more, provided the total amount does not exceed the total requested amount in the suit.[28]

Nevertheless, there are certain factors the court must consider the plaintiff and defendant's circumstances when liquidating *isharyo*.[29] Within the first group is the extent of the victim's physical and emotional disturbance suffered, measured from the standpoint of an average person and should not exceed a tolerable limit of society. In addition, courts will also consider the victim's age, sex, marital status, health condition, social standing, occupation, material wealth, tendencies, lifestyle,[30] and negligence (if any), as well as any kind of aftereffects or profit the victim might have had from the act.[31]

This standard applies to victims who cannot experience loss. For example, the Supreme Court held in a 1936 case[32] that a one-year-

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39 (2007) (Japan).

[28] *Supra* note 26.

[29] Hiroshi Uebayashi, *Seishinteki Songai ni taisuru* Isharyo, *in* CHUSHAKU MINPO (19) SAIKEN (20) FUHOKOI 193, 203-211 (Ichiro Kato ed., 1965) (Japan). Also, Ito *supra* note 3 at 164.

[30] The main reason for granting damages in cases regarding non-economic losses, at least in current Japanese theory, is to compensate the victim. Therefore, the lifestyle the victim had before the injury is of great importance. Nevertheless, if the average lifestyle of the population is declining, some scholars believe that such a situation should also be taken into account. Uebayashi *supra* note 29 at 206.

[31] Article 722 of the Japanese Civil code establishes a system of comparative negligence under which victim's negligence has to be taken into account when calculating the amount. In a 1915 case, the Great Court of Judicature ruled that in the case of victims with some kind of disability, the negligence of the guardian should not be taken into account when determining damages. Daishin'in [Great Ct. of Jud.] Jun.,15, 1915 Tai 3 (o) no. 688 Minroku 21-939 (Japan).

[32] Daishin'in [Great Ct. of Jud.] May, 13, 1936 Sho 10 (o) no. 2183 Taiminshu 15-

old infant could sue for future emotional suffering caused by his father's death. Likewise, a Yokohama District Court[33] granted damages for non-economic losses to a 60-year-old man who entered a vegetative state due to medical malpractice.

Courts also consider defendants' circumstances, beginning with their state of mind, primarily whether they committed an intentional or negligent act.[34] The defendant's wealth is also a significant factor.[35] However, the Supreme Court has declined to consider the wealth of victims.[36] Any kind of sympathy, apology, or nursing from a defendant towards the victim and the motives and reasons behind the tortious act are elements that might affect the amount a defendant must pay.[37] Scholars argue that these considerations negate the compensatory nature of *isharyo*.[38]

Japanese awards for non-economic losses tend to be relatively low, possibly because judges enjoy complete discretion in determining damages. As Saito[39] has stated:

*[B]ecause judges can freely determine the amount*

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861 (Japan).

[33] Yokohama Chiho Saibansho [Yokohama Dist. Ct.] Jun., 20, 2003 Hei 11 (wa) no. 3642 Hanji 1829-97 (Japan).

[34] Ito *supra* note 3 at 164.

[35] Ibid.

[36] Daishin'in [Great Ct. of Jud.] Jul., 7, 1933 Sho 7 (o) no. 2838 Minshu 12-1805 (Japan) The defendant hit the plaintiff with a brassier in the head during a party, causing laceration and affecting his eyesight. However, the defendant passed away before the appeal proceedings were completed, and his heirs continued in his place. The Supreme Court overturned the ruling of the lower court that took into account the wealth of the heirs when determining the amount.

[37] Ito *supra* note 3 at 164.

[38] Ibid.

[39] Osamu Saito, *Isharyo no Santei no Riron*, 164 Hou no Shihai 5, 11 (2012) (Japan).

> *lawyers do not know if their request will be granted even if they advocate for it, and even if their request is granted, the amount is usually low, and the burden on the lawyer is cumbersome; therefore, they do not press for the emotional pains of the victim too firmly. Thus, lawyers' understanding of this type of pain diminishes, resulting in the amount for non-economic losses cases staying low. Since the amount is low, it has become a vicious circle.*

This judiciary discretion and the lack of understanding by the lawyers is perhaps one of the reasons for the standard used in cases of foreign plaintiffs.

Traditionally, Japanese courts have granted low damages, usually around one million JPY in defamation cases. The Justice System Reform Council[40] recommended the following:

> *With regard to determining the amount of damages, in light of the criticism that, viewed overall, the amount of damages is too low, it is desirable that necessary institutional studies be made and that damage determinations continue to be made in line with the circumstances of each individual case without being bound by the so-called "market rate" of past cases.*

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[40] The Justice System Reform Council was established by the the Law concerning Establishment of Justice System Reform Council (Law No.68, promulgated on June 9, 1999) and its goal was to "*fundamental measures necessary for justice reform and justice infrastructure arrangement by defining the role of the Japanese administration of justice in the 21st century*". Its agenda was geared towards on how to achieve "*a more accessible and user-friendly justice system, public participation in the justice system, redefinition of the legal profession and reinforcement of its function.*"
For more information in English see: http://japan.kantei.go.jp/policy/sihou/singikai/index_e.html.

Later the same year, the Tokyo District Court held a symposium where it proposed that the standard for damages in cases of mass media defamation be raised to four or five million JPY.[41]

The Japan Federation of Bar Associations has also compiled two handbooks that engage with the quantification of *isharyo* regarding traffic accidents. These books, informally called the Red Book[42] and the Blue Book,[43] establish a standard for reparations in three cases: death, injuries, and PTSD or sequelae. However, while the courts usually adhere to these standards, they are not legally binding, and there are cases in which damages have been awarded without consulting the handbooks.[44]

## Ⅲ. ARTICLE 710

The Japanese Civil Code is one of the few civil codes informed by the French tradition that has regulated non-economic interest and losses since its inception. Article 710 reads:

> *Persons liable for damages under the provisions of the preceding article must also compensate for damages other than those to property, regardless of whether the body, liberty, or reputation of others have been infringed, or property rights of other have been infringed.*

This provision is the basis for all claims dealing with non-economic losses. In addition, the courts have expanded it to address

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[41] Tokyo Chiho Saibansho Songai Baisho Sosho (*Mass Media ni Yoru Meiyo Kison Sosho no Kenkyu to Teigen*), 1209 Jurist 63 (2001) (Japan).

[42] *Minji Kotsu Jiko Sosho Songai Baisho Gaku Santei Kijun Jokan* (Nichibenren Kotsu Jiko Sodan Senta –Tokyo Shibun ed.) (Japan).

[43] *Kotsu Jiko Songai Baisho Santei Kijun 21* (Nichibenren Kotsu Jiko Sodan Senta ed.) (Japan).

[44] Hiroyuki Hirano, Minpo Sogo 6 Fuhokoi 320 (3rd., ed 2013) (Japan).

many of the social issues that have arisen since the code's enactment over a hundred years ago, evidencing that the list of legal interests is not to be taken as *numerus clausus*. However, because of the way in which Japanese scholarship and case law conceptualizes loss and harm, the relationship between Articles 709, 710, and 711 has not always been clear, particularly regarding the protected legal interest.

### A. THE DRAFTING PROCESS

The Bossoinade draft presented limited losses to those of economic nature. Similarly, the drafters also debated the importance of loss and which elements the concept included during the drafting process. However, regardless of differences in opinion, the drafters ultimately adopted Ume's view that *songai* covered both economic and non-economic losses as the official position of the Japanese Civil Code.

Hozumi recognized that the language of Article 709[45] included both economic and non-economic losses.[46] He explained that excluding non-economic losses (*mukei songai*) from the types of recoverable losses would result in the code not being sensitive to the demands of society. Furthermore, Hozumi explained that limiting an individual's legal interests to those of material nature (*zaisanjo no rieki*) was too narrow of a view, as individuals have several legal interests in their daily lives.[47]

Regarding the relation between the infringement requirement and Article 710, Hozumi believed that any discussion of losses, both economic and non-economic, should be left to scholars.[48] Committee

[45] Article 719 of the draft.

[46] Hoten Chosakai Minpo Giji Sokkiroku Dai 40 at 148 ura available at http://dl.ndl.go.jp/info:ndljp/pid/1367567 (at 152).

[47] Hoten Chosakai Minpo Giji Sokkiroku Dai 40 at 148 ura available at http://dl.ndl.go.jp/info:ndljp/pid/1367567 (at 152).

[48] Hoten Chosakai Minpo Giji Sokkiroku Dai 40 at 149 ura available at http://dl.ndl.go.jp/info:ndljp/pid/1367567 (at 153).

member Kuniomi Yokota inquired if sadness and the loss of amenities fell within the scope of Article 710[49], to which Hozumi replied that if they were proven during the trial, he was not opposed to the judge including them in the amount granted for damages.

Rinsho Mitsukuri, one of the committee members for the civil code based on the Bossoinade draft, requested clarification on whether the drafters understood the concept of right, or *kenri*, to be limited to property rights. Hozumi specified that rights were not limited to those based on property and that Article 710´s goal was to prevent any doubts regarding that matter in particular.[50] [51] Thus, while the drafters left the door open to future scholars and law professionals to develop the case law and case law regarding non-economic interest and losses, they were also keen on making a point that they were part of the Japanese delictual liability system.

There were no comments regarding the goal or nature of *isharyo*[52], and there is no evidence that would indicate they granted them any particular function apart from the one already discussed for general delictual liability. Hozumi cited English law, particularly punitive damages, when explaining that the court system at the time had come to recognize non-economic losses. However, Hozumi explicitly communicated that such a meaning should not be construed from the language used in the draft[53]. Moreover, the drafters did not

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[49] Article 732 of the draft.

[50] Hoten Chosakai Minpo Giji Sokkiroku Dai 40 at 154 ura available at http://dl.ndl.go.jp/info:ndljp/pid/1367567 (at 158).

[51] The original version of Article 710 used different language. For one, it made no reference to Article 709, and left granting the remedy completely in the hands of the court. Furthermore, it included one more paragraph, later becoming Article 723, which grants the victims in cases of defamation the ability to request for appropriate measures in order to restore their honor.

[52] The term used during the drafting process was either *itamikin* or *ishakin*.

[53] Hoten Chosakai Minpo Giji Sokkiroku Dai 41 at 206 ura available at http://

provide any particular means for calculating damages for non-economic losses. Hozumi's opinion seems to support the view of non-economic losses as similar to parasitic damages, *i.e.*, they were to be taken into account when another right had already been infringed upon; the dominant view under the common law system at that point in time.

In his commentary on the Civil Code, Ume avoided the subject of the nature of *isharyo*. However, he was clear that civil delict and criminal wrongs were not equivalent and reiterated that Article 710 was included to clarify that non-economic losses should be compensated under the system of delictual liability.[54] Based on these comments, it is apparent that the drafters did not consider the matter of *isharyo* to be of significant importance; instead, they focused on discussing infringed rights or losses rather than their quantification.

## B. CLASSIFICATION OF NON-ECONOMIC LOSSES UNDER JAPANESE LAW AND SCHOLARSHIP

Article 710 requires the infringement of a legal right as the basis for liability, presenting a list, *i.e.*, a violation of the victim's body, liberty, or reputation. However, an analysis of Articles 709 and 710 reveals a more nuanced issue. Since, as the drafters argued, the infringement of a right and the consequent loss are thought to be two different concepts, and the latter a result of the former, infringement must therefore be based upon an event. In contrast, loss refers to a

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dl.ndl.go.jp/info:ndljp/pid/1367568 (at 210).

[54] Kenshiro Ume, MINPO YOGI MAKI SONO SAN SAIKEN HEN 885 (reprint 1984) If anything, Ume appears to have been more interested in presenting examples and expanding upon the concept of non-economic losses than discussing monetary compensation or damages. This goes in line with his legal training under the French system. Ume's influence restricted the discussion to the realm of losses, as scholarly dissertations regarding the nature of *isharyo* did not began to appear until after his death and the subsequent influx of German ideas.

purely legal idea. This dichotomy becomes apparent in non-economic losses such as emotional distress, as the drafters did not exhibit a limited view of which type of losses were covered under Articles 710. However, a thorough discussion regarding the content of these types of losses failed to take place during the drafting process.[55]

In addition, the draft's language for losses such as sadness, suffering, or harm to feelings, indicates that the drafters were not referencing a right but the result of an infringement. Moreover, the initial case law alluded to these losses as "extra patrimonial losses" (*zaisangai no songai*) or "losses without form" (*mukei songai*) when treating them in a general manner, and "emotional suffering" (*seishinjo no kutsu, seishin kutsuu*), "loss of social standing" (*shakaijo no hyoka no gensho*), "loss of friendly relations" (*jujin to no kousai no gensho*)[56] as specific losses.

Since the mid-1950s, case law has further reduced the terms and mainly settled on dividing *songai* into patrimonial losses (*zaisanteki songai*) and emotional distress (*seishinteki songai*), with physical pain, emotional suffering, grief, frustration, shame, etc. as specific examples of the latter. Additionally, the courts defined *seishinteki songai* as "*the emotional and psychological result that arises from the loss of emotional interests,*" "*the disturbance of the emotional stability as a person,*" or "the *loss suffered by the victims in their emotional situation.*" [57]

Personality rights, or *jinkakuken*, have gained momentum since the 1960s as another term for non-economic interests.[58] Scholars began

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[55] Noriko Suka, *Seishinteki Jinkakuken to Songai Baisho ni kansuru Kakusho,* 117 Senshu Hogakuron Shu 1, 16 (2013) (Japan).

[56] *Id.* At 17.

[57] Ibid.

[58] However, personality rights under Japanese law are not necessarily the same as personality rights under common law or personality rights under a traditional civil law model. While they do share some similarities with the latter, it can be argued that they are closer to the concept of *patrimoine*

writing on this subject in the early 20th century.[59] For example, as early as 1920, Hideo Hatoyama wrote that the term *jinkakuken* could refer to the content of comprehensive rights for protecting personality (*Recht der Personlichkeit*) or to each specific right that aimed to protect personality interests (*Personlichkristrechte*).[60] Hatoyama considered that defending these interests was of utmost importance for an individual, and they would expand in tandem with contemporary cultural developments.[61] He explained that only three personality rights were granted protection under the Japanese Civil Code: *body, liberty, and reputation*. Nevertheless, he argued that the concept was not limited to only those three, but also included the right to a name (*shimeiken*)、the right to self-image (*shouzoken*), business (*eigyoken*),

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*moral*.

[59] Tatsuo Chikusa, during his time as a district court judge in Matsumoto, Nagano, carried out comprehensive research on what he called *jinteki rieki* for the judiciary branch. Tatsuo Chikusa, *Jinteki Rieki Shingai ni yoru Songai Baisho, in* Shiho Kenkyuu Hokoku Shoshu Kenkyu Hoshi 6 Shihosho Chosaka (1931) (Japan).

Even though Chikusa uses the term *jinteki* in the title of his work, it is clear from the content that he did not intend to make a distinction, as in various occasions he utilizes the term *jinkakuken*. Furthermore, to the list established under Article 710, Chikusa adds rights such as secrets (privacy using modern terminology), virtue (basically a prohibition on extramarital relations), name, interest inherent to marriage or engagements, and interests inherent to family relations. However, in contrast with Hatoyama, he did not consider the freedom of business (*eigyoken*) a type of non-economic interest.

[60] Hideo Hatoyama, Nihon Saiken Ho Kakuron Shita 864. (1920) (Japan) available at http://dl.ndl.go.jp/info:ndljp/pid/952513 at 186.

