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# NEWSLETTER

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## Articles




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# The Supreme Court Disallowed the Deletion of Google's Search Results

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On January 31, 2017, the Supreme Court of Japan issued a decision rejecting the plaintiff's attempt to remove his criminal history from Google's search results.[1]

## The Facts of the Case

The plaintiff was arrested, convicted and sentenced to pay a fine for child prostitution in 2011. Details of his arrest including his name were reported on the day of the arrest and published in electronic bulletin board systems. His conviction was not reported thereafter.

In 2014, the plaintiff filed a motion for preliminary injunction against Google Inc. ("Google"), the U.S. company, to seek the deletion of Google's search results concerning his arrest. At the time of the filing, if his name and residential prefecture were entered in the search box, Google would provide the URLs and information with respect to his arrest as the search results.

The Saitama District Court (the original court) ruled for the plaintiff, but the Tokyo High Court (the appellate court) reversed its ruling. On further appeal, the Supreme Court decided for Google and rejected the plaintiff's motion.

## The Decision of the Supreme Court

First, the Supreme Court cited several precedents regarding the right of privacy and reaffirmed that one had a legal interest not to have facts regarding his/her privacy published without just cause.

Then, the Supreme Court made two important findings concerning the nature of a search engine. First, notwithstanding the fact that the search results were automatically generated by Google's algorithms, these algorithms were made by Google, and therefore each search result is considered as an act of expression of Google. Second, the Court found that the provision of search results aids people in publishing and collecting necessary information from the immense amount available on the Internet, and concluded that a search engine is a platform of information flow. The Supreme Court held that placing constraints on search results would hamper such important act of expression of Google and the role of a search engine.

Following these general explanations on the interests of search engines like Google and the public, the Supreme Court held that a court had to balance the legal interest not to have private facts published without just cause with the above reasons for not restricting the search results. The Court then identified six factors to decide whether to grant the motion of the plaintiff: (1) nature and content of the facts; (2) the scope of the disclosure of facts related to the privacy of a person through the URLs and information provided, and the extent and details of the injury that such person may suffer from such disclosure, (3) the social status and the influence of such person, (4) the purposes and significance of the original contents made available through the links provided by the Google search engine, (5) the social situation when such contents were published and subsequent changes to such social situation, and (6) the necessity of the facts provided in such contents.

Taking into account these six factors, the Court held that the search results should be deleted only when the legal interest in privacy clearly overrides the reasons for permitting the search results. Thus, the Supreme Court rejected the plaintiff's motion because he did not satisfy the established standard.

## The Context of the Decision

In Japan, as in other countries, a number of cases have been recently filed seeking to delete certain search results. This is the first Supreme Court decision in Japan on this matter.

From the 1960s, Japanese courts have gradually established a legal interest in privacy. It is now settled that a person may seek damages and an injunction based on an invasion of privacy despite the lack of a statute that explicitly recognizes such legal interest. The Supreme Court has held that criminal history is private information and a person has an interest in not having it disclosed without just cause. However, courts have constantly held that privacy is not an absolute right and must be balanced with other rights, in particular, the freedom of expression.

The Supreme Court reaffirmed the legal interest in privacy in this case and balanced it with the freedom of expression although it went further by making new findings relating to the vital role of a search engine on the Internet.

### Comparison with the Google Spain Case

This case has been reported as a decision on the "right to be forgotten" (i.e., the right of an individual to request the removal of his or her personal data from accessibility via a search engine) but, strictly speaking, such label is misleading.

As widely known, in the Google Spain case,[2] the Court of Justice of the European Union interpreted Articles 12 and 14 of Directive 95/46/EC (the Data Protection Directive) and established broadly a "right to be forgotten." Following the Google Spain judgment, Regulation (EU) 2016/679 (the General Data Protection Regulation) explicitly recognized the right to be forgotten in Article 17 and provided detailed rules therefor.

This case, however, is clearly different from the judicial and legislative movements in the European Union ("EU") on several fundamental points, the most prominent being that the Supreme Court did not cite the Act on Protection of Personal Information (the "Act"),[3] which is the Japanese data protection law, to rule on this case. The reason for this is that, at present, the Act only offers a limited right of deletion to individuals, i.e., the right to delete personal data if illegally collected or

used beyond the purposes of the collection. A significant amendment to the Act, which will take effect on May 30, 2017, will require a data controller to make an effort to delete personal data if such data is no longer necessary in relation to the purposes of the use thereof. However, even as amended, the Act will still not provide a comprehensive right of deletion similar to the "right to be forgotten" in the EU.

### Conclusion

The Supreme Court applied a traditional invasion of privacy approach to a technologically cutting-edge case. Although this is not a "right to be forgotten" case, this case is important for subsequent similar cases and is worth being carefully studied.

