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SHACKLES FOR THE BEHEMOTH?

: The Importance of Business and Human Rights Approach

Sotaro Ishizuka^{*}

What role can the Constitution play in constitutionalizing the digital space (refer to section I)? In particular, there is a growing focus on human rights issues related to digital platforms (DPFs), and it is inevitable that a constitution, with a human rights catalog, will be involved.

A key challenge is, however, that the Constitution is the law that constitutes the state and at the same time is what limits the state.¹ As anyone with a basic understanding of constitutional law knows, the Constitution is originally an instrument to restrain the state—referred to here as the Leviathan, and not a social power such as a DPF, or the Behemoth. Thus, the constitution as a binding instrument is structurally specialized to shackle the Leviathan and is generally not suitable for use on the Behemoths. But, why is that?

The modern constitution is a tool designed to allow the governed to counter the concentrated power of the modern state, with the premise being the asymmetry of power between the state and the individual. Individuals without power can assert their human rights against the state, sometimes changing or halting state policies. On the other hand, the state with its absolute power cannot assert human rights—otherwise the asymmetry would not be resolved. In contrast, social power arises from within society itself, composed of individuals, and unlike the state, which has an *a priori* monopoly on power, it is not absolute. Sometimes individuals, companies, and organizations have *de facto* power, and sometimes they do not. Thus, there is no *a priori* fixed structural asymmetry in society (although many mini-Behemoths swarm around in society, but they do not possess the absoluteness of the Leviathan). This makes it possible for any individual, company, or organization to claim human rights, and as such, it is difficult for the claim of human rights to be the dividing line in the game for private individuals.

It is still premature to assume that the constitutional human rights catalog cannot play any role. The human rights catalog has been a force for restraining social power in the past, and they may continue to do so in different ways in the future. I would like to examine both aspects of this issue.

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¹ A constitution generally consists of two parts: one relating to “institutions of governance” and the other relating to “human rights.” The former creates the principal organs of the state, such as the legislative, judicial, and executive branches of government, while the latter provides for the prohibition of human rights violations by the state constituted by these organs. Both concern matters related to the state.

1 The Constitution and the Individual, the Intermediate, and the State

(1) The Constitution and Human Rights

The term ‘human rights’ is widely used in political, social and legal contexts. In political and social movements, various human rights issues such as voting rights for foreign residents, LGBTQ rights, the right to die, and the rights of nature and animals are asserted, regardless of what is written in the constitutional documents. These are assertions supported by some moral or political philosophy, or social theory, and are expected to be realized in society going forward, perhaps through politics. Such claims arise from the fundamental demand that human beings must be able to live in safety, be free, be equal, have their dignity protected, and should not be impoverished, evolving and expanding as times and social conditions change. Human rights are also an ideological device for the inclusion of new developments in human society and their continued development in a form that can be agreed upon. One scholar has described human rights as “wild and lively as a wild untamed horse.”²

In contrast, when human rights are used in a legal sense, they refer primarily to the various rights provided for in the Constitution. A legal right must be protectable by law if infringed upon.³ To achieve this, it must be clear who can claim the right (the right holder), who must comply with the corresponding obligation (the addressee), and what can be claimed on the basis of that right (content of the right). Otherwise, it will be difficult to make the case in court. By taming the wild horse of human rights to conform to the constitutional order, “human rights” become “rights guaranteed under the Constitution.” In this article, human rights in the legal sense are sometimes referred to as constitutional rights or fundamental rights.⁴

If human rights in the legal sense are inherent to the Constitution, then the nature of the Constitution itself becomes an issue. It is often explained at the beginning of university, the word “constitution,” or “Verfassung” as they say in German, takes its meaning from composition, structure, or organization. Therefore a constitution is the law that constitutes and organizes a state. Indeed, when looking at the chapters of any country’s constitution, provisions for the legislature, executive, judiciary, local or federal government, and finances can be found, indicating that the constitution defines the major structure⁵ of the state. Rulers must follow the Constitution regarding the organization of the nation, and must realize the interests of the whole while following it. The Constitution is not a set of rules written for the people that they must abide by, but a set of rules written for the state⁶ that the state must abide by.⁷ The human rights established therein are also

2 Yasuhiro Okudaira, “Constitution III: Rights Guaranteed by the Constitution” (Yuhikaku, 1993), pp. 20 et seq.

3 *Marbury v. Madison*, 5 U.S. 137 (1803).

4 Okudaira, *supra* note (2), p. 21.

5 In Japan, the distinction is often drawn under the name of ‘human rights’ and ‘governance,’ but in German constitutional law classes and textbooks, the distinction is made as fundamental rights (Grundrecht) and state organization law (Staatsorganisationsrecht).