However, Hatoyama refers to these rights when discussing the infringement requirement. Therefore, he is referring to the event, and not necessarily to the loss. Nevertheless, in the case of personality rights, the event and loss are so intimately related that it is possible to argue that, in some cases, they are one and the same.

[61] Ibid.

credibility (*shinyou ken*), and family rights (*kazokuken*).[62]

Since then, scholarship has tried to define and classify the concept differently. For example, according to Takehisa Awaji. *jinkakuken* are classified into two groups. The first group consists of rights related to the body or physical integrity (*shintaiteki jinkakuken*), while the second group includes rights associated with the emotional aspects of an individual (*seishinteki jinkakuken*). Awaji further asserted that the latter included an individual's emotional well-being and freedom.

According to Kiyoshi Igarashi, personality rights comprised an individual's life, health, and freedom. Igarashi posited that the law must protect these rights to assure the development of freedom. He further divided them into general personality rights and individual personality rights.[63] In the former, he included personal interests that are not limited and are granted legal protection as a whole, while the latter encompassed specific interests, such as a name, image, reputation, etc.

In 1965, Munehiko Mishima indicated that in Japan, defamation cases had traditionally focused on *jinkakuken*. After World War II, the number of cases increased because of advanced comprehension by the general public. Nevertheless, cases regarding image, name, privacy, and other *jinkakuken* were rare.[64] Masanobu Kato argues that there are four types of rights or interests protected under delictual liability: absolute *jinkakuken*, or those listed under Article 710; absolute rights, such as property; relative *jinkakuken*, or those not listed in Article 710; and finally, relative rights. Kato has incorporated personal information, honor, privacy, name, image, and peaceful life under relative *jinkakuken*.[65]

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[62] Ibid.

[63] Kiyoshi Igarashi, Jinkaku Kenron 7 (1989) (Japan).

[64] Munehiko Mishima, Jinkakuken no Hogo 250. (1965) (Japan).

[65] Masanobu Kato, Shin Minpo Taikei V Jimu Kanri・Futo Ritoku・Fuhokoi

Suka has noted that the term jinkakuken is used in two cases in recent literature. The first refers to the content and the limit of protected legal interests, while the second serves as the legal basis for injunctions.[66] Regarding the second meaning, there is an issue on whether the infringed interest is considered a legal right under private law, thus, granting the plaintiff ground for injunction. Consequently, research on the nature of legal interests that comprise the concept of *jinkakuken* has been relatively limited compared to research regarding injunctions.[67] She has further argued that under delictual liability founded on the idea of unlawfulness, the first meaning refers to "rights". However, the content and nature of such legal interests have not been the subject of much discussion.[68]

## Ⅳ. Article 711

Article 711 of the Japanese Civil Code grants remedy to close relatives in cases of a victim's death. Specifically:

> *A person who has taken the life of another must compensate for damages the father, mother, spouse and children of the victim, even in cases where the property rights of the same have not been infringed.*

This article is a direct result of the drafters' resistance to the school of natural law. There is no doubt that a victim has a right to life and that such a right is compatible with the perception of "right" upheld by the drafters. However, the right to life is peculiar because its infringement inherently results in the inexistence of the right

188 (2ed. 2005) (Japan).

[66] Noriko *Soka, Seishinteki Jinkakuken Shingai to sono Kyusai Hoho ni kansuru Mondai Ishiki*, 100 Senshu Hogakuron 157, 159-160 (2007) (Japan).

[67] *Id.* at 159.

[68] Ibid.

holder. Therefore, under solely positivist thinking, there must be a legal basis for a claim to exist under such circumstances. The solution was to grant an independent claim to the victim's close relatives.

Furthermore, the language is clear that this provision applies to both economic and non-economic losses. However, since a victim's relatives could claim damages for economic losses via Article 709, interpretations of Article 711 have always linked it solely to non-economic losses.[69] Furthermore, in contrast to Article 710, which requires that liability fulfill the conditions set forth under Article 709, Article 711 grants remedy without citing the infringement of rights requirement. In its place, the drafters navigated the issue of liability by setting a limit for the number of people who could bring the claim.

Accordingly, discussions on Article 711 – both during and after the drafting process – assumed a more academic and procedural nature. However, the development of the unlawfulness concept meant the foundational background during the drafting process is no longer supported.[70] As a result, the study of Article 711 provides an opportunity to explore how Japanese legal thinking differs from other codes of similar background and influence.

### A. THE DRAFTING PROCESS

During committee discussions, Hozumi assumed responsibility for explaining the necessity of Article 711 and answering any questions brought forth by other committee members. Discussions regarding Article 711 focused on its legal and logical basis under the delictual liability model chosen by the drafters. There were almost no discussions regarding the scholarship, doctrine, or implication of

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[69] Ippei Osawa, *Minpo 711 ni okeru Hoeki Hogo no Kozo I Fuhokoi Sekinin no Seisakuteki Kaju ni kansuru Ikkosatsu*, 128(1) Journal of the Jurisprudence Association the University of Tokyo 157,158 (2011) (Japan).

[70] *Id.* at 159.

selecting one school of thought over the other, as with Article 709.

The drafters discussed the transferability of a claim for non-economic losses under Article 710 via *mortis causa*. Committee member Yasushi Hijigata asked whether the relatives of a victim could sue in cases where that victim was merely injured or in cases where the victim died on the deceased's behalf.[71] Hozumi responded by noting that in cases where a victim died and a relative's rights were infringed upon as a result, *i.e.*, in cases where the victim had a duty to support that relative, then it was natural that the pain and suffering of that relative were taken into account when determining damages. However, this did not extend to the victim's pupils, as the victim had no legal obligation to support them.[72]

As presented in the draft under Article 732, the original provision did not include the final sentence regarding the infringement of property rights. Although the drafters' conceptualization of *songai* included both economic and non-economic losses, the sentence was added to ensure complete clarity that non-economic losses were covered.[73] Committee member Kuniomi Yokota inquired what would happen if the parents of a plaintiff were killed. Hozumi responded that unless the deceased was the plaintiff's provider or supporter, there was no right infringement to justify liability under Article 709, as the children of the deceased did not have a right to the life of their

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[71] Hoten Chosakai Minpo Giji Sokkiroku Dai 40 at 163 hyo available at http://dl.ndl.go.jp/info:ndljp/pid/1367567 (at 166).

[72] Hoten Chosakai Minpo Giji Sokkiroku Dai 40 at 163 ura available at http://dl.ndl.go.jp/info:ndljp/pid/1367567 (at 167).
However, as Ozawa points out, Hozumi is not really answering the question presented. He is merely stating that the relatives' claims would extend to economic and non-economic losses that resulted from the infringement of their legal right, without addressing whether they could sue in the victim's stead under Articles 709 and 710. Ippei Osawa *supra* note 69 at 192.

[73] *Id.* at 189.

parents. Nevertheless, if they had a right, the judge should consider emotional losses in deciding the amount for damages.[74] Therefore, sadness and similar negative emotions can be regarded as *songai*, at least from the drafters' perspective only insofar they resulted from the infringement of a legal right.[75]

Yokota continued by highlighting a contradiction. If, as the drafters explained, Article 709 right requirement served to broaden liability, then compensation for emotional distress like sadness and hardship could not be explained entirely, as they could not be considered rights in the traditional sense of the word. In that case, requiring the infringement of a legal right would have the opposite effect, acting as a limitation to liability.[76] Yokota further proposed eliminating the infringement requirement, which would more closely resemble delictual liability under the French *Code*.[77] By doing so, Yokota argued, there would be no issue in compensating the relatives of a deceased victim, even in the absence of a legal right.[78]

According to Hozumi, the infringement requirement covered sadness and suffering. He further argued that life in a society entails that some individuals will suffer harm and loss. Therefore, the infringement of rights requirement would establish the limits of delictual liability.[79] Furthermore, Hozumi explained that the relation

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[74] Hoten Chosakai Minpo Giji Sokkiroku Dai 40 at 153 ura available at http://dl.ndl.go.jp/info:ndljp/pid/1367567 (at 156).

[75] Osawa *supra* note 69 at 182.

[76] Hoten Chosakai Minpo Giji Sokkiroku Dai 40 at 173 hyo to 174 hyo available at http://dl.ndl.go.jp/info:ndljp/pid/1367567 (at 176-177).

[77] Under Yokota's proposal Article 709 would have read: "Whoever intently or negligently causes harm to another must compensate such harm."

[78] To be exact, Yokota argues that not compensating the victrim's children because they have no right to the life of their parent is not interesting (*omoshirokunai*).

[79] Hoten Chosakai Minpo Giji Sokkiroku Dai 40 at 174 ura available at http://

between family members is such that Article 711 was an exception to the infringement rule, pointing out that similar provisions were present in civil codes of various countries[80], a stance that neither Tomii nor Ume criticized.

On the contrary, Ume explained that Article 711 aimed to prevent an aggressor from evading punishment for infringing on another individual's right to life under the pretense that relatives possessed no rights concerning the victim's life. Tomii also argued that in the case of death, the closest relatives of a victim were also victims, and that while monetary compensation may be inadequate to repair their losses, it was at least some consolation. Nevertheless, Hozumi also specified that only relatives listed under Article 711 could request a remedy, and the claim did not extend to grandparents or grandchildren.[81]

### B. THE EXTENT OF ARTICLE 711

After the enactment of the Civil Code, the courts began construing Section 711 without considering the drafters' intent. These interpretations occurred in two periods: pre-World War II and post-World War II.[82] During the former, the courts approached the issue mainly from the victim's standpoint, focusing on the coexistence of

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dl.ndl.go.jp/info:ndljp/pid/1367567 (at 178).

[80] However, Yoshimi argues that many of the codes presented by Hozumi as evidence dealt with economic losses without referring to non-economic losses. Seiko Yoshimi, *Seimei Shingai no Songai Baisho Seikyu to sono Sozokusei ni tsuite – tokuni Isharyo Seikyuken wo Chushin toshite-, in* GENDAI SHOHOGAKU NO SHOMONDAI: TANAKA SEIJI SENSEI KOKI KINEN 675, 681 (Eisuke Yoshinaga ed., 1967).

[81] Hoten Chosakai Minpo Giji Sokkiroku Dai 41 at 148 ura available at http://dl.ndl.go.jp/info:ndljp/pid/1367568 (at 233).

[82] Osawa *supra* note 69 at 199.

both the victim's and relatives' claims.[83] Scholarship regarding Article 711 has also followed the same course, with discussions centering on the transferability of a victim's claim in the case of death. Scholars who followed the German school argued that Article 709 did not cover indirect losses; therefore, claims under Article 711 should fall within the scope of Article 709, allowing for both to coexist for the effect of their transferability.[84]

The Great Court of Judicature ruled that since the plaintiff's and victim's economic losses were different, both claims could be brought forth without contradicting the spirit of the law.[85] Soon, two issues regarding the language of Article 711 became apparent. The first was whether Article 711 was limited to cases where the victim died. This would appear to be a non-issue; after all, the drafters were clear about their intent, and discussions regarding the basis of Article 711 focused on the lack of the right of relatives to the deceased's life. Accordingly, the provision's language is clear and limits the claim so that only those who have *taken the victim's life* are liable to the victim's relative.

However, the Supreme Court ruled in 1958 that in cases in which a victim suffered a bodily injury resulting in grievous physical disability, a relative (in this case, the mother) could sue for remedy, as her emotional distress could be equated to that suffered in cases of the actual death of a victim.[86] However, the Court did not grant a remedy

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[83] Discussions regarding Article 711 must be framed within the two opposing views regarding the transferability, *mortis causa*, of the victim's claim for non-economic losses that was mentioned in the corresponding section. Therefore, the issue was not whether the victims and their relatives had a claim, but rather the relation between those claims. See: Osawa *supra* note 69 at 200 - 201.

[84] *Id.* at 203.

[85] Daishin'in [Great Ct. of Jud.] Jul. 31, 1942 Sho 17 (o) no. 428 Shinbun 4795-10 (Japan).

[86] Saiko Saibansho [Sup. Ct.] Aug. 5, 1958 Sho 31 (o) no. 215 Minshu 12-12-1901

under Article 711. Instead, it stated that in these cases, in which the facts were similar to the situation protected under Article 711, the relative's rights were infringed upon. As such, it fell within the scope of Articles 709 and 710.[87]

Furthermore, the Court was explicit that the defendant would be liable for emotional distress only if the victim's injury were of such a magnitude that the family's suffering was equal to what they would have experienced with the victim's death.[88] In a case where an eight-year-old child was unconscious for two weeks due to the defendant's action, the Court did not recognize the parents' emotional distress. The Court admitted that the parents, who had not slept for four days, had suffered an intense form of emotional distress; nevertheless, their suffering could not be equated with that which would have resulted from the death of their son.[89]

The second issue that the courts encountered was whether Article 711 limited remedy to the relatives listed. Hozumi was unambiguous in his opinion that the list provided by the provision was *numerus clausus*. Moreover, the statutory language supports this view, as it states that the responsible party is liable to the victim's father, mother, spouse, and children. Indeed, no aspect allows expanding the

(Japan).

[87] It can be argued that this stance goes against the express intent of the drafters, as it recognizes that third parties' rights can be infringed upon as a result of injury suffered by the victim. If this approach is taken in cases of physical injury, it is rather difficult to negate that the same infringement can result from the death of the victim. Therefore, the whole basis for the establishment of Section 711, granting remedy regardless of the existence of a right to the life of the victim, can be called into question.

[88] Saiko Saibansho [Sup. Ct.] Jun. 13, 1967 Sho 40 (o) no. 1308 Minshu 21-6-1447 (Japan).

[89] Saiko Saibansho [Sup. Ct.] Sept. 19, 1968 Sho 43 (o) no. 63 Minshu 22-9-1923 (Japan).

list beyond the individuals established therein.

Initially, the courts strictly adhered to the law; there were questions on the status of illegitimate children. In a 1932 case, the Great Court of Judicature ruled that an unborn child conceived with a common-law wife could sue for economic but not for non-economic losses arising from the father's death.[90] However, in the same ruling, the Court denied the claim from the *de-facto* spouse, as she had settled with the defendant.[91] [92]

Lower courts granted remedy to the parent of an illegitimate child, provided the relationship between the child and parent was the same as if it were between a parent and a legitimate child.[93] Furthermore, if no other relatives were alive, the courts construed Article 711 to include the victim's grandparents. For example, in a 1967 case, the Tokyo District Court ruled that, while Article 711 should be construed in a limited manner, it recognized that the grandparents were the primary caretakers of the victim and should thus granted damages under Article 711.[94]

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[90] Daishin'in [Great Ct. of Jud.] Oct. 6, 1932 Sho 6 (o) no. 2771 Daiminshu 11-2023 (Japan).

[91] However, the Court later adopted a more lenient view towards *de facto* spouses regarding various aspects of the conjugal life, such as financial support. Saiko Saibansho [Sup. Ct.] Apr. 11, 1958 Sho 32 (o) no.21 Minshu 12-5-789 (Japan).

[92] Some lower courts ignored the precedent and granted remedy to *de facto* spouses. Tokyo Chiho Saibansho [Tokyo Dist.Ct.] Dec. 10, 1968 Sho 42 (wa) no. 11524 Komin 1-4-1429 (Japan).

[93] Tokyo Koto Saibansho [Tokyo High. Ct.] Jul., 5, 1961 Sho 36 (ne) no. 617 Saiji 334-6 (Japan).