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1. Supreme Court, Jan. 31, 2017 at http://www.courts.go.jp/app/files/hanrei_jp/482/086482_hanrei.pdf (in Japanese).
2. Case C-131/12, Google Spain SL & Google Inc. v Agencia Española de Protecccción de Datos (AEPD) & Mario Costeja González, May 13, 2014, ECLI:EU:C:2014:317 - Opinion Advocate-General Jääskinen of June 25, 2013.
3. Kojin joho no hogo ni kansuru horitsu [Act on Protection of Personal Information] Law No. 57 of May 30, 2003, as last amended by Law No. 51 of May 27, 2016.

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## Equal Treatment in Labor Conditions Prompted by Recent Court Decisions

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The Labor Division of the Tokyo District Court issued a decision[1] (the "Case") disrupting what has, so far, been the common hiring practice in Japan - the employment of non-regular employees to save on labor costs.

The Case upheld the claim of the plaintiff-employees on the basis of Article 20[2] of the Labor Contract Act (the "LCA").[3] The facts of the Case are as follows: the defendant-employer is a logistics company that provides trucking services. The plaintiff-employees are retirees who were rehired by the defendant-company as truck drivers. The Special Act[4] generally requires employers to rehire its retired employees if they desire to continue working until they reach the age of 65. Accordingly, the defendant rehired the plaintiffs under its rehiring system as fixed-term employees. The defendant, like most companies, executed employment contracts with the plaintiffs; however, this time, the salaries paid were lower despite the fact that plaintiffs worked in the same manner as they did before they retired. It bears mentioning that it is not unusual for a company to offer a 30% or more reduction in salary even if the rehired fixed-term employees are expected to do the same work as before.

The Tokyo District Court, looking negatively on such practice, held that under Article 20 of the LCA, if a fixed-term employee performs the same work as a non fixed-term employee - after considering the "content of the duties" and the "extent of changes in the content of duties and work locations" - then a difference in the amount of the salaries between the fixed-term employees and non fixed-term employees will be considered "unreasonable," regardless of how insignificant such difference is, unless there exists exceptional circumstances. On appeal, the Tokyo High Court[5] reversed the decision of the Tokyo District Court, stating that the common practice under the rehiring system of the Special Act has to be respected and that the salary level is not "unreasonable" under Article 20 of the LCA. The Case is currently on appeal with the Supreme Court.

After the bubble era, there was a tendency for Japanese companies to reduce their regular employees and replace them with non-regular ones. In recent years, the ratio between regular and non-regular employees has reached approximately 60-40, although thirty years

ago, regular employees constituted over 80% of employees. The usual features of non-regular employment are: it is fixed-termed; no retirement allowance, bonuses and other benefits; and no tenure, all of which regular employees traditionally enjoy. In addition, salaries of non-regular employees are much lower than that of regular ones, and they have little chance of promotion/increase in salary even if they work in a similar or the same manner as regular employees. Statistics show that the salaries of non-regular employees, on average, amount to only about 60% of the salaries received by regular employees.

This current tendency to pay lower wages to non-regular employees has been blamed as one of the reasons for the decline in the number of children in Japan. Similar to other developed countries, this decline has been considered a serious social problem in the country. The low income and little hope to increase salaries discourage the younger generation from having children. Accordingly, the Japanese government has aimed to raise the salary levels of non-regular employees and balance them with those of regular employees to tackle this problem. The principle of equal pay for equal work has been declared as a government policy objective in 2016.

There are several other pending cases that dispute the above interpretation and application of Article 20 of the LCA. Due attention should therefore be given to the outcome of those cases as well as to the policies or legislation that may be issued by the government on this matter.

For the basic concepts and legal framework of Japanese labor and employment law, please refer to our more extensive article on this topic at the URL below:

https://www.globallegalinsights.com/practice-areas/employment-and-labour-law/global-legal-insights---employment-and-labour-law-2017-5th-ed./japan

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1. Tokyo District Court, May 13, 2016, 1135 Rodo hanrei 11.
2. Article 20. If a labor condition of a fixed-term labor contract for a Worker is different from the counterpart labor condition of another labor contract without a fixed term for another Worker with the same Employer due to the existence of a fixed term, [then such difference will not] be found unreasonable, [after] considering the content of the duties

of the Workers and the extent of responsibility accompanying the said duties, the extent of changes in the content of duties and work locations, and other circumstances.
3. Rodo keiyakuho [Labor Contract Act] Law No. 128 of Dec. 5, 2007, as last amended by Law No. 56 of Aug. 10, 2012.
4. Konenreishato no koyo no anteito nikansuru horitsu [Act on Stabilization of Employment of Elderly Persons] Law No. 68 of May 25, 1971, as last amended by Law No. 73 of Sept. 18, 2015 (the "Special Act").
5. Tokyo High Court, Nov. 2, 2016, 1144 Rodo hanrei 16.