6 The American Declaration of Independence, which also influenced the U.S. Constitution, contains a litany of misdeeds in governance by the King of England.

7 Many people may misunderstand that it is the people who must abide by the rules of the Constitution. Satoshi Yokodaido et al. “On Human Rights Education” Bulletin of the Educational Research and Practice, Faculty of Education, Kagoshima University 2009, Vol.19, 1-11, also points out the gap in understanding of human rights in the general public consciousness.

a “collection of don’ts,” primarily what the state is not allowed to do in order to achieve the common good.

(2) From Medieval Society to Modern Society

If the rights stipulated in the Constitution are addressed to the state because the entire Constitution is written to address the state, then one might wonder why the Constitution addresses only the state even when there are other powers that need to be controlled. This is because the constitutions that modern developed countries have are modern constitutionalist constitutions.

Modern constitutionalist constitutions, like the Constitution of Japan, take the modern state as the object of their composition and control. In medieval status societies prior to the modern state, individuals belonged to some status group, and each status group was subject to discipline and enjoyed privileges. Specifically, they belonged to so-called intermediate groups, such as the nobility, the church, or a guild (professional association). On the other hand, in modern society, the status system is dismantled by the state, and the public authority of non-state social forces is denied.⁸ Public power is monopolized by the state. In this dynamic, it is assumed that intermediate groups have been dismantled, and the only characters on the stage are the state and individuals. Therefore, in order for rights to be protected, it suffices that the rights imply “freedom from the state.” In modern society, the following are presumed to be true: ① the state monopolizes power; ② the people are the governed; and ③ the constitution establishes the rules that constitute and simultaneously bind the state (division of power) and guarantees the people their rights of protection from the state (guarantee of rights).

Another consequence derived from this framework is the “principle of private autonomy,” meaning the issue of relations between private individuals should, in principle, be left to the judgment of the private individuals themselves. This position mimics the equality of private individuals in a situation where the status system is dismantled and power is concentrated in the state.⁹ However, if this assumption is not maintained, the question of how to secure freedom from private or social power, arises.

(3) Intermediate Groups and Individuals in Modern Society

In modern societies, forming a status or granting privileges to certain groups are often constitutionally prohibited. However, there can be groups that exert a strong, if not publicly, *de facto* influence. The quasi-equal power (in economic and social terms) of private individuals can no longer be maintained in the modern era.

From a constitutional perspective, there are three possible prescriptions: ① include not only the state but also a certain level of social power as the addressee of the constitution, and extend the effect of constitutional norms, including rights provisions, to such social power; ② consider the dismantling of intermediate organizations, which is the premise for the establishment of the constitutionally bound modern state, and

⁸ Yoichi Higuchi, “Human Rights” (Sanseido, 1996), pp. 18, 37. The individual there is placed in a state of “being freed from the restraints of the status community and at the same time thrown out of its protection—in that sense, ‘doubly automatic’” (Ibid., p. 50).

⁹ Higuchi, *supra* note 8, p. 19.

weakening such organizations that have power comparable to that of the state (see Chapter 3 for a competition law perspective)¹⁰; and ③ for organizations that would affect all spheres of life, regulate the relationship with the state through the Constitution (item 3 in this article). In the following, ① will be discussed in Section 2, ② will be talked about in Section 3, and ③ will be discussed in the Conclusion section.

Bearing in mind the growing size of the DPF companies, the situation is serious and may become even more so in the future.¹¹ How can the Constitution respond to this? Globally, various responses are being prepared, or have already been taken, with the advancing Behemoth in mind.

2 The Addressee for Constitutional Rights

(1) The Private Individual Effectiveness Theory of Constitutional Rights

① The Understanding in Japan

As already mentioned, the state is the addressee for the rights provided in the Constitution, not the people. In other words, it is the state that must adhere to the Constitution. If it were only the state that wielded power, the people would be fine as long as they were protected from the state, but in reality, individuals and groups emerge that may not be as powerful as the state, but are still powerful in society. The issue is that no matter how powerful an individual or group may be, in principle, the Constitution has no effect on them. The question then becomes whether the effect of the Constitution extends to the relationship between private individuals. This is the so-called “private individual effectiveness theory.”

Typically, when a legal dispute arises between a large corporation and consumers, employers and employees, the press and those being reported, or a public facilities and its users, there are many situations in which it seems as if Constitution should be given effect considering the difference in power between the two parties.. For example, if a company discriminates in hiring them part-time workers, or employees’ ideology or beliefs are investigated when deciding whether to hire them, when a news organization or the press violates the honor or privacy of the person being reported, or when a person is denied access to a public bathhouse because they are a foreigner, private individual effectiveness becomes an issue.