[94] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Nov. 20, 1967 Sho 38 (wa) no. 7690 Hanta No. 215 - 115 (Japan),
More recently: Sendai Chiho Saibansho [Sendai Dist. Ct.] Feb. 27, 2008 Hei 19 (wa) no. 169 (Japan) However, in this case, the father of the victim also sued for damages.

In 1974, the Supreme Court held that Article 711 was not limited to the victim's father, mother, spouse, or children. Instead, it should extend to individuals in similar positions as those listed in the statute and who would suffer emotional distress to an equal degree in the case of the victim's death.[95]

In that case, the Court granted damages to the victim's sister-in-law, who had sued for damages under Articles 711. In analyzing the relationship between the victim and the plaintiff, the Court considered that the plaintiff had a disability as the result of contracting myelitis during childhood, and she had cohabitated for many years with the victim, from whom she also received care and support. Thus, the plaintiff's emotions should be granted legal protection without utilizing a legal right as a basis.

At the scholarship level, discussions regarding unlawfulness have also extended to Article 711. Hiroshi Suekawa was opposed to the idea that delictual liability arose from the infringement of a legal right. In particular, he argued that judgment of delictual liability should be based on the unlawfulness of the defendant's act and that the infringement of a legal right was not a requirement.[96] Concerning Article 711, Suekawa assumed the stance that, in general, killing another person was unlawful *per se,* and that the consequences of such

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Saitama Chiho Saibansho [Saitama Dist. Ct.] Feb. 27, 2008 Hei 19 (wa) no. 537 (Japan) both parents and the grandmother. However, being a blood relative is not enough. The court denied the claim of a brother under the argument that his relationship with the deceased did not meet the criteria set under Section 711. Osaka Chiho Saibansho [Osaka Dist. Ct.] Apr. 28, 2008 Hei 18 (wa) no. 2506 Komin 41-2-534 (Japan).

In-laws have also been denied damages. Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Aug. 27, 2013. Hei 24 (wa) 13073 (Japan).

[95] Saiko Saibansho [Sup. Ct.] Dec. 17, 1974 Sho 49 (o) no. 212 Minshu 28-10-2040 (Japan).

[96] Hiroshi Suekawa, Kenri Shingai Ron 481 (1930) (Japan).

an event would affect a large number of people.

Therefore, as a matter of legal policy, it would be necessary to restrict the number of persons allowed to claim non-economic losses, even if they suffered no economic losses due to the victim's death.[97] He further argued that the relatives' claim could not be explained under the premise that a legal right must be infringed. Instead, basing the standard of liability upon the defendant's conduct, *i.e.*, the act of killing the victim, would preclude the need to resort to legal rights to explain the relatives' claims.[98]

Wagatsuma further expanded the concept of unlawfulness. However, he approached Article 711 from a different perspective. First, Wagatsuma agreed with Suekawa that the infringement requirement was equivalent to an expression of unlawfulness within the Japanese Civil Code.[99] However, Wagatsuma proposed that the standard for determining unlawfulness should be the importance of the victim's legal interest and the aggressor's conduct.[100]

The main difference between these views is that Suekawa believed that liability under Article 711 arose from the fact that killing someone was unlawful *per se*, while for Wagatsuma, the unlawfulness of the act was insufficient for determining liability. Instead, Wagatsuma believed that liability arose from the severance of a victim's family ties and relationships with relatives that resulted from the aggressor's act.[101] This difference is not merely semantic. From Suewaka's perspective, the defendant's act is unlawful *per se*, and thus the law must act to prevent an endless chain of liabilities to third parties. In the case of the Japanese Civil Code, it does so through the list of

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[97] *Id. at* 501.

[98] *Id. at* 502.

[99] Sakae Wagatsuma, Jimu Kanri Futo Ritoku Fuhokoi 125 (1988) (Japan).

[100] *Id.* at 126.

[101] *Id.* at 138.

claimants set forth under Article 711. Since this list cannot be viewed as only setting a procedural means to a claim but rather a tool of legal and public policy, the courts would therefore struggle to grant remedy to individuals not covered by the provision's language.

However, this is not an issue under Wagatsuma's approach. Since "family ties" are a critical factor in determining liability, it is no longer a public policy matter, thus allowing an examination of each case to determine the relationship between victims and their relatives. Furthermore, from Wagatsuma's viewpoint, killing another person would be considered unlawful in most cases, so the issue rests solely within the sphere of the legal interest protected –. *i.e.*, the family ties – effectively classifying it as an issue regarding the unlawfulness of the loss.

Judging from the case law, the courts seem to have favored a variation on Wagatsuma's approach. Courts consider either the loss suffered by the claimants, *i.e.*, emotional distress resulting from the victim's injury, or the type of relationship between the victim and the claimant, *i.e.*, whether such relationship is similar to those protected under Article 711.

## Ⅴ. CASE LAW

The previous sections focused on historical and scholarly aspects of delictual liability. This section focuses on how the courts protect specific non-economic interests. The number of non-economic interests protected under Article 710 began after World War II. By the end of the century, these claims had been streamlined to the extent that they arguably more closely resemble common law actions than counterparts under the continental civil law system.

Injury to life and body do not significantly differ from those found in other jurisdictions. In some cases, particularly those dealing with medical malpractice, courts have created multiple non-economic

interests to protect victims better. Courts also had to answer whether relatives could inherit the victims' claim after the latter's death. Moreover, Japan's insularity has led to a different standard for foreign victims.

Reputation and privacy are also considered non-economic interests. However, Japanese law is significantly stricter regarding what actions constitute defamation or privacy infringement. For one, truth is not an absolute defense, and defendants might be liable even if the plaintiff is a public figure. Moreover, courts have found defendants responsible for comments made by third parties on social media services.

Lastly, Japanese law also protects certain social relations, such as marriage. Specifically, courts have developed claims for extramarital affairs and extramarital relations that cause a divorce.

### A. LIFE AND BODY

Claims arising from bodily harm under Article 710 are parasitic, *i.e.*, non-economic losses, such as pain and suffering, are considered when calculating damages under the figure of *isharyo*. Moreover, most claims for bodily injury are related to either traffic accidents or medical malpractice, with courts using the Blue or Red book to liquidate damages in the case of the former.

There is generally little to say regarding bodily injury in traffic accident cases, as Japanese case law and scholarship do not deviate from other jurisdictions. However, the victim's attitude can influence the amount received in some cases. For example, in an Osaka case, the court ruled that the victim's deliberate attempt to blame the defendant was enough to reduce the damages for injury and PTSD by 10%.[102] In addition, the rules do not only apply to traffic accidents caused by cars. While admitting that circumstances vary in each case, Fujimura

[102] Osaka Chiho Saibansho [Osaka Dist. Ct.] Sept. 26, 2008 Jiho Journal 1784-18.

argues that there is no need to make a distinction since the infringed interests are the same regardless of which vehicles were involved in an accident (e.g., car, bicycle, train, airplane, etc.).[103]

### a. MEDICAL MALPRACTICE

Medical malpractice cases present a unique set of issues, particularly regarding causality. Yutaka Tejima has noted that cases in which there is a clear link between the plaintiff's injury and the doctor's conduct are rare.[104] There is also a difference in cases regarding informed consent. In cases where patients are not provided with the necessary information to opt for a specific treatment, awards tend to be high compared to patients who received an explanation and subsequently underwent treatment.[105] Furthermore, if a doctor or institution attempts to cover up the medical malpractice, that itself is grounds for a different claim, regardless of the resulting bodily injury from the defendant´s initial conduct. Moreover, medical malpractice cases differ from other types of claims in the event of a patient's death, particularly in those cases where the victim might already have had a preexisting condition that could result in death regardless.

If a victim's health was already at a stage where death was the imminent result, it is impossible to argue that the doctor's action infringed upon the victim's wellbeing. Therefore, the courts were forced to address the issue by approaching these cases from the perspective that the patient had a different right altogether, rather than from traditional ideas of bodily injury. These approaches differ from the loss of chance doctrine present in other jurisdictions. Still, to

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[103] Kazuo Fujimura, *Kotsu Jiko, in* ISHARYO SANTEI NO RIRON 33, 61 (Osamu Saito ed. 4th ed., 2013) (Japan).

[104] Yukata Tejima, *Iryo Jiko, in* ISHARYO SANTEI NO RIRON 71, 119 (Osamu Saito ed., 4th ed., 2013) (Japan).

[105] Ibid.

a certain degree, they follow the same legal principles, if only to the extent that they establish liability.

Lower courts began ruling on cases where there was no detriment to overall health while acknowledging the practitioner's negligence, or a causal link could not be established. Some courts treated these as an infringement of an "expectation right" (*kitaiken shingai*), *i.e.*, the expectation held by the patient that, if the medical treatment was performed satisfactorily, there was a probability that the detrimental result (death) could have been avoided.[106] However, this trend was by no means uniform, and some courts have rejected the claim that expectation is a legally protected interest.[107] Moreover, since the victim's expectation is subjective, courts began granting claims assuming that the "possibility of prolonging the life" (*enmei no kanosei*) had been infringed.[108] These cases awarded damages as reparation for the victim's emotional shock suffered rather than for the infringement itself.

The above cases addressed issues where the result was the victim's death. However, the courts soon began expanding liability to cases in which a patient's condition would have improved, but the practitioner was late in administrating treatment – regardless of whether the result was death.[109]

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[106] Fukuoka Chiho Saibansho [Fukuoka Dist. Ct.] Mar. 29, 1977 Sho 48 (wa) no. 1020 Hanji 867-90 (Japan).

[107] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Oct., 27, 1981 Sho 52 (wa) no. 11316 Hanji 1046-70 (Japan).

[108] Utsunomiya Chiho Saibansho [Utsunomiya Dist. Ct.] Feb. 25, 1982 Sho 54 (wa) no. 122 Hanta 468-124 (Japan).

[109] Urawa Chiho Saibansho [Urawa District. Ct.] Dec. 27, 1985 Sho 55 (wa) no. 32 Hanji 1186-93 (Japan).
Nagoya Chiho Saibansho [Nagoya District. Ct.] Dec. 21, 1986 Sho 56 (ne) no. 291 Hanta 629-254 (Japan).

In 2000, the Supreme Court ruled on the matter.[110] In that case, the Court decided that if a treatment did not follow medical standards of the time, the victim (or in this case the estate) is entitled to damages for emotional suffering if there was a substantial possibility (*soto teido no kanosei*) that the victim would have survived, regardless of the existence of a clear causal link. In 2002,[111] the Supreme Court revisited the issue and expanded liability beyond cases in which the victim died to include those in which there was a substantial probability that the victim would not have suffered severe sequelae if the proper treatment had been administered.

In 2003,[112] the Supreme Court approached the issue from a contractual liability perspective. Following the precedent set in 2000, the Court held that a medical practitioner was liable for a breach of contract if there was a substantial probability that the victim could have lived longer if the practitioner had performed further tests that would have detected cancer. The main difference between these two cases is that the Court did not use the language "emotional distress"[113] to refer to the victim's loss in the 2003 case, but rather that the defendant was liable under the rules of a breach of contract.

Thus, under this interpretation, victims of loss of chance for breach of contract could arguably claim both economic and non-economic losses. Therefore, the Japanese claims for loss of chance in delictual liability exhibit two main characteristics. First, they are mainly limited to medical malpractice cases. Second, unlike in other

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[110] Saiko Saibansho [Sup. Ct.] Sept. 22, 2000 Hei 9 (o) no. 42 Minshu 54-7-2574 (Japan).

[111] Saiko Saibansho [Sup. Ct.] Nov., 11, 2002 Hei 14 (uke) no. 1257 Minshu 57-10-1466 (Japan).

[112] Saiko Saibansho [Sup. Ct.] Jan. 15, 2004 Hei 14 (uke) no. 1937 Saihan Shumin 213-229 (Japan).

[113] However, the Court did use the term "emotional distress" in the context of quoting the 2000 ruling.

systems, they do not provide a remedy for a percentage of the losses suffered, whether economic or non-economic; instead, they are accepted as an independent, non-economic loss, specifically for the victim's emotional distress.

### b. TRANSFERENCE OF THE CLAIM

Another issue regarding claims from bodily injury is the transferability of a claim via *mortis causa*. The drafters were opposed to the inheritance of claims under Article 710. Furthermore, since the victim's close relatives have an independent claim via Article 711, there was no need for a victim's claim to be incorporated into their estate. Nevertheless, this spurred one of the first great discussions regarding Article 710. Discussions focused on procedural issues and the claim's nature, *i.e.*, whether the claim under Article 710 was a purely personal right.[114]

To further complicate matters, the Supreme Court adopted a rather nuanced approach, with early case law construing Article 710 as a purely personal right. However, the victim´s heir would inherit the claim only if the victim had manifested their intention to sue before dying.[115] Consequently, a victim's relatives had to prove the victim's intent to sue for non-economic losses Article 710. If the victim had already brought a suit before passing, this would present no problem. The issue lay in cases where victims died instantly or before

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[114] Sakae Wagatsuma, *Isharyo Seikyuken no Sozokusei*, 29 Hogaku Shirin 37, 45(1927) (Japan).

[115] The oldest example is a 1910 case in which the victim, a 56-year-old woman, suffered injuries when the employee of a company who was driving a vehicle crashed with the city train. She sued the company and died before a decision was reached, and her heirs continued the process in her stead. The Great Court of Judicature held that since she had already sued, the heirs could inherit her right to claim moral damage. Daishin'in [Great Ct. of Jud] Oct. 3, 1910 Mei 43 (o) no. 150 Minroku 16-621 (Japan).

suing. Thus, courts had to construe the late victim's actions and words. For example, in a 1913 Supreme Court case,[116] a 31-year-old man died because of the negligence of a railway employee. The trial court granted damages for both economic and non-economic losses. Nevertheless, the Supreme Court reversed the decision, asserting that claims for non-economic losses are a purely personal right that cannot be inherited unless the victim had expressed their intention to sue. By contrast, in a 1919 case, the Supreme Court upheld a lower court decision that recognized a claim from the relatives of a victim who had died while in the hospital since the latter had left a note in which he manifested his intention to sue for non-economic losses.

In two cases, in 1927[117] and 1933,[118] the victims died while screaming "too bad, too bad (*zannen zannen*[119])." In both cases, the lower court recognized the heirs' right to inherit the claims for non-economic losses. However, just as in the case mentioned above, the Supreme Court overturned the rulings, declaring that claims for non-economic losses that result from injuries perish with the victim, and heirs only inherit the claim if the victim had already clearly communicated that they were planning to file a suit.

However, the court did acknowledge that such a manifestation of intent did not need to have reached the defendant to be valid. Regarding the victim's last words, the court stated that the expression

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[116] Daishin'in [Great Ct. of Jud] Oct. 20, 1913 Tai 2 (2) no. 172 Minroku 19-910 (Japan).

[117] Daishin'in [Great Ct. of Jud] May. 30, 1927 Shogan (o) no. 375 Shinbun 2702 -5 (Japan).

[118] Daishin'in [Great Ct. of Jud] May. 17, 1933 Sho 7 (o) no. 3149 Shinbun 3561 -13 (Japan) .

[119] Because the word *zannen* means regret, there is no adequate way to translate his expression into English. It could also be translated as "what a shame," "I regret this," "how vexing," "how disappointing," or any similar expression.

"too bad" did not meet the criteria to be considered an intention to sue, as it could be construed as the victim expressing regret about their own negligence. In 1933,[120] the appeals court of Tokyo followed the test set by the Supreme Court in ruling that a drowning victim's calls for help could not be interpreted as an intention to sue. In another case in 1937,[121] the Supreme Court ruled that the expression "it is [the other party's] fault, [they] had enough time to stop but did not do it" manifested an intent to sue for non-economic losses, and as such, the victim's heirs could inherit the claim.