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# FinTech-Related Amendments to the Banking Act, Payment Services Act and Installment Sales Act

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In response to information and communication technological developments, amendments to the Banking Act[1] and Payment Services Act[2] were enacted in May 2016, and will come into force in April this year. The Installment Sales Act[3] was also amended in December 2016, to take effect sometime within a year and a half thereafter. All these changes are expected to facilitate information technology (IT) innovation in the finance industry.

The following is an overview of some of the FinTech-related amendments to the above laws:

## The Banking Act

Under the current Banking Act, banks are not allowed to do any business other than banking, and the holding of voting rights in shares or equity by banks and bank holding companies is generally limited to

5% and 15%, respectively. The amended Banking Act will enable banks and bank holding companies to acquire, with prior regulatory approval, voting rights more than the said threshold amounts in companies that contribute or are likely to contribute to the level of sophistication of banking services or the improvement of convenience of their customers. The published ordinance implementing the amendments to the Banking Act supplements the criteria for such approval, which include a requirement that the applicants (i.e., banks or bank holding companies) and their subsidiaries and other affiliates will remain healthy even in case of a total loss of the value of the shares held by such applicants. Investments by bank holding companies are more likely to be approved compared to investments by banks because the risk of a total loss of an investment by a bank holding company is less likely to have an adverse effect on the bank it owns.

### The Payment Services Act

The Payment Services Act regulates the business of prepaid payment instruments (e.g., prepaid cards). At present, the law requires the available amount for payment and other items to be described in the instrument upon its issuance. The amended Payment Services Act and its implementing order will allow the issuer of instruments built into electronic devices such as smartwatches to make such information available online.

The amended Payment Services Act also establishes a registration system for virtual currency exchange businesses, and to secure the confidence of users, obligates operators of such businesses to segregate the cash and virtual currency of the customers from their own cash and virtual currency. The implementing order specifies the segregation methods, which include, in case of cash, deposit with banks or creation of a money trust with an indemnity of the principal amount and, in case of virtual currency, keeping each customer's currency identifiable by the operator or a third-party delegate. Also, the situation of the implementation of such segregation must be audited more than once a year by an accountant or auditing firm. Further, the order imposes financial requirements that operators must meet such as having a capital of ten million yen or more and non-negative net assets.

### The Installment Sales Act

The amendments to the Installment Sales Act, which regulates credit card transactions, are intended to implement the necessary measures to improve the environment where customers can use their credit cards in a safe and secure manner. The current law regulates credit card transactions on the basis of an "on-us" model where the issuer and the acquirer are identical. However, most of the current transactions are "non-on-us" transactions, wherein the issuer is different from the acquirer, which enters into agreements with the merchants. Further, intermediaries such as payment service providers ("PSPs") have become recently involved between an acquirer and a merchant in the "non-on-us" transactions. The current law, however, does not sufficiently regulate such acquirers and it does not regulate such intermediaries at all.

The amended law now introduces a registration system for operators in the business of concluding agreements with merchants such as acquirers and PSPs. Also, a foreign acquirer will be required to set up its business office in Japan and register it unless it partners up with a registered PSP. As an exception, a PSP does not need to be registered if it carries out its business under the control of a registered acquirer. Registered operators such as acquirers or PSPs will be obligated to inspect merchants and take the necessary measures against them based on the results of such inspection. The amended law will formally recognize the existence of PSPs.

The current law also requires merchants to issue documents describing, among others, the price of the goods or services to customers when they make payments by credit card, with the exception of such information being made available online with the prior consent of the credit card users. The amended law will further relax merchants' documentation obligations, taking into account the spread of credit card payments via smartphones.

More FinTech-related amendments are expected to take place in other areas of law. Therefore, companies interested in Fin-Tech-related business opportunities should closely look at the status of the amendments like those described above and how they will affect their business.

1. Ginko ho [Banking Act] Law No. 59 of June 1, 1981.
2. Shikin kessai ni kansuru horitsu [Payment Services Act] Law No. 59 of June 24, 2009.
3. Kappu hanbai ho [Installment Sales Act] Law No. 159 of July 1, 1961.