There are three main constitutional responses to this: ① the null force theory, which holds that constitutional rights do not extend to private citizens. This is the most natural, given the Constitution’s origins and nature; ② the theory of direct effect, which holds that private persons are also the addressees of rights—this is a rather radical theory and is not well supported because it would fundamentally change the original concept of the Constitution; and ③ the indirect application theory, which takes into account the principles of

¹⁰ This is an antitrust idea, but given the role that Behemoths play, their purpose and effect is broader in that they contribute not only to a free and fair competitive order, but also to a free and democratic social order.

¹¹ Tatsuhiko Yamamoto, “The Paradox of ‘Hyper-Individualism’” (Koubundou, 2023), notes that in Japan, “a substantive constitutional theory that responds to fundamental changes in the social structure and even shifts in power has not been fully developed...A constitution that is not conceived in the digital space will become a mere piece of paper with a very narrow scope in the near future.”

the Constitution when interpreting and applying the provisions of private laws (such as the Civil Code) that resolve disputes between private parties. This theory is widely supported because it is reasonable in allowing the constitutional ideas to be read into private law decisions without directly applying the Constitution to private parties.

If the problem is an overly powerful DPF (Behemoth), then either ② the theory of direct application or ③ the theory of indirect application would allow the Constitution to be given effect in some way. However, ② and ③ are very different in terms of how they give effect. This is because the basic structure differs between cases where constitutional rights function between private individuals and cases where these rights are exercised against the state. The problem in cases where rights take effect between private parties is that both private parties in conflict have rights. For example, just as the person being reported has the right to their honor and privacy (Article 13 of the Constitution), media organizations and publishers have the right to freedom of expression (Article 21), and just as employees have the right to freedom of thought and belief (Article 19), companies have the right to hire freely (Article 22). In such cases, it cannot be said that either right or freedom has *a priori* priority, but must be determined on a case-by-case basis. In contrast, the state is not the subject of constitutional rights meaning the state cannot assert rights. As mentioned above, constitutional rights are intended to give weak citizens legal weapons against an overly powerful state with a monopoly on public power. Thus, only citizens who can claim constitutional rights, and the rights and freedoms of the people (as opposed to the public interest that the state can claim) take precedence in principle. Even with private citizens, if the direct application of ② is insisted upon, one private party cannot claim rights in the same way as the state, and will be placed in an *a priori* disadvantageous position. Considering the varying strengths and weaknesses of private relationships, although the direct application of ② should not be used for all private relationships, it may be necessary to separately consider the case of DPF operators who are so powerful that they are referred to as “new rulers.”¹² Assuming that this is the case, the question is what is the *Merkmal* (standard characteristic) that should be used to determine which private citizens should have the constitutional rights directly applied.

② Emergence of Direct Application in Germany

In Germany, there is already a case that could be considered a direct application of constitutional human rights (called fundamental rights in Germany) to private citizens.¹³ This was not initially a case against a DPF, but it constitutes a logic that could be applied to a DPF and is indeed now starting to be used against a DPF.

(a) Fraport Case Ruling (2011)¹⁴

In this case, Fraport AG, the operator of Frankfurt Airport, prohibited access to airport facilities for the

12 See Eijiro Mizutani, “Toward a Theory of Online Platform Governance,” *Hanrei Jiho* No. 2487 (2021), p. 110.

13 Vgl. *Anna-Bettina Kaiser*, Privatautonomie, in: Matthias Jestaedt/Hidemi Suzuki (Hrsg.), *Verfassungsentwicklung III*, Mohr Siebeck 2021, S. 7 describes the decision to ban stadium admission as having “gone from indirect third-party effect (indirect application) to a de facto direct third-party effect (direct application)” (Explanations in parentheses by Ishizuka).

14 BVerfGE 128, 226. See Miki Kadota, “Freedom of Assembly and Management Rights on Private Property,” *Hougaku-seijigaku Ronkyu* No. 128 (2021), p. 128 et seq.

purpose of demonstrations, and the Regional Court of Frankfurt am Main ruled in favor of such a ban. But the Federal Constitutional Court ruled that this decision violated the Constitution (freedom of assembly), and based its decision on two decisive reasons. First, although Fraport is a private company, it is majority-owned by the state, which is directly bound by fundamental rights, and the Fraport side could not assert fundamental rights to the contrary. This put the demonstrators in a superior position in principle. Second, the protection of freedom of assembly extends to spaces open to the public (public forums), not only in public facilities such as public streets and community centers, but also in privately operated shopping centers and airports. This means that with the exception of some areas, such as the departure area after passing through security checkpoints where admission is generally restricted, demonstrations are more likely to be allowed, albeit with some limitations. However, it remains unclear which of these reasons primarily justified the demonstrators' position.