These types of cases prompted discussions among scholars, which yielded two opposing views. The first view, represented by Ichiro Kato,[122] denied that claims for non-economic losses could be inheritable. Those who accepted this theory based their argument on Article 896 of the Civil Code, which expressly states that purely personal claims cannot be inherited.[123] Under this view, relatives of a victim could sue only for emotional distress under the rules set by Article 711. Seiko Yoshimi proposed a modified version of this theory.[124] Yoshimi argued that, in cases of injuries that resulted in death, the victim had no claim – economic or otherwise – and heirs

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[120] Tokyo Koto Saibansho [Tokyo High Ct.] May. 26, 1933 Sho 8 (ne) no. 1714 Shinbun 3568 -5 (Japan).

[121] Daishin'in [Great Ct. of Jud.] Aug. 6, 1937 Sho 12 (o) no. 530 Hanketsu Zenshuu 4-15-10 (Japan).

[122] Ichiro Kato, *Isharyo Seikyuken no Sozokusei -Daihoutei Hanketsu wo megutte*, 391 Jurist 34 (1968) (Japan).

[123] Article 896:

*From the time of commencement of inheritance, an heir shall succeed blanket rights and duties attached to the property of the decedent, provided that this shall not apply to rights or duties of the decedent that are purely personal.*

[124] Seiko Yoshimi, *Seimei Shingai no Songai Baisho Seikyuken to Sono Sozokusei ni Tsuite, in* Seiji Tanaka, Gendai Shouho Gaku no Shomondai 675 (Eisuke Yoshinaga ed., 1967).

could only sue under Article 711 for their own losses.

In contrast to this view, Sakae Wagatsuma postulated that claims under Article 710 were not only transferable via *mortis causa,* but that victims did not need to manifest their intention to sue either. In 1927, he wrote a highly influential paper in which he criticized case law up to that point as being unsound.[125] Supporters of Wagatsuma´s view argued that both economic and non-economic losses should be treated equally for the effects of inheritances. They also indicated that in cases where a victim died without an opportunity to communicate with anyone, even if that victim had not died immediately, the defendant could not be held liable, regardless of how much the victim suffered.

The Supreme Court finally reversed its precedent in 1967.[126] In that case, a truck had run over an older adult, who later died without suing or expressing an intention to sue for non-economic losses. The victim had neither a wife nor any children, so his sister sued the truck owner in his stead. The lower court and the appeals court denied the claim based on the precedent, but the Supreme Court overturned the ruling, arguing that the principle that claims for non-economic losses are only transferable if victims had sued or manifested an intention to sue was contrary to the notion of fairness and reason. Furthermore, the court noted that while the legal interest protected was indeed a purely personal interest of the victim, the claim for damages was a monetary credit that could be inherited. However, the court did specify that relatives would forgo this right if the victim had expressed an intention not to sue.

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[125] Wagatsuma *supra* note 114 at 1325.

[126] Saiko Saibansho [Sup. Ct.] Nov. 1, 1967 Sho 38 (o) no. 1408 Minshuu 12-9-2249 (Japan).

### c. NON-ECONOMIC LOSSES IN THE CASE OF FOREIGNERS[127]

Depending on the purposes and length of their stay, foreigners are divided into three groups: permanent residents, workers, and visitors. This classification directly affects how the courts approach delictual liability lawsuits. If the victim is foreign, courts will first determine their migratory status before quantifying damages, particularly non-economic damages.[128]

As in most jurisdictions, the standard for determining economic losses in Japanese law varies depending on the facts of the case and the injury suffered by the victim. Lost wages and future income are calculated based on whether the victim died or sustained injuries and any resulting disabilities. If the victim survives and does not suffer sequalae, damages are calculated based on the period the person did not work as well as other expenses that resulted from the delictual act. If, however, the victim is left with a disability, the courts will calculate damages based on a reduction of labor capacity *(rōdōnōryoku sōshitsu)*.[129] However, if the victim dies, courts will calculate damages on a legal fiction, using the national census data; this standard applies when the victim was a small child.[130]

Early lower court case law was divided on how to calculate economic damages in the case of foreigners, with some courts comparing the stand of living of the victim's home country to that of Japan and using the census information when comparable.[131] Other

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[127] For a more in-depth analysis of this topic see: Ruben Rodriguez Samudio, *Foreigners under Japanese Delictual Liability Law*, 48 Journal of Japanese Law 205 (2019) (Ger.).

[128] *Id.* at 213.

[129] H.Nakayama, *Gaikoku-jin*, *in* Gendai Saiban-hōtaikei Dai 6 Maki 203, 204 (Toshiaki Imura ed., 2000).

[130] Takashi Uchida, Minpo Ii Saiken Kakuron 419 (3rd ed., 2011).

[131] Komatsu Koto Saibansho [Komatsu High Ct.] June, 25, Hei 2 (ne) no. 282 Hanta 770-224(Japan).

courts focused on the migratory status of the victim, calculating loss income Japanese living standard only for the period the victim could have lived and worked in Japan but future wages using the victim's home country standard.[132] A similar method has been used for foreign spouses if the court considers they might permanently return to their home.[133] Furthermore, some courts would reject using the Japanese standard altogether if there was no evidence that the victim would work in Japan in the future.[134]

In 1997, the Supreme Court addressed the issue of foreign victims' future income. The victim was a Pakistani national who suffered a work-related injury while working illegally after entering Japan under a tourist visa. The Court ruled that the Japanese standard applied to the three years following the accident and the Pakistani standard for the remaining years.[135]

In the case of economic losses, such as lost income, the argument that a victim's country should set the quantification method is sound. After all, such a remedy aims to compensate the victim for the amount lost because of the harmful event. However, questions arise when this standard is applied to non-economic damages.

For non-economic losses where the victim is a permanent resident of Japan, damages are calculated in the same manner as they would be for a Japanese national. However, if the victim is a temporary worker or visitor, the economic situation of their home country is significant. The courts have adopted the view that when a victim's

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[132] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Nov. 25, 1992 ,Hei 3 (wa) no. 1283 Hanji 1479-146 (Japan).

[133] Gifu Chiho Saibansho [Gifu Dist. Ct.] March 17, 1997, Hei 7 (wa) no. 79 Hanta 953-224 (Japan).

[134] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Nov. 28, 1993 ,Hei Gan (wa) no. 10931 Hanji 1457-115 (Japan).

[135] Saiko Saibansho [Sup. Ct.] Jan. 28, 1997, Hei 5 (o) no. 2132 Minshuu 51-1-75 (Japan).

country of origin has a lower standard of living than Japan, non-economic damages should be adjusted to reflect that reality.[136] Not all cases apply this standard, and some courts have even declared that this distinction contradicts Article 14 of the Constitution.[137] [138] One Tokyo High Court decision upheld the standard that the lower court

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[136] Matsuyama Chiho Saibansho [Matsuyama Dist. Ct.] Sept. 21, 1990 Hei 2 (wa) no. 32 Kominshu 23-5-1191 (Japan). A Chinese tourist died in a traffic accident. The court held that in calculating damages for emotional distress, the amount should be decided in line with its value in the victim's home country. The plaintiff appealed, and the appeals court overturned under the argument that Article 14 of the Constitution did not allow for such distinctions.

Tokushima Chiho Saibansho [Tokushima District. Ct.] Jan. 21, 2011 Hei 21 (wa) no. 69 Hanta 1346-192 (Japan) The plaintiff was a 26-year-old trainee who lost his right arm. Chinese prices should set the standard, regardless of the classification such injuries receive under Japanese law.

Tokyo Chiho Saibansho [Tokyo District. Ct.] Jan. 27, 2004 Hei 14 (wa) no. 28270 (Japan) A police officer shot a Chinese individual who was trying to run away. The court held that the actions of the officer did not meet the criteria set by the police law defense. The court took into account the nationality of the plaintiff and granted 500,000 yen in damages for the non-economic losses resulting from the injury.

[137] Article 14 All people are equal under the law, and there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status, or family origin.

Peers and peerage shall not be recognized. No privilege shall accompany any award of honor, decoration, or any distinction, nor shall any such award be valid beyond the lifetime of the individual who now holds or hereafter may receive it. Translation from:

http://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html.

[138] Kofu Chiho Saibansho [Kofu District. Ct.] Feb. 5, 2008 Hei 16 (wa) no. 405 Hanji 2023-134 (Japan) The victim was a Taiwanese national traveling Japan as a tourist. After kidnapping and raping her, the defendant killed the victim. The court rejected the defendant's argument that damages for emotional suffering should be calculated using Taiwanese prices.

had initially employed to determine damages. The court held that such a distinction should not be based upon the nationalities of victims or their next of kin, but rather upon the standard of living of their countries of origin, concluding that if a given standard of living varies from that of Japan, that difference should be considered.[139]

Since judges have no obligation to explain how they arrive at a damage amount, some cases do not explain the standard used. As a result, courts may decide that an amount is sufficient without mentioning nationality.[140] In addition, courts have used the standard of living criteria to Article 711 claims.[141]

In a recent case, a foreigner from Ghana was being deported after illegally residing in Japan for 20 years. The victim was fluent in Japanese, had a Japanese spouse and a stable source of income, and

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[139] Tokyo Koto Saibansho [Tokyo High Ct.] Jan. 25, 2001 Hei 12 (ne) no. 5097 Hanta 1059-298 (Japan), The victim was a national from Sri Lanka.

[140] Tokyo Chiho Saibansho [Tokyo District. Ct.] Dec.24,1997 Hei 8 (wa) no. 12634 Komin 30-6-1838 (Japan) A 23-year-old Chinese exchange student studying Japanese died as a result of a traffic accident. The court granted eight million JPY.

Tokyo Chiho Saibansho [Tokyo District. Ct.] Nov. 25, 1992 Hei 3 (wa) no. 1283 Hanji 1479-146 (Japan) An Iranian short-stay exchange student lost four fingers on the left hand in a work-related accident.

[141] Chiba Chiho Saibansho [Chiba District. Ct.] Jun. 17, 2014 Hei 24 (wa) no. 2950 Hanji 2248-72 (Japan) A Chinese technical intern trainee died as a result of injuries from an assault by a co-worker. Regarding the applicable law, the court held that for the mater of inheritance, Chinese law applied. In regards to delictual liability, however, it ruled that the applicable law was Japanese civil law. The court recognized the emotional distress of the plaintiffs (the victim's father and mother). Particularly, the court added, the mother had been diagnosed with depression as a result, and the father had to quit his job to take care of her. Nevertheless, the court added, the difference in living standards (price index) between Japan and China must be taken into account. Therefore, the court granted each parent 500,000 JPY in damages.

was an upstanding citizen in all aspects, apart from his lack of documents. However, authorities located him and initiated procedures for deportation. The victim resisted before boarding the airplane resulting in an officer restraining him and ending with death by suffocation. In finding for the next of kin, the victim's wife and mother, the court made no distinction based on nationality. Instead, it focused on the unlawfulness of the officers' conduct and granted 500 million JPY for the emotional distress of the victim and 100 million JPY each to the next of kin.[142] However, the case was later overturned under the argument that the police department's actions did not meet the criteria of delictual liability under the State Liability Act.[143]

### B. DEFAMATION AND PRIVACY

Japanese scholars and case law tend to group defamation and privacy when discussing personality rights.[144] Any comparative law scholar interested in Japanese defamation or privacy law will find these two areas under the same umbrella, and it is not rare to find case law examining claims together. While there are certain similarities between these two interests since both protect information, Japanese law is particular in its approach. Ito explains that, in contrast to American common law, Japanese law focuses on whether the alleged facts caused a reputational loss and on the nature of the truth defense.[145]

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[142] Tokyo Chiho Saibansho [Tokyo District. Ct.] Mar. 19, 2014 Hei 23 (wa) no. 25874 Hanta 1420-246 (Japan).

[143] Tokyo Koto Saibansho [Tokyo High Ct.] Jan. 18, 2016 Hei 26 (ne) no. 2195 (Japan), Saiko Saibansho [Sup. Ct.] Nov. 9, 2016 Hei 28 (o) no. 890, Hei 28 (uke) no. 1145 (Japan).

[144] Ken Mizuno, Meiyo Kison・Puraibashi shingai nado, *in* SHIN SHUSHAKU MINPO (15) (Atsumi Kubota, ed.) 490 (2017).

[145] Hirobumi Ito, *Puraibashi to Fuhokoi Ho*, 20 Bulletin of Toyohashi Sozo Junior College 19, 24 (2003).

One reason for this is that, in contrast to other jurisdictions, Japanese defamation law is not limited to false statements; it also covers any information that might cause a loss of social standing. There are also some cultural aspects; some information might not be considered private in other countries; for example, news outlets tend to blur the faces of arrested individuals. This tendency is particularly evident in cases dealing with criminal records, which, while true, nevertheless grant the individual a right to seek damages either for defamation or privacy infringement. In a 1981 case, the Supreme Court ruled that criminal records directly affect an individual's reputation, and thus they had a legal interest in not having them published or leaked.[146] The Supreme Court later extended this protection to include information published in non-fiction books and novels.[147] Mizuno posits that in these cases, the fact that the information is accurate is the main issue; therefore, it is not the content of the information but rather the fact that it was revealed that infringes upon the plaintiff's rights.[148]

In addition, it could be argued that, under current Japanese law, privacy has two distinct meanings: one referring to the personality right as understood under Articles 709 and 710 of the Japanese Civil code, and the other as it relates to the Personal Data Protection Act. Therefore, this section condenses scholarly and practical discussions on both subjects following the traditional classification under Japanese law.

### a. DEFAMATION[149]

[146] Saiko Saibansho [Sup. Ct.] Apr. 14, 1981 Sho 52 (o) no. 323 Minshu 35-3-620 (Japan).

[147] Saiko Saibansho [Sup. Ct.] Feb. 8, 1994 Hei Gan (o) no. 1649 Minshu 48-2-149 (Japan).

[148] Mizuno *supra* note 144 at - 500.

[149] For more on Japanese defamation law: Ruben E. Rodriguez Samudio, The Price of a Tweet Defamation and Social Media in Japan, 53 Journal of Japanese

As with other jurisdictions, Japanese civil law protects personal reputation. Japanese defamation in civil law is closely linked to criminal provisions. Defamation claims had their origins in criminal law, with civil case law adopting specific standards of the Criminal Code[150] or developed by case law in criminal cases.[151]

The Civil Code briefly mentions defamation as one of the protected interests under Article 710 and Article 723. However, since the Civil Code is far less specific on the requirements and defenses in defamation claims, scholars and courts assumed the task of construing articles 710 and 723 by referencing the provisions of the Criminal Code. Notably, while the Criminal Code requires a *defamatory act*, the civil code only protects reputation; hence, the question of the exact nature of what constitutes reputation under the Civil Code.

The Great Court of Judicature ruled early on that an infringement of reputation right (*meiyo ken*) was not limited to a

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Law 71 (2022) (GER.).