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# The "Minpaku" Business in Japan

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## 1. The Minpaku business

The Minpaku business, which means "lodging services offered by using all or part of a house (such as stand-alone houses and apartments)"[1] is developing rapidly in Japan. For example, the number of guests who use the services of the local subsidiary of Airbnb, a U.S. company, which is the world's largest operator of online booking services for short-term lodging in residential properties, reached one million in 2015, which is a 530% increase from the figure in 2014. Tujia, one of the major operators in China, which offers similar services, will reportedly also invest in Japan to cater to Chinese tourists.[2]

The Minpaku business has been attracting a lot of attention because of an increase in foreign tourists, especially with the Tokyo 2020 Olympic and Paralympic Games drawing near, shortage of short-term lodging facilities, and an increase in unutilized rooms and houses.[3]

## 2. Regulation of the Minpaku business

The Inns and Hotels Act (the "Act")[4] regulates the hotel business, which is defined as a "business in which [an enterprise] establishes facilities and offers lodging to people by charging accommodation charges."[5] Due to such broad definition, the Act has far-reaching effects. Any individual or entity that wishes to operate a business covered by the Act, regardless of the size of the business, must obtain a license from the prefectural governor, comply with the various requirements as to the structure and operation of the lodging facilities, etc.[6]

The Minpaku business is also subject to the Building Standards Act, which prohibits any construction of hotels and other lodging facilities in areas that are exclusively residential or industrial.

In addition, for rented houses, a tenant may not sublet without the consent of the landlord under the Japanese Civil Code.[7] In many apartments, the relevant homeowners' agreement does not allow the conduct of a Minpaku business.

### 3. Deregulation of the Minpaku business

(1) The *"Minpaku Tokku"* scheme

Since December 2013, under the National Strategic Special Zones Law, short-term lodging facilities in a *"Minpaku Tokku"* or a Minpaku Special Zone can be exempted from the application of the Act if the local government unit passes an ordinance for it to be covered by the Minpaku Tokku scheme.[8] However, as of February 10, 2017, only a few local government units have passed such an ordinance such as the Ota Ward in Tokyo, the Osaka Prefecture and the Fukuoka Prefecture. Moreover, the requirements for an exemption under a Minpaku ordinance are often stringent,[9] making it difficult to start a new Minpaku business.

In October 2016, the minimum length of stay by guests in lodging facilities in a Minpaku Tokku to be specified in the Minpaku ordinance was shortened from two nights and three days to nine nights and ten days[10] from the previous period of six nights and seven days to nine nights and ten days. This has increased the use of the Minpaku Tokku scheme.

(2) The Minpaku New Law

A new law will be passed further deregulating the offering of short-term lodging services in general subject to compliance with certain requirements such as the maximum limit of 180 days per year allowed for lodging services (the "New Law"). Under the New Law, property owners who wish to offer housing for a Minpaku purpose must simply notify the prefectural governor, dispensing with the licensing requirement, while intermediaries and management companies must register with the relevant administrative agency.

The bill for the New Law was approved at a Cabinet meeting on March 10, 2017, and has been submitted to the National Diet for deliberation and approval.

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1. Final Report from the Review Meeting on "Minpaku Services," June 20, 2016, p. 1. http://www.mhlw.go.jp/file/05-Shingikai-11121000-Iyakushokuhinkyoku-Soumuka/0000128393.pdf.
2. The Nihon Keizai Shimbun, Morning Edition, February 1, 2017.
3. In 2013, the vacancy rate was about 13.5% with 8,200,000 vacant homes (Housing and Land Survey, Special Calculation of Data, Statistics Bureau, the Ministry of Internal Affairs and Communications, 2013 at http://www.stat.go.jp/data/jyutaku/).
4. Ryokan gyo ho [the Inns and Hotels Act] Law of No. 138 of July 12, 1948.
5. The Act, art. 2.
6. For instance, lodging facilities must set up front desks (The Act, art. 3, para. 2; Ryokan gyo ho shikou rei [the Order for Enforcement of the Inns and Hotels Act] the Cabinet Order No. 152 of June 21, 1957, art. 1, as last amended by the Cabinet Order No. 98 of March 30, 2016); set up hotel registers (The Act, art. 6, para. 1); and implement necessary measures to meet hygiene standards (The Act, art. 4, paras. 1 and 2).
7. Minpo [Civil Code] Law No. 89 of April 27, 1896, art. 612, as last amended by Law No. 71 of June 7, 2016.
8. Kokka senryaku tokubetsu kuiki ho [the National Strategic Special Zones Law] Law No. 107 of December 13, 2013, art. 13 (the "Special Zones Law").
9. For example, the floor area of a guest room in the facility must be 25m$^2$ or greater (The Special Zones Law, art. 13, para. 1; Kokka senryaku tokubetsu kuiki ho shikou rei [the Order for Enforcement of the National Strategic Special Zones Law] Cabinet Order No. 99 of March 28, 2014, art. 12, item 3, I (the "Order")).
10. The Special Zones Law, art.13, para.1; the Order, art. 12, item 2.

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