[150] Specifically, Articles 230 and 231 establish very clear rules on the crime of defamation:

> *Article 230:*
> *(1) A person who defames another by alleging facts in public shall, regardless of whether such facts are true or false, be punished by imprisonment with or without work for not more than 3 years or a fine of not more than 500,000 yen.*
> *(2) A person who defames a dead person shall not be punished unless such defamation is based on a falsehood.*
> *Article 231:*
> *A person who insults another in public, even if it does not allege facts, shall be punished by misdemeanor imprisonment without work or a petty fine.*

[151] SHIGENORI MATSUI, HYOGEN NO JIYU TO MEIYO KISON 2, 198 (2013). The origins of Art. 230 of the Criminal Code can be found on the 1853 Zanbōritsu law which aimed at quelling citizen rights movements and prevent criticism against the government.

considerable negative impact on an individual's position in society but also included any injury to the trust in a person caused by empty comments.[152] This social reputation or *shakai meiyo* is further defined as the objective assessment of an individual's social standing.[153] This protection also extends, with some caveats, to dead individuals. Specifically, in the case of the dead, the protected interests are the relatives' feelings of respect and love.[154] In addition, the trust society puts in juridical persons is also considered as reputation and thus granted legal protection.[155]

The courts developed a "general public" standard to determine if the defendant's action is defamatory. This standard refers to a general reader for newspapers[156], an ordinary viewer in the case of broadcasted media[157], and an ordinary user for digital media and services[158].

Ishibashi explains that, in practice, courts will not ascertain if the defendant's conduct caused a loss of social standing. Thus, current defamation law does not necessarily protect an individual's reputation; instead, it protects it from the danger of harm.[159] Similarly, Hashimoto

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[152] Daishin'in [Great Ct. of Jud.] Feb. 19, 1906 Mei 38 (o) no. 296 Minroku 12-226 (Japan).

[153] Saiko Saibansho [Sup. Ct.] Dec. 18, 1970 Sho 43 (o) no. 1357 Minshu 24-13-2151 (Japan).

[154] Tokyo Koto Saibansho [Tokyo High. Ct.] March. 14, 1979 Sho 52 (ne) no. 1829 Kominshu 32-1-33 (Japan).

[155] Saiko Saibansho [Sup. Ct.] June 11, 1986 Sho 56 (o) no. 609 Minshu 40-4-872 (Japan).

[156] Saiko Saibansho [Sup. Ct.] July 20, 1956 Sho 29 (o) no. 634 Minshu 10-8-1059 (Japan).

[157] Saiko Saibansho [Sup. Ct.] Oct. 16, 2003 Hei 14 (o) no. 846 Minshu 57-9-1075 (Japan).

[158] Saiko Saibansho [Sup. Ct.] Mar. 23, 2012 Hei 22 (u) no. 1529 Saiban shu min 240-149 (Japan).

[159] Hideki Ishibashi, *Meiyo Kison to Meiyo Kanjo no Shingai*, 5-6 Ritsumeikan

argues that, in theory, the courts have explained reputational loss. However, since such a concept is abstract, the standard for determining whether such loss has occurred is not clear.[160]

An essential element in defamation claims is whether the plaintiff's reputation was affected and not the veracity of the defendant's claims.[161] However, while the plaintiff's social standing is granted robust legal protections, not every reputational loss is considered worthy of remedy. Therefore, courts will not award damages in the case of insignificant reputation losses[162] or cases where the plaintiff's reputation had already been lowered to such a degree that it cannot be affected any further[163]. Moreover, the Supreme Court has established that facts that affect the plaintiff's social standing besides the defendant's conduct should be considered when liquidating damages.[164]

Another requirement for the claim to succeed is that the defendant's actions must refer to the plaintiff, either expressly or to such a degree that the plaintiff's identity could be ascertained. This requirement is essential when dealing with groups, particularly in hate speech directed at specific groups. For example, under traditional case

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Hogaku 27, 50 (2015) (Japan).

[160] Makoto Hashimoto, *Meiyo Kanjo Shingai to Shakaiteki Hyoka no Teika* (4), 147 Kumamoto Law Review 55, 59 (2019)(Japan).

[161] Saiko Saibansho [Sup. Ct.] June 11, 1986 Sho 56 (o) no. 609 Minshu 40-4-872 (Japan).

[162] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] July 27, 1998 Hei 8 (wa) no. 11786 Hanta 991-200 (Japan).

Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Nov., 1998 Hei 8 (wa) no. 9967 Hanji 1682-70 (Japan).

[163] Tokyo Koto Saibansho [Tokyo High. Ct.] Sept. 25, 2002 Hei 14 (ne) no. 2266 Hanji 1813-86 (Japan).

[164] Saiko Saibansho [Sup. Ct.] May 27, 1997 Hei 8 (o) no. 220 Minshu 51-5-2024 (Japan).

law and scholarship, comments regarding a group in general, such as "*people from Osaka are loud*" would not be actionable.[165] However, affected individuals can seek damages if the remarks refer to a specific and determinable group of people, such as farmers from a particular city.[166]

Since *shakai meiyo* is an individual's social standing, Japanese civil defamation law borrows from its criminal law counterpart, requiring that the defendant's comments or statements be public (*kouzensei*), or communicable (*denpannsei*). In this regard, publicity refers to remarks made to a large number of indeterminate people, and communicability addresses statements or comments that, while not public, could be easily reproduced and transmitted.

In contrast to the Criminal Code[167], the Japanese Civil code establishes no defenses against defamation claims[168]. Therefore, the courts had to develop certain limits to balance delictual liability with

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[165] KATSUHIKO TSUKUDA, MEIYO KISON NO HOURITSU JITUMU 66 (2nd ed., 2008).

[166] Saitama Chiho Saibansho [Saitama Dist. Ct.] May 15, 2001 Hei 4 (wa) no. 16940 Hanta 857-248 (Japan). In this case the defendant claim that the produce from Tokorozawa contained high Dioxins levels.

[167] Article 230-2:

*(1) When an act prescribed under paragraph (1) of the preceding Article is found to relate to matters of public interest and to have been conducted solely for the benefit of the public, the truth or falsity of the alleged facts shall be examined, and punishment shall not be imposed if they are proven to be true.*

*(2) In application of the preceding paragraph, matters concerning the criminal act of a person who has not been prosecuted shall be deemed to be matters of public interest.*

*(3) When the act prescribed under paragraph (1) of the preceding Article is made with regard to matters concerning a public officer or a candidate for election, punishment shall not be imposed if an inquiry into the truth or falsity of the alleged facts is made and they are proven to be true.*

[168] There are, however, special defenses available to individuals based on their profession, such as lawyers or politicians.

legally recognized freedoms. The first of these defenses is the *shinjitsu sōtōsei no hōri* first admitted in a 1966 Supreme Case.[169] While usually translated as a truth defense, it bears almost no resemblance with its common law counterpart in practice. Whereas the truth is an absolute defense under common law, the defendant must meet specific criteria to succeed in Japan.

The truth defense requires that the defendant's statements be accurate, refer to a matter of public interest, and have been made solely to benefit said public interest. This defense is available regardless of the plaintiff´s status as a public figure or a private individual. The Court did not set a standard as to what constitutes public interest. The lower courts have ruled that the mere fact that a large number of people are interested in a specific issue does not immediately relate it to the public interest; instead, the defendant's statements must refer to a large number of interests that are of public relevance.[170]

The second defense against a defamation claim is the fair comment defense or *kōseina ronpyō no hōri*. First adopted in 1981, in contrast to the truth defense, the fair comment defense aims to protect comments regarding the conduct of a public figure.[171] Following the standard set by the truth defense, comments must be made with the public interest in mind and must not constitute a personal attack on the plaintiff. However, in contrast to the truth defense, any previous interaction between the parties and the matter discussed can be considered.

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[169] Saiko Saibansho [Sup. Ct.] June 23, 1966 Sho 37 (o) no. 815 Minshu 20-5-1118 (Japan).

[170] Tokyo Koto Saibansho [Tokyo High. Ct.] July 5, 2001 Hei 13 (ne) no. 1564 Hanji 1760-93 (Japan).

[171] Saiko Saibansho [Sup. Ct.] Dec. 21, 1989, 1966 Sho 60 (o) no. 1274 Minshu 43-12-2252 (Japan).

The last defense available to all defendants is the counter-speech defense or *taiko genron no hori*. In contrast to the truth and fair comment defenses, the counter-speech defense does not seek to protect the public interest; instead, it focuses on the balance of private interests. Some scholars argue that it might be a form of self-defense enshrined in Article 720 of the Civil Code[172].[173] For this defense to succeed, the counter-speech must be proportionate to the other party's conduct.[174]

In addition to protecting the objective social standing of an individual, Japanese courts have also established that defamation also protects subjective feelings of self-worth. Specifically, in 1944, the Supreme Court also ruled that defamation in under Article 723 refers only to *shakai meiyo* and not to any subjective feelings of reputation or *meiyo kanjo*.[175] Scholars took this distinction to mean an additional non-economic interest related to reputation not protected under Articles 710 or 723 but rather under the general rules of delictual liability as set forth by Article 709. Consequently, *meiyo kanjo* does not require

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[172] Article 720 :

*(1) A person who, in response to the tortious act of another, unavoidably commits a harmful act to protect himself/herself, the rights of a third party, or any legally protected interest, shall not be liable for damages; provided, however, that the victim shall not be precluded from claiming damages against the person who committed the tortious act.*

*(2) The provisions of the preceding paragraph shall apply mutatis mutandis to cases where a thing belonging to others is damaged to avoid imminent danger arising from that thing.*

[173] Tsukuda *supra* note 165 at 354. However, Tsukuda recognizes that this argument can only be used if the invoking party has already been the victim of defamatory comments.

[174] Saiko Saibansho [Sup. Ct.] Apr. 16, 1963, Sho 34 (o) no. 1019 Minshu 17-3-476 (Japan).

[175] Saiko Saibansho [Sup. Ct.] Dec. 18, 1970 Sho 43 (o) no. 1357 Minshu 24-13-2151 (Japan).

any loss of social standing; instead, it focuses on the infringement of the victim's self-perceived sense of honor arising from an insult or slander.[176]

Ishibashi explains that, in practice, it is not easy to distinguish between these two legal interests.[177] *Meiyo kanjo* also refers to emotional distress, though not the same as its common law counter part. Rather, *meiyo kanjo* denotes the emotional shock and pain caused by the defendant´s defamatory actions.[178] However, since granting victims absolute legal protection from all conducts affecting their emotional state would also limit the defendant´s freedoms, not every type of emotional shock gives rise to a claim. Therefore, the Supreme Court has ruled that *meiyo kanjo* claims are only viable when insults surpass the socially accepted threshold.[179] Lower courts have established that while insults might by themselves affect the plaintiff's emotional state, mere discomfort, frustration, or anger are not worthy of monetary compensation.[180]

Since *meiyo kanjo* protects the victim's subjective feelings, these claims do not require that the defendant's remarks be public, only focusing on their content, how they were made, the relation between the parties, the plaintiff's profession, age, social position, etc.[181] For example, scholars cannot, in principle, sue for *meijo kanjo* for criticism

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[176] Hirano *supra* note 44 at 95, 96.

[177] Ishibashi *supra* note 159 at 28, 29.

[178] *Id*. at 29.

[179] Saiko Saibansho [Sup. Ct.] Apr. 13, 2010, Hei 21 (uke) no. 609 Minshu 64-3-758 (Japan).

[180] Osaka Koto Saibansho [Tokyo High. Ct.] July 30, 1992 Hei Gan (ne) no. 2352 Hanji 1434-38 (Japan),
Tokyo Koto Saibansho [Tokyo High. Ct.] Nov. 11, 1993, Hei 5 (ne) no. 2234 Hanji 1491-99 (Japan).

[181] Tokyo Chiho Saibansho [Tokyo District. Ct.] 昭和56.8.25　判時1019-81 no. 11786 Hanta 991-200 (Japan).

against their research. Only when the complaint was made intentionally with a complete lack of basis, to the point it amounts to nothing more than harassment, will it grant the target a claim for damages.[182]

Even though *shakai meiyo* and *meiyo kanjo* are two distinct legal interests, Hashimoto argues that, in practice, it cannot be said that case law on defamation makes a clear distinction between these two interests.[183] Moreover, Hashimoto posits that courts sometimes recognize infringements on *shakai meiyo* and *meiyo kanjo*. In these cases, the courts based their decision to recognize the latter because the loss of social standing was such that it surpassed the socially accepted threshold.[184] He also points out that the defendant's statements by themselves are not enough to be considered defamatory in some cases. In most cases, they would only constitute privacy infringement.

### b. PRIVACY

Privacy was first recognized in a 1964 case known as the *Utage no Ato* case[185]. *Utage no Ato* (After the Banquet) is a 1960 novel that tells the story of the proprietress of a Japanese restaurant that mainly serves politicians and reveals many details of the Japanese political landscape. A Japanese politician sued the author, arguing that the novel told details about his private life. In finding for the plaintiff, the Tokyo District Court recognized that privacy is a legally protected right and defined it as the right not to have one's private life

[182] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Nov. 13, 1997 Hei 7 (wa) no. 17998 Hanta 885-197 (Japan).

[183] Hashimoto *supra* note 160 at 57.

[184] Hashimoto *supra* note 160 at 31-32.

[185] Tokyo Chiho Saibansho [Tokyo District. Ct.] Sept. 9, 1964 Sho 36 (wa) no. 1882 Geminshu 15-9-2317 (Japan).

indiscriminately exposed.

Initially, and in contrast to defamation, privacy was not concerned about the accuracy of the information published. Instead, it focused on the act of revealing the information. Thus, privacy cases did not consider the plaintiff's social standing. However, by the beginning of the new millennium and influenced by constitutional arguments on the right to control one´s information, discussions on privacy shifted to include the consent of the individual and granted protection to personal data.[186] As with other jurisdictions, privacy under Japanese law is not a concrete and defined term that courts discuss; instead, case law focuses on the specific legal interests covered under the umbrella of privacy law.[187]

Consequently, scholars have tried to classify privacy-related non-economic interests under current Japanese privacy law. Hirano argues that there are three types of privacy infringement: interfering with an individual's private life, revealing information regarding an individual's private life, and illegally collecting or transferring personal data.[188] Mizuno considers that privacy rights are violated when an individual´s private life is disturbed by collecting, using, or sharing personal data.[189] Both of these classifications protect rights, i.e., the right against intrusions in one's private life, the right against having one's private life revealed, and the right against collection, use, and transfer of personal information.

Following Hirano's classification, the first right is the most straightforward of the three; it protects against intrusion into an individual's private sphere. Consequently, any unlawful invasion or disruption of an individual's private life peace will grant them a claim

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[186] Hirano *supra* note 44 at 117.

[187] Mizuno *supra* note 144 at 526.

[188] Hirano *supra* note 44 at 117.

[189] Mizuno *supra* note 144 at 527-547.

for damages. This right mainly covers personal spaces; therefore, spying, filming, recording, and entering the residence are all covered under this right.[190] Furthermore, in this context, the right to privacy extends to hospital rooms[191] and company lockers[192]. By contrast, photos taken by the police during a protest are not considered privacy infringements.[193] Likewise, this protection also covers personal property, such as backpacks and suitcases; thus, unlawful searches by law enforcement officers are also considered a privacy violation even if the owner is the one who opened and showed the contents[194].

The second right guards against the publication of personal information without consent. This right protects against the publication of a person's name, address[195], professional and academic history, religion, phone number, criminal record, private relations, etc. The *Utage no Ato* case is the leading case; however, the same does not necessarily apply to fictional characters based on actual persons, as long as the author adds enough creative elements.[196]

In contrast to the disturbance of an individual's private life, this right is usually balanced against other legal interests such as the freedom of expression, freedom of the press, right to know, etc.[197]

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[190] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Showa 49.7.15 Hanji 777-60 (Japan)

[191] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] May 22, 1990, Sho 62 (wa) no. 4992 Hanji 1357-93 (Japan).

[192] Saiko Saibansho [Sup. Ct.] Sept. 5, 1995, Hei 4 (o) no. 10 Saiban Minshu 176-536 (Japan).

[193] Saiko Saibansho [Sup. Ct.] Dec. 24, 1969 Sho 40 (a) no. 1187 Keishu 23-12-1625 (Japan).

[194] Kobe Chiho Saibansho [Kobe Dist. Ct.] Jan. 12, 2017 Hei 27 (wa) 367 (Japan).

[195] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Jan. 21, 1998 Hei 8 (wa) 22728 Hanji 1646-102 (Japan). The plaintiff had requested the phone company not to include his name, address, and phone number in the telephone directory.

[196] Tokyo Chiho Saibansho [Tokyo Dist Ct.] May 19, 1997 Hei Gan (wa) 17241 Hanji 1550-49 (Japan).

[197] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] May 22, 1990 Sho 62 (wa) 4992

Therefore, photos taken within an establishment for promotional purposes are not considered privacy infringement, particularly if the plaintiffs were informed and had the opportunity to leave the area[198] As a general rule, revealing the name of arrested individuals is not considered a privacy invasion. However, publishing their spouse's name, workplace, education, or other similar information will grant the latter a claim for damages.[199] By contrast, courts have ruled that publishing criminal records constitute a privacy infringement if enough time has passed since the trial.[200] Likewise, courts have granted remedy in the case of juvenile delinquents for using a pseudonym that is too similar to their actual name while simultaneously publishing other personal information.[201]

This right also raises the issue of privacy in the case of public figures such as politicians and celebrities. Courts have ruled that publishing photos of a celebrity's residence constitute privacy infringement.[202] Conversely, whether publishing a celebrity's personal information is a privacy violation is usually decided on a case-by-case

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Hanji 1357-93 (Japan). The court ruled that reporting on the disease of a CEO by itself did not violate his privacy, but taking pictures of his stay at the hospital, including pictures of him in a wheelchair, infringed upon his right to not be disturbed.

[198] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Aug. 8, 1965 Sho 29 (wa) 11008 Hanji 92-16 (Japan).

[199] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Apr. 14, 1995 Hei 6 (wa) 4227 Hanji 1547-88 (Japan).

[200] Saiko Saibansho [Sup. Ct.] Feb. 8, 1994 Hei Gan (o) no. 1649 Minshu 48-2-149 (Japan).

[201] Nagoya Koto Saibansho [Nagoya High Ct.] June, 29, 2000 Hei 11 (ne) 648, Hei 12 (ne) 24 Hanji 1736-35 (Japan).

[202] Kobe Chiho Saibansho [Kobe Dist. Ct.] Feb. 12, Hei 8 (yo) 251 Hanji 1604-127 (Japan),
Tokyo Chiho Saibansho [Tokyo Dist. Ct.] June, 23, 1997, Hei 8 (wa) 21783 Hanji 1618-97 (Japan).

basis. For example, in a case a dealing with the publication of a professional soccer player's photos and other personal information, the court ruled that photos of their jr. high school soccer practice were not protected, but granted damages for publishing photos of the plaintiff as a newborn, information about their family, grades during school, personality, etc.[203] Moreover, courts have used the right to images to balance the lower standard of protection. For example, in a case regarding the swimsuit photos of a tv announcer, the court held that such photos had little relation to the plaintiff's position as an announcer and granted remedy based on their right to image.[204]

The third interest covered by privacy is the right against collecting, using, or transferring personal information or data to third parties. In contrast to the right against disturbance, this right does not require that information collection occur within private spaces, focusing instead on whether the affected individual granted consent. Furthermore, as opposed to the right against publication, the right against transfer does not necessitate the publication of the information; any unlawful transfer, be it public or not, will give rise to a claim. Additionally, in 2003 the government passed the Personal Data Protection Act, which prohibits the publication of personal information without consent and limits its processing and transference to third parties.

In a famous case, a private university complied with a police request and handed in a list containing the names, addresses, student numbers, phone numbers, and other personal information of college class participants without their consent.[205] Likewise, the Uji City's

[203] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Feb. 29, 2000, Hei 10 (wa) 5887 Hanji 1715-76 (Japan).

[204] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Sept. 5, 2001, Hei 11 (wa) 21521 Hanji 1773-104 (Japan).

[205] Saiko Saibansho [Sup. Ct.] Setp. 12, 2003, Hei 14 (wa) 1656 Minshu 57-8-973

municipal government was found liable when a third party contracted to create a system using its citizens' personal information copied and sold the data to a third party.[206]

### c. DEFAMATION AND PRIVACY OVER THE INTERNET

The rise of the internet and the pervasive use of social media forced the courts to review the standards applicable to defamation and privacy laws. Notably, the increase of bulletin boards in the late 90s and early 2000s facilitated the exchange of ideas and the creation of new forms of entertainment. Unfortunately, these boards also became platforms for personal attacks. One of the main points of contention during this early period was whether service providers were liable for their users´ acts. In 2001, the government enacted the Act on the Limitation of Liability for Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Senders (the 2001 Act) shielded internet providers from liability for actions committed by their users.

In general, the courts applied the principles discussed above to online services. Online defamation does not deviate much from the traditional standards set by the courts. For example, emails and other forms of online communication are considered to meet the publicity and communicability requirements.[207] In the case of bulletin boards, both individual posts and the title of a particular thread can fall within the purview of defamation law.[208] There is some discussion on

(Japan). The court also considered the fact that the university had ignored its own policy regarding transference of personal data to third parties.

[206] Osaka Koto Saibansho [Osaka High Ct.] Feb. 29, 2000 (Japan) (not published).

[207] However, in the case of emails courts will consider the number of recipients; thus, mailing lists, mail magazines, or mass emails will usually meet the publicity criteria. Takayuki Matsuo, Yuichiro Yamada, Sashin Hanrei ni Miru Intanettojo no Meijokison no Ronri to Jitsumu 150 (2ed., 2019).

[208] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Sept. 15, 2017, Hei 29 (wa) (Japan).

whether bulletin boards are trustworthy since, in contrast to other forms of media such as newspapers, the former's content is usually not curated.[209]

The courts have also scrutinized social media services where users can express their opinions regarding a post. Depending on their contents, defamation or privacy infringement rules apply to original posts on these services. However, the same cannot be said of actions that show support for the original post. One such example is services with a "like" option, such as Twitter and Facebook. In these cases, the courts have ruled that pressing the like button is only a show of support for the post and cannot be considered as a statement or comment by itself.[210] Nevertheless, some commentators believe that liability should be determined on a case-by-case basis, particularly in cases where the original post is evidently slanderous.[211]

A more challenging issue presents itself with actions that reproduce or introduce the original post to other users to such information, as with links or retweets. The courts are divided in the case of the former. Some courts have denied liability for posting links to news articles[212] or bulletin board threads[213]. By contrast, courts have granted damages for linking slanderous blogs[214] or when the link

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The court considered that a thread titled "Black Companies" implied that companies within that threat violated labor law.

[209] Matsuo, Yamada *supra* note 207 at 108.

[210] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Mar. 20, 2014, Hei24 (wa) 3861, Hei 24 (wa) 28756 (Japan).

[211] Matsuo, Yamada *supra* note 207 at 349.

[212] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Jan. 29, 2015 Hei 26 (wa) 19237 (Japan).

[213] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Jan. 26, 2016 Hei 26 (wa) 24943 (Japan).

[214] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Dec. 21, 2015 Hei 25 (wa) 7362 (Japan).

reveals an individual's personal information[215]. The last one is not surprising seen that courts ruled early on that doxing on internet forums is a privacy infringement[216].

However, in the case of retweets, the courts have adopted a stricter stance, i.e., simple retweets without any remakes are considered equal to the original post.[217] For example, in 2020, the Osaka High Court held that retweeting a tweet accusing a former governor of contributing to a government officer to commit suicide constituted defamation; even if the original tweet included a link to a newspaper article, the plaintiff had publicly apologized to the family, and there were official records on the matter.[218] Moreover, even though not directly related to defamation or privacy, a Tokyo District Court recently held that using a screenshot of a deleted tweet constituted copyright infringement.[219]

Plaintiffs faced procedural barriers when presenting suits since they did not know the defendant's identity in most cases. Under the 2001 Act, a plaintiff could sue to obtain a user's personal information. However, this process first required suing the platform or service provider for the IP address, then suing the ISP to obtain the user's data before finally suing the user for defamation or privacy infringement, a process which usually took years. The law was

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[215] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Nov. 7, 2014 Hei 26 (wa) 13217 (Japan).

[216] Kobe Chiho Saibansho [Kobe Dist. Ct.] June, 23, 1999 Hei 10 (wa) 1828 (Japan).

[217] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Dec. 24, 2014, Hei 24 (wa) 28870 (Japan).

Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Nv. 25, 2015 Hei 26 (wa) 25111 (Japan).

[218] Osaka Koto Saibansho [Osaka High Ct.] June 23, 2020 Rei Gan (ne) 2126 (Japan).

[219] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Dec. 10th, 2021 Rei 3 (wa) 15819 (Japan).

amended in 2021 to allow plaintiffs to obtain the required personal information and sue users in one process.

Discussions on the right to be forgotten are another example of how the internet influenced defamation and privacy case law. In 2014, a Kyoto District Court ruled that search results themselves are not defamatory statements.[220] The first ruling that recognized the right to be forgotten was in 2014 when a Tokyo District Court ordered Google to delete search results regarding the plaintiff. In 2017, the Supreme Court handed its first ruling on the matter. In that case, the Court emphasized the importance of search engines and the possibility of recognizing the right to be forgotten under Japanese law; nevertheless, it denied its application after balancing the public good and the plaintiff's interest.[221]

### C. SOCIAL RELATIONS[222]

Japan classifies certain social relations, particularly those arising from marriage, as non-economic interests and grants them legal protection under delictual liability law. While spouses owe each other a duty of support based on Article 752 of the Civil Code, there is no provision regarding continued financial support after a divorce has been finalized.[223] Courts developed a type of compensation for divorce

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[220] Kyoto Chiho Saibansho [Kyoto Dist. Ct.] Aug. 7, 2014 Hei 25 (wa) 2893 (Japan). The decision was later upheld by Kyoto High Court. [Kyoto High Ct.] Feb. 18, 2015 Hei 26 (ne) 2415 (Japan).

[221] Saiko Saibansho [Sup. Ct.] Jan. 31, 2017 Hei 27 (kyo) no. 45 Minshu 71-1-63 (Japan).

[222] For a more in-depth analysis of this topic see: R.RODRIGUEZ SAMUDIO, Interference with Spousal Rights, 50 Journal of Japanese Law 151 (2020)(GER.).

[223] Rodriguez Samudio *supra* note 222 at 156.
However, Article 877 of the Civil Code does establish a parental obligation of child support. Hence, in practice, the parent who retains guardianship is only entitled to receive support from his or her former spouse in the form of child

called *rikon ni tomonau isharyo* (*rikon isharyo*) in cases where one spouse is considered to have caused the divorce. The Supreme Court has said that these damages are granted for the emotional distress suffered by the victim because of the divorce and are independent of other claims.[224] Furthermore, slighted spouses have a separate claim for the infringement of their marital rights, regardless of any love between the spouses.[225] These types of damages are known as *futei koi isharyo* or *futei* isharyo[226]. They are granted when one spouse commits adultery and are one of the most common claims for non-economic damages in Japan, to the point that the word *isharyo* is one of the few technical legal terms most Japanese people understand.[227] Both claims aim to protect the marital relation for unlawful disturbances by using delictual liability.[228]

The main difference between these two claims is that *rikon* isharyo claims require the divorce to be viable. Conversely, *futei koi isharyo* claims only necessitate the existence of an extramarital affair. Furthermore, the responsible party is not the same. In *rikon isharyo* cases, the claim can only be brought against the spouse, while for *futei koi isharyo* case, plaintiffs can sue their spouse and the lover.[229] In addition, the defenses available to defendants are not the same, and neither is the statute of limitations. The period for both claims is three years; however, for *rikon isharyo* it begins to run when the divorce is finalized; by contrast, for *futei koi isharyo,* it starts on the day the

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support.

[224] Saiko Saibansho [Sup. Ct.] July 23, Sho 43 (o) 142 Minshu 25-5-805 (Japan).

[225] Saiko Saibansho [Sup. Ct.] Mar. 30, 1979 Sho 51 (o) 328 Minshu 33-2-303 (Japan).

[226] *Futei kōi* can be translated as an adulterous act and is recognized as one of the grounds for divorce under Article 770 of the Civil Code.

[227] Rodriguez Samudio *supra* note 222 at 152.

[228] *Id.* at 164.

[229] *Id.* at 164.

victim-spouse knew or should have known of the affair.[230]

### a. DIVORCE

The Japanese Civil Code appears to follow the "clean break" principle, under which the spouses do not owe each other any obligations after divorce. The Japanese law allows for both no-fault and fault-based divorces. The system has been described as treating divorce as an absolutely private matter.[231]

Furthermore, spouses have at their disposal four options to dissolve the marital relation: by mutual agreement (*kyōgi rikon*), through litigation (*saiban rikon*), via conciliation (*chōtei rikon*), or by judicial decision of a family court (*shinpan rikon*).[232] While not specified under the Civil Code, there are also two types of divorce that are nevertheless recognized as part of the divorce proceedings. One is known as divorce via settlement (*wakai rikon*), and it takes place if the parties settle during the judicial process of divorce. Divorce via acceptance (*shodaku rikon*) occuers after judicial proceedings have begun but before the ruling is handed down. Whereas in *wakai rikon* both parties reach a compromise, in *shodaku rikon* cases one party, usually the defendant-spouse, will agree to all the claims submitted by the other party.

The Supreme Court has established that compensation for the marriage breakdown is independent of any division of community property arising from the divorce.[233] Therefore, even after finalizing the divorce and distributing property, the slighted spouse can bring a

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[230] Saiko Saibansho [Sup. Ct.] Jan. 20, 1994 July 23 Hei 3 (o) 403 Saiban Minshu 171-1 (Japan).

[231] B. VERSCHRAEGEN, Divorce, in: Zweigert et al. (eds.), International Encyclopedia of Comparative Law, Volume IV – Persons and Family (2004) 137.

[232] Rodriguez Samudio *supra* note 222 at 154-156.

[233] Saiko Saibansho [Sup. Ct.] Feb. 2, 1956 Sho 26 (o) 469 Minshu 10-2-124 (Japan).

suit for *isharyo*.[234] Spouses can also negotiate the amount of *rikon isharyo* during the divorce proceedings, and this agreement has legally binding.[235]

Scholars argue that there is a distinction between the emotional distress caused by the affair and the emotional distress by the divorce itself; however, courts have not followed this line of reasoning.[236] Furthermore, there are criticisms against recognizing non-economic losses for divorce. Some commentators point out that requesting a divorce is neither a breach of contract nor a type of delictual liability.[237] Supporters of *rikon isharyo* counter that these claims are not based on contractual or delictual liability, but rather should be considered a type of adjustment.

Scholars also argue that, since *rikon isharyo* are granted under Article 709, they should follow the general negligence rules. However, in practice there have been there has been a shift to a type of strict liability or a relaxation of the negligence standard.[238] Furthermore, critics point out that in some cases, particularly those of divorce via agreement, a spouse will use *rikon ishayo* as a bargaining chip to sign the agreement unless a certain amount is promised. Thus, in these cases, *rikon isharyo* is nothing more than a price tag on the divorce that might run against Article 90 of the Civil Code, which prohibits acts against public policy.[239]

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[234] Saiko Saibansho [Sup. Ct.]  Jul. 23, 1971 Sho 43 (o) 142 Minshu 25-5-805 (Japan).

[235] Saiko Saibansho [Sup. Ct.] Sept. 10, 2000 Hei 10 (o) 560 Minshu 54-3-1013 (Japan).

[236] Chiba Ken Bengoshi Kai *supra* note 3 at 7.

[237] Michiro Tanaka, *Rikon Futei Kankei-to, in* ISHARYO SANTEI NO RIRON 195, 197 (Osamu Saito ed., 4th ed., 2013) (Japan).

[238] JUN NAKAGAWA, KAZOKU HO NO GENDAITEKI KADAI 165 (1992) (Japan).

[239] TAKAO SATO, GENDAI KAZOKU HO I 180 (1992).

Case law has established three criteria for *rikon isharyo*.[240] First, one of the spouses must have committed a culpable conduct, or in its absence, there must be an agreement to pay *isharyo*. Second, the slighted spouse must have suffered emotional distress. Third, the divorce must have been finalized.

The most common example of culpable acts are extramarital affairs and emotional or physical violence. Personality traits are not considered culpable conducts.[241] Since unaccompanied job transfers (*tanshin funin*) are rather common in Japanese work culture, the courts do not require cohabitation for the claim to succeed.[242] In addition, if both parties contributed to the marriage breakdown, then neither is entitled to compensation.[243]

As a general rule, only spouses can be sued, though a recent ruling appears to have opened the possibility of suing third parties. These rules also apply if the spouses live abroad[244] or finalize the divorce under in a foreign jurisdiction[245], even if the latter does not recognize *rikon isharyo*.

In a 2019 case[246], the Supreme Court ruled on the matter of claims against third parties for *rikon isharyo*. In that case, the plaintiff

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[240] Rodriguez Samudio *supra* note 222 at 158.

[241] Tokyo Koto Saibansho [Tokyo High Ct.] Nov. 25, 1982 Sho 56 (ne) 811 Hanji 1062-59 (Japan).

[242] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Jan. 19, 2011 Hei 22 (wa) 510 (Japan).

[243] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Aug. 29, 2003 Hei 14 (wa) 320 (Japan).

[244] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Jan. 30, 2004 Hei 14 (wa) 485 Hanji 1854-51 (Japan).

[245] Kobe Chiho Saibansho [Kobe Dist. Ct.] June 19, 1990 Sho 62 (wa) 541 Hanji 1383-154 (Japan).

[246] Saiko Saibansho [Sup. Ct.] Feb. 19, 2019 Hei 29 (uke) 1456 Minshu 73-2-187 (Japan).

sued his wife's former lover, arguing that the affair, which had finished over five years before the divorce took place, was the main cause his marriage ended. Both the trial and the appellate court found for the plaintiff and ordered the defendant to pay damages. The defendant petitioned the Supreme Court to review the case, particularly two points of law: first, whether a third party could be held liable for the divorce, and second, in the event that the defendant was responsible, the point at which the statute of limitations began to run.

In a very brief decision, the Court upheld the previous case law that spouses have a claim against each other for the emotional distress caused by the divorce and rejected the plaintiff's claim under the argument that, under the fact of the case, it could not be said that the affair caused the marriage breakdown. In addition, the Court pointed out that, since divorce is a legal act that materializes through the will of the parties, in principle, a third party could not be held liable for the divorce based on the mere fact that their conduct could have contributed to the breakdown of the marriage. Since the Court did not find the defendant liable, it did not address the second question regarding the statute of limitations.

More importantly, the Court did not reject the idea that a third party could be held liable if their actions led to a divorce. Instead, the Court appears to have created a new claim under which a third party is liable if their main intention was to cause the couple to divorce and if the third party took unjustifiable actions towards achieving this goal. Therefore, we consider that, under this ruling, victim-spouses can sue a third party if the following three criteria are met[247]: (1) An intent to cause the divorce; (2) Unjustifiable intervention; (3) The divorce is completed.

### b. EXTRAMARITAL AFFAIRS

[247] Rodriguez Samudio *supra* note 222 at 165.

The courts have also developed a body of law for *futei koi isharyo*. The first case that recognized this claim took place in 1979.[248] The Supreme Court ruled that a third party who had extramarital affairs had infringed upon the rights of the victim-spouse and thus was liable for the disruption of a healthy marriage (*kenkoteki na kekkon seikatu*), regardless of the presence of any feelings of love amongst spouses. However, children are barred from bringing a similar suit since the affair does not affect parental love.[249]

While these claims are a staple in Japanese delictual liability law, they are not without critics. For example, some scholars posit that relationships between spouses do not entail complete control over their conduct, that the unfaithful spouse is the one who should shoulder the burden, and that relationships between spouses is a private matter, one into which the law should not intrude.[250]

Furthermore, the lover must have known, or be in a position in which they could have known about the marriage, and pursued the affair regardless.[251] In addition, the suit will also be barred if the victim-spouse granted their consent or in any form gave the impression that they did not oppose the affair.[252]

However, one of the main differences between *rikon isharyo* and *futei koi isharyo* claims is that the courts have developed a defense for the latter. Specifically, victim-spouses are not entitled to damages if the

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[248] Saiko Saibansho [Sup. Ct.] Mar. 30, 1979 Sho 51 (o) no. 328 Minshu 33-2-303 (Japan).

[249] Saiko Saibansho [Sup. Ct.] Mar. 30, 1979 Sho 53 (o) no. 1267 Saiban Shumin 126-423 (Japan). Interestingly enough, the court ruled on the same day on the very same issue in a case where the unfaithful spouse was the mother.

[250] Takao *supra* note 238 at 206.

[251] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Nov. 30, 2017 Hei 29 (wa) 12339 (Japan).

[252] Saiko Saibansho [Sup. Ct.] June 19, 1996 Hei 7 (o) no. 2176 Kagetsu 48-12-39 (Japan).

marriage was already strained by the time the affair began, as it is considered that there is no legal interest to protect.[253] Thus, it is not uncommon for the marital relationship to come under scrutiny in cases dealing with *futei koi isharyo*. Violence is considered a sign that the marriage has broken down[254] and so are any indications that the spouses wish to divorce.[255] Furthermore, as mentioned before, the Japanese system of *tannin fushin* meant while separation might be considered evidence that the marriage is not sound, it is by no means absolute. Thus, a one-year separation due to work after 20 years of marriage is not enough to defeat a claim for damages.[256]

*Futei koi isharyo* also brings up the question of the liability of sexual workers. The legal status of prostitution is beyond the scope of this paper; nevertheless, it is not as clear-cut as in other jurisdictions.[257] Courts have developed a defense for individuals providing sexual services under an authorized business, arguing that, even if the client's spouse disagrees, the service itself is nothing more than a service for sexual release.[258]

However, lower courts are split on whether this defense applies to cases of so-called pillow business or *makura eigyo*. This term

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[253] Saiko Saibansho [Sup. Ct.] Mar. 26, 1996 Hei 5 (o) no. 381 Minshu 50-4-993 (Japan).

[254] *Supra* note 252.

[255] Tokyo Koto Saibansho [Tokyo High Ct.] June 22, 2005 Hei 17 (ne) 1843 Hanta 1202-280 (Japan).

[256] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Feb. 26, 2018 Hei 29 (wa) 7349 (Japan).

[257] Jun Hongo, Law bends over backward to allow 'fuzoku', Japan Times, May 27, 2008.
Available at:¦ https://www.japantimes.co.jp/news/2008/05/27/news/law-bends-over-backward-to-allow-fuzoku/#.XiJ6uMgzbD5.

[258] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Apr. 14, 2014 Hei 25 (wa) no. 34252 (Japan).

describes the practice of certain professionals, such as those working in hostess clubs, of engaging in sexual relations with their best clients to maintain their patronage.[259] Some courts consider that *makura eigyo* is covered under the same protection as sex workers[260]. In contrast, others have ruled that such conduct infringes upon the household's peace (*kon'in kyodo seikatsu no heiwa*).[261]

In contrast to *rikon isharyo*、the Supreme Court ruled that since adultery is a consensual act, the unfaithful spouse is jointly liable.[262] However, the culpable spouse can argue that the marriage was already strained, thus defeating the claim.[263] Furthermore, the victim-spouse might decide to sue only the lover[264], but any amount paid as *futei koi isharyo* will be considered if the spouse also chooses to sue for *rikon isharyo*.[265]

### c. DE FACTO SPOUSES AND ENGAGEMENT

Engagement and *de facto* marriage, while not necessarily granted the same status as marriage, are nevertheless legally protected. In 1915, the Great Court of Judicature ruled that a promise to marry is a legally binding contract, albeit one in which parties

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[259] Rodriguez Samudio *supra* note 222 at 163.

[260] Tokyo Chiho Saibansho [Tokyo District. Ct.] Apr. 14, 2014 Hei 25 (wa) no. 34252 Hanta 1411-312 (Japan).

[261] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Jan. 31, 2018 Hei 28 (wa) no. 43410 (Japan).

[262] Saiko Saibansho [Sup. Ct.] Mar. 30, 1979 Sho 51 (o) no. 328 Minshu 32-2-303 (Japan).

[263] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Mar. 28, 2016 Hei 26 (wa) 11367 (Japan).

[264] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Jul. 25, 2007 Hei 18 (wa) 17206 (Japan).

Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Feb. 8, 2007 Hei 18 (wa) 14977 (Japan).

[265] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Feb. 21, 2007 Hei 18 (wa) 5738 (Japan).

cannot request courts for specific performance. Nevertheless, the Court determined that the offended party could sue for non-economic losses in the case of a breach.[266] It then elaborated upon this in a 1958 ruling, determining that in cases where a man and woman share the responsibilities and administration of a household entail a relation equivalent to a marriage.[267]

The Supreme Court has also ruled that, once a promise to marry had been made, the offended party could sue for emotional suffering due to a breach of contract.[268] Nevertheless, the courts admit the cancelation of an engagement if there is a justifiable reason.[269] However, there is the issue of criteria for determining *de facto* marriages. For example, the Fukuoka District Court held that even if parties do not live together, their jobs and position, routine visits to each other's abodes, and sexual relations could be considered a form of cohabitation that embodies a *de facto* relation.[270]

There are also cases where a *de facto* relation could amount to polygamy. In a 1940 case, the spouses were separated in preparation for divorce, and both began dating other people. The Great Court of Judicature ruled that the husband's lover, who was aware of this state

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[266] Daishin'in [Great Ct. of Jud.] Jan. 26, 1915 Tai 2 (o) no. 621 Minroku 21-49 (Japan).

[267] Saiko Saibansho [Sup. Ct.] Apr. 11, 1958 Sho 32 (o) no. 21 Minshu 12-5-789 (Japan).

[268] Saiko Saibansho [Sup. Ct.] Dec. 20, 1963 Sho 38 (o) no. 334 Minshu 17-12-1708 (Japan).

[269] The courts have narrowly construed the criteria for justifiable annulment of engagement. For example, not even religious differences are enough of a justification. Osaka Chiho Saibansho [Osaka District. Ct.] Jul. 31, 1967 Sho 40 (wa) no. 2778 Hanji 510-57 (Japan), Kyoto Chiho Saibansho [Kyoto Dist. Ct.] Jan. 28, 1970 Sho 40 (wa) no. 206 Hanji 615-56 (Japan).

[270] Fukuoka Chiho Saibansho [Fukuoka Dist. Ct.] Aug. 26, 1969 Sho 43 (wa) no. 334 Hanji 577-90 (Japan).

of affairs, had no recourse against him.[271] In 1969, the Supreme Court granted remedy in a similar case under the argument that the defendant used lies to seduce the plaintiff to initiate the extramarital affair.[272]

Recently, discussions regarding the rights of same-sex couples have been on the rise, with some municipalities establishing partnership systems. In 2019, a Utsunomiya District Court recognized a claim for emotional distress arising from an adulterous relationship in a same-sex couple.[273] A female couple had legally married under the State of New York laws in 2014, and, after returning to Japan, the couple then contacted defendant B (male) to serve as a sperm donor. However, defendant A and defendant B began a romantic relationship which led to the divorce in 2018, and both defendants married later that year, divorcing a month later. The plaintiff sued both her former spouse and the lover for damages.

In finding for the plaintiff, the court considered that the constitutional provision that requires the consent of "both sexes" was nothing more than a reflection of the social values of the period when the constitution was written. Therefore, it did not prevent the rights of same-sex couples from being recognized. In particular, the court held that same-sex unions were to be granted the same protections as de facto marriage, i.e., barring rights regarding succession. They were to be considered the same as legal marriages.

The fact that Japanese courts are willing to grant a certain level of protection to same-sex marriage might be an indication of a

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[271] Daishin'in [Great Ct. of Jud.] Jul. 6, 1940 Sho 14 (o) no. 1802 Taiminshu 19-1142 (Japan).

[272] Saiko Saibansho [Sup. Ct.] Sept. 26, 1969 Sho 42 (o) no. 790 Minshu 23-9-1727 (Japan).

[273] Utsunomiya Chiho Saibansho [Utsunomiya Dist. Ct.] Sept. 18, 2019 Hei 30 (wa) 30 (Japan).

societal change. Nevertheless, in perhaps the first application of the new standard set by the Supreme Court regarding the liability of third parties for a divorce, the Utsunomiya court rejected the claim brought against the lover. The court considered that defendant B concluded that same-sex marriage is not recognized under Japanese law, and thus was not aware of any duties they might have against the other.

### D. OTHER LEGAL INTERESTS

#### a. PUBLIC NUISANCES

In the 1960s, the list of protected interests expanded to more effectively address the realities of public harms, such as pollution. However, it was scholarship, not the courts, that decided that these newly developed and protected rights should be included under personality rights. One of these rights is the right to a peaceful life (*heion seikatsuken*).[274] In 1975, the Supreme Court granted remedy to residents affected by noise pollution from the Osaka International Airport. The court ordered compensation for losses resulting from the noise. However, it denied damages for any future losses, as it considered these too difficult to determine.[275]

Another famous case at the local level was the Nagoya Bullet Train (*shinkansen*) case.[276] In this case, the plaintiff claimed that the train interfered with daily conversations, telephone calls, studies, lectures, and thoughts, prevented them from watching television or

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[274] In this case, life refers to everyday activities, and not to the lifetime of the individual.

[275] Saiko Saibansho [Sup. Ct.] Dec. 16, 1981 Sho 51 (o) no. 395 Minshu 35-10-1369 (Japan). The plaintiff also requested for a permanent injunction for airport operations from 9 p.m. to 7 a.m. However, the court denied the petition under the argument that such request did not fall within the scope of a civil liability case, as the airport operation fell within the purview of administrative law.

[276] Nagoya Koto Saibansho [Nagoya High. Ct.] Apr. 12, 1985 Sho 57 (ne) no. 88 Gemin 34 1-4 - 461 (Japan).

listening to the radio, interrupted their sleep patterns, and produced both emotional distress and bodily harm. Although the Nagoya High Court did not expressly quote the Supreme Court case, the ruling was similar and granted damages for non-economic losses suffered by the plaintiff. However, the court rejected claims for future losses. Since then, the legal landscape of Japan has included cases regarding various types of pollution, and scholarship has followed suit in attempting to analyze them.[277].

### b. LIABILITY FOR LOSS OF PROPERTY[278]

A glance at the language of Article 710 reveals that non-economic losses are recoverable, regardless of whether or not the infringed interest is a property right. The traditional stance within scholarship and case law dictates that victims do not have a claim for non-economic losses when such losses arise from harm to property.[279] In the lower courts, in particular, the stance is to consider that losses resulting from property damage should be addressed as economic losses, and that emotional suffering is not part of recoverable losses.[280]

However, the courts have granted remedy in cases that meet

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[277] See: Shoetsu Matsumoto, *Shinkansen Kougai Sosho to Kankyoken・Jinkakuken, Kokyosei – Hanketsu wo Bochou site-,* 15(2) Chukyo Law Review 1 (1980) (Japan) available at: http://www.chukyo-u.ac.jp/educate/law/academic/hougaku/data/15/2/matumoto.pdf,

Atsushi Miyazaki, *Jinkakuken toshite no Josui Kyojuken ni tsuite – Haikibutsu Shori Jisetsu wo meguru Sashitome Saiban wo Kenki tosite-*, 35 Soka Hogaku 75 (2005) (Japan),

Kimura Kazunari, *Kinji no Saibanrei ni miru「Jinkakuken」Gainen no Shoso*、364-65 Ritsumeikan Hokgaku 136, 137-140 (2016) (Japan).

[278] For more see: Yuki Makino, *Zaisan Songai ni okeru Isharyo Seikyu no Kahi*、50(1) Jochi Hogakuronshu, 35 (2006) (Japan).

[279] Osamu Saito, *Sono Ta no Shomondai* in *Isharyo Santei no* Riron 307, 308 (Osamu Saito ed., 4th ed., 2013) (Japan).

[280] Makino *supra* note 278 at 37.

one of the following criteria: there is a special relationship between the property and the victim, the conduct of the defendant is intentional and affects the victim in such a manner that the emotional suffering surpasses the general threshold, or the damage to property results in emotional suffering that surpasses the general threshold accepted by society.[281] This stance is not new either. The Great Court of Judicature ruled as early as 1910 that when a defendant's conduct destroys property to which the victim has a unique and sentimental connection, such as with a family heirloom, the defendant is liable for damages.[282]

The lower courts' rulings reveal that, in many cases, the relation between a piece of property and its owner is the deciding factor. For example, the new owner of an immobile property[283] is liable for destroying a pen and traditional family shrines.[284] In another case, a couple took their 10-year wedding anniversary rings for repair. The jeweler replaced the diamond with synthetic zirconia, and when the plaintiffs realized this, they requested it back. However, the business did not comply, so the couple sued. In granting damages, the district court determined that the diamond had a special significance to the plaintiffs, as the wife even had PTSD due to the ordeal.[285] In cases of damage to buildings, emotional suffering is not usually considered when calculating damages, except for traffic accidents in which a car collides with a building. In these cases, the courts consider plaintiffs'

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[281] Saito *supra* note 279 at 308.

[282] Daishin'in [Great Ct. of Jud.] Jun. 7, 1910 Mei 43 (re) no. 954 Keiroku 16-1121 (Japan) The court reaffirmed this position in 1960. Saiko Saibansho [Sup. Ct.] Mar. 10, 1960 Sho 33 (o) no. 659 Minshu 14-3-389 (Japan).

[283] The ruling uses the word *tatemono* which can refer to any type of structures.

[284] Tokyo Chiho Saibansho [Tokyo District. Ct.] Apr. 22, 2002 Hei 13 (wa) no. 1743 Hanji 1801-97 (Japan).

[285] Tokyo Chiho Saibansho [Tokyo District. Ct.] Feb. 15, 2007 Hei 16 (wa) no. 10480 Hanji 1986-66 (Japan).

fear and anxiety due to these collisions.[286]

Cases related to the injury or deaths of pets are also common. However, Makino has noted that early case law approached these instances based on property damage,[287] while recent case law tends to classify them as pure emotional distress.[288] Furthermore, Saito has explained that awards tend to be higher if a death results from veterinary malpractice, as this is also considered a breach of contract.[289] Finally, the animal must be a pet. If the animal is killed while still being treated as an object, the courts will not grant damages for emotional distress.[290]

## Ⅵ. SUMMARY

The inclusion of two provisions regarding non-economic losses in the Japanese Civil Code evidences that the drafters were aware of trends in comparative law during the time they were writing the code. After all, each of the three drafters was trained in a country that had undergone the process of developing the legal foundation necessary to

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[286] Osaka Chiho Saibansho [Osaka District. Ct.] Mar. 30, 1973 Sho 47 (wa) 752 Hanta 306-241 (Japan) Okayama Chiho Saibansho [Okayama District. Ct.] Sept.19, 1996 Hei 6 (wa) no. 1182 Komin 29-5-1405 (Japan).

[287] Tokyo Chiho Saibansho [Tokyo District. Ct.] Sept. 11, 1961 Sho 35 (ne) 1801 Hanji 283-21 (Japan).

[288] Makino *supra* note 278 at 43.

[289] Tokyo Chiho Saibansho [Tokyo District. Ct.] May, 10, 2004 Hei 15 (wa) no. 16710 Hanji 1889-65 (Japan),
Utsunomiya Chiho Saibansho [Utsunomiya District. Ct.] Mar. 28, 2002 Hei 9 (wa) no. 529 (Japan).

[290] Osaka Chiho Saibansho [Osaka District. Ct.] Jan. 13, 1997 Hei 8 (wa) no. 2167 Hanji 1606-65 (Japan) The veterinarian was held liable for using a labor-inducing drug that resulted in the death of the cat.
Hiroshima Koto Saibansho [Hiroshima High. Ct.] Nov. 6, 1972 Hanta 286-230 Defendant held liable for stealing a colored carp from the plaintiff.

expand liability for non-economic losses. France had recognized such a remedy for over 50 years by the time Ume and Hozumi obtained their doctorates. Tomii, who was educated in common law, also had the opportunity to track these developments, as non-economic losses under the common law were developed during the same time frame.

Regarding the code itself, the simplicity of the language in Article 710 allows for an interpretation that permits the addition of new interests without much of an issue. However, given some of the relevant discussions in scholarship and case law, it is surprising that there was disagreement over whether the interests listed in Article 710 were *numerus clausus*. Moreover, there is the question of what exactly the system set up by Article 710 compensates. The obvious answer would seem to follow the rules of Article 709 and identify non-economic interest and losses arising from their infringement as the object of the suit. However, the content of non-economic interest and losses is not easily established, since they are non-verifiable by their very nature. Nevertheless, the consensus is that emotional suffering is the principal loss requiring recovery, with emotional suffering ranging from pain and suffering to shame. Additionally, in defamation cases, social standing and loss of trust are also deemed recoverable.

However, the courts and scholarship have not always adopted the same stance regarding this matter. Scholarship has addressed the development of non-economic losses under the theory of personality rights, adding new rights as the courts address contemporary issues, such as pollution. The courts in those cases have tended to approach the problem from the losses suffered by the victim, *i.e.*, interface with the daily conversations, telephone calls, studies, sleep patterns, lectures or thoughts of the plaintiffs, emotional distress, and bodily harm. This recalls the right infringement requirement of Article 709. Initially, the drafters' idea of a legal right was closely related to the concept of formal law as a means to distinguish between moral and legal considerations. Nevertheless, in most cases, non-economic interests are

grounded in ethical considerations rather than purely legal ones.

This also invokes the issue of differentiating between the infringement of a right and the loss that results from it in the case of non-economic losses, and whether this is even possible. This is usually addressed under the doctrine of subjective and objective non-economic losses. The drafting committee's discussion regarding the rights of relatives highlights this issue. Each committee member understood that the death of a close relative, such as a parent, triggers sadness and emotional trauma. The issue was never whether the loss existed but rather how to justify the claim under the system's design, as each member firmly believed that individuals do not hold rights over the lives of third parties.

However, since their idea of right was purely steeped in a positivist approach to the concept, whether relatives had their rights infringed upon by the death of a victim would appear to be a moot point. Thus, since the drafters believed that rights must be established via a formal law, and the promulgation of the Civil Code through the legal procedures of Japan granted the status of formal law, relatives do maintain a right to the life of a victim under Article 711. In other words, the drafters themselves created the very right they were trying so hard to deny.

Another example of the same issue is how the courts decide when to grant damages for injuries of third parties. This chapter has presented one case[291] in which the court did not analyze the defendant's actions or the injuries suffered by the plaintiff's son. Furthermore, the Court did not deny that the plaintiffs suffered emotional distress. Instead, the deciding factor was the degree of suffering. Likewise, in claims for non-economic losses in the event of property damage, courts decide whether to grant remedy based solely on the sentimental

[291] Saiko Saibansho [Sup. Ct.] Sept. 19, 1968 Sho 43 (o) no. 63 Minshu 22-9-1923 (Japan).

relation of owners with their property. However, as this category of cases concerns infringement of property rights, the distinction might be more difficult.

In cases of loss of chance (*soto teido no kanosei*), this argument finds firmer ground. The emotional distress of a victim whose life is ending is by far more ambiguous than one whose life was abruptly cut short. Indeed, in cases in which a patient is aware that a procedure may not help at all – a sort of "Hail Mary" – it might be impossible to claim that the actions of medical staff augmented their suffering. Nevertheless, the courts have usually addressed these cases by granting damages for emotional distress resulting from the loss a substantial probability. In these cases, it might be more accurate to say that the courts are compensating for the violation of the right, rather than for any loss resulting from it.

The courts arguably adopted a system similar to those of other countries with French legal influence, which dictates that the unlawfulness of a loss determines whether or not a plaintiff qualifies for remedy—accepting this line of thought yields two possibilities. The first possibility is that the courts decide whether the plaintiffs' rights are infringed upon based on the suffered loss. However, this would mean the courts do not follow the cause-effect relationship between rights infringement and loss as established under Article 709. The second possibility is that the courts simply reject the idea of right infringements in these cases, as the rulings are based on the existence and nature of the loss itself and forgo a need for any sort of infringement.

However, critics may assert that the loss is simply the evidence necessary to prove the occurrence of an infringement. Indeed, this is not a new position, as the doctrine of objective and subjective *dommage moral* precisely addresses this issue. Nevertheless, it would mean that the infringement of a right must be considered the loss *per se*. It would also mean that any reparation for non-economic losses

would need to include two aspects: reparation for infringement of the right and any actual losses suffered by the victim, as evident in cases of divorce.

Finally, there is the issue of the relation between *isharyo* and protected legal interests. As cases concerning emotional distress involving foreign victims have illustrated, the court standard blurs the distinction between economic and non-economic losses and raises the issue of discrimination. More than anything, it demonstrates the detriment to the nature of the legal interest when quantifying losses assumes center stage. Regarding economic losses, such as lost income, the argument that the victim's country should set the quantification method is sound. After all, such a remedy aims to grant the victim the amount lost because of the harmful event.

As we have argued elsewhere, the legal basis for using different standards is not immediately apparent.[292] Since the issue is one of delictual liability based on civil law provisions, it could be argued that the question of the applicable law is the determining factor. In that case, the governing provisions are found in the Act on General Rules for Application of Laws, specifically Article 17, which states that:

> "[T]he formation and effect of a claim arising from a tort shall be governed by the law of the place where the result of the wrongful act occurred; provided, however, that if the occurrence of the result at said place was ordinarily unforeseeable, the law of the place where the wrongful act was committed shall govern".

Based on this provision, the applicable law to determine liability in cases where a foreign victim dies in Japan is Japanese law, specifically Article 709 or general liability and Article 710 for non-economic losses.

Applying various standards for different periods in the case of

[292] Rodriguez Samudio *supra* note 56 at 213.

economic losses does not necessarily violate the principle of equal protection under the law.[293] However, there is still the issue of the legal basis for the distinction; as strictly speaking, the courts determine liability based on the provisions found within the Japanese Civil Code. Suppose the issue is approached as a matter of procedural law. In that case, it is possible to argue that even if liability is determined under Japanese law, judges have the authority to evaluate the evidence presented before them freely. Therefore, a stronger argument can be made that economic losses can be ascertained based on each case's factual circumstances.

Another question is whether the courts would be willing to apply a higher standard of living. We could not find any case in the Westlaw Japan database where the victim or the victim's family were nationals from a developed country with a higher standard of living than Japan. Since Japan is famous for being a very safe country, foreigners are most likely to be the victims of traffic accidents, in which case insurance companies take care of most of the process. Demographics can also explain this disparity since most visitors and long-stay foreign residents hail from Asian countries with lower living standards than Japan.[294]

The same cannot be said for non-economic losses. First, there is no doubt that Japanese courts and scholarship recognize the same non-economic interests and losses for both nationals and foreigners. The issue is how courts liquidate these damages. Since courts do not have to explain how they calculate *isharyo*, they could have granted foreign victims lower amounts without using nationality as a standard, in which case it would have been more difficult to detect. Moreover, even in most cases mentioned here and in previous work, the amounts granted were not necessarily low enough to warrant any special

[293] Rodriguez Samudio *supra* note 127 at 213.

[294] Rodriguez Samudio *supra* note 127 at 221.

attention or to be considered discriminatory *per-se*, which begs the question of why to bring up the victim's nationality in the first place.[295]

Using economic indicators to calculate non-economic damages is also troublesome. By itself, any amount recognized as damages for emotions such as sadness, anger, loss, despair, or physical sensations such as pain is controversial, as most people understand that no amount of money will completely compensate the victim. Moreover, the argument that the money will be used in a specific country, and thus it should be calculated on that country's standard of living, is not very convincing. For one, the courts are guessing whether the victim or their families will live in their home country their whole life. Nothing stops a plaintiff from moving to another country or even to a different province, prefecture, or state in the same country.

Moreover, we find no reason why granting the victims, or their families, damages based on the Japanese standard would be akin to them profiting from their loss. If victims are partly responsible for the accident that causes the injury, that should be treated as a matter of comparative negligence. Moreover, it is disingenuous to argue that a person who lost their life, or otherwise might live with a permanent disability somehow stands to profit based on the amount of money received. The same is true regarding the grief of the next of kin.

Another criticism of this approach is that Japanese courts do not consider the economic differences between prefectures when calculating damages in the case of Japanese nationals. For example, according to a 2018 report by the Ministry of Internal and Communications, in 2017, the price index differed up to almost 8% between prefectures, which is by no means insignificant. Lastly, this approach also fails to address the situation of federal countries such as the U.S.A or a system like the European Union that allows their citizens to live and work anywhere within their territory. Thus, it is

[295] Ibid.

unclear how Japanese courts would determine non-economic losses of US or European citizens born in high-income countries or states that work or live in a lower-income ones.[296]

Japanese law adopts a very conservative approach in the matter of defamation. While this is not necessarily a cause for criticism, it raises questions on how defamation rules apply to a globally connected world. Communications are no longer limited to bulleting boards in Japanese servers. Instead, global communities such as Twitter or Reddit have brought fourth instant interactions that surpass national and digital frontiers. In theory, lack of truth as an absolute defense in defamation cases could open the door for claims against persons not living in Japan. The situation is even direr in the case of sharing information. Under current case law, a Japanese plaintiff can potentially sue any person who retweets or shares a link, as Japanese courts consider that tweets are defamatory remarks. The fact that this applies to cases dealing with former politicians' acts during their time in office is even more concerning.

Furthermore, while only one case has been reported, Japanese courts' willingness to use copyright provisions to prevent third parties from the plaintiff's post points to a level of privacy protection that does not consider the nature of online interactions. This stance presents the same problems as with defamation claims, as it would allow plaintiffs to sue anyone worldwide for sharing screenshots of deleted tweets.

[296] *Id*. at 223.