⑥ Beer Can Flash Mob Decision (2015)¹⁵

The following case developed by generalizing the second reason of the Fraport case decision. In this case, a rally was planned in a plaza outside a shopping mall, which included a performance of drinking beer *en masse* to assert freedom in a public space. In response to this, the business that owned the plaza prohibited the rally, which the district court approved. In response, the Federal Constitutional Court issued a preliminary order vacating the court's ban. The state was not involved in this enterprise, and therefore the first ground used in the Fraport decision (state equivocation due to majority shareholding by the state) could not be used. According to the decision, while it is true that "a private landowning corporation is not directly bound by fundamental rights in the same way as state power," and that fundamental rights are only indirectly applied, it was stated as follows:

"A private citizen may be obligated by [the other party's] fundamental rights to a similar or exactly the same extent as the state, even though he or she has ... his or her own fundamental rights. This is especially true when the private citizen effectively attains an obligatory or guarantor status comparable to that of a traditional state. Depending on the nature of the guarantees and the case, indirect fundamental rights restraints on private citizens may approach or equal fundamental rights restraints on the state. In the protection of communication, this is taken into account, among other things, when a private entity takes upon itself the framing of conditions of public communication, thereby stepping into a function that was previously assigned *ex post facto* only to the state".

While the premise is that private corporations are people and not states, and therefore not directly bound by fundamental rights, it has been shown that there are cases in which private corporations are indeed bound by fundamental rights in the same manner as states. Furthermore, it has also been shown that the possibility of fundamental rights constraining private corporations is not necessarily limited to public forums related

¹⁵ BVerfG, 18.07.2015 - 1 BvQ 25/15.

to expressive activities, and that the setting of public forums are only one example of the application of fundamental rights..

© Stadium Admission Banning Decision (2018)¹⁶

The following incident does not involve expressive activities. In this case, a club banned soccer fans from entering its stadiums nationwide in response to their rioting. Again, the soccer club is a private entity, and only the indirect application of fundamental rights is at issue. However, in weighing the interests of the club and the fans, it was held that, among other things, the social significance of the service and the social power of one side played an important role. In addition, the organizer's own decision to hold a socially significant event, such as a soccer match, open to the public, "gives rise to a special legal responsibility from the Constitution even to private citizens. This private citizen may not use the right of decision, which here arises from the right of private management of property (Hausrecht)—which in other cases may arise from a monopoly or structural advantage—to exclude certain persons from such events without legitimate cause" and required objective reasons and other procedures such as prior hearings. In this case, the same basic rights restraints as the state were recognized not only in communication spaces, but also in events of social importance.¹⁷

④ "Third Way" Decision (2019)¹⁸

And finally, there came an incident that brought the DPF problem to the fore. In this case, the German far-right party "Third Way" (Der Dritte Weg) had its account blocked by Facebook for hate speech posts. The Regional Court ruled that the block was reasonable, but the Federal Constitutional Court ordered that the block be temporarily lifted pending the results of the European Parliament elections. The case involved Facebook and its influence in the following:

"The Petitioner (Third Path) uses the Respondent's (Facebook) services, and according to Facebook's advertising, 30 million people each month use its services to express their political views and take a position on daily political events. The use of this open forum for interaction and the expression of opinions is crucial for the Third Path, because it is by far the most popular social media in terms of number of users. Access to this irreplaceable medium is crucial for the dissemination of their political platform and ideals. With this exclusion, the Third Path is denied the ability to spread its political message and actively discuss it with the users of the social network operated by Facebook. If a temporary order is not issued, this opportunity will be blocked for the Third Path and the visibility of the Third Path and its arguments will be significantly affected during this period".

Here, although it was a temporary stay, it is assumed that the "social significance of the service and the social power of one side" as described in the decision to ban stadium entry was taken into account.

16 BVerfGE 148, 267.

17 *Kaiser*, Fn. 13, S. 7. The constraints in this case are considered "state equivalent" because "no more than objective reasons and especially procedural legal requirements are imposed on the state in similar cases."

18 BVerfG Beschluss 22.5.2019, 1 BvQ 42/19.

⑤ Summary

As described above, in Germany, the same basic rights restraints as those of the state are extended to private citizens under certain “special circumstances,” albeit within the framework of indirect application. If “the social significance of the service and the social power of one side” is taken into consideration, then “the same basic rights as those of the state” will almost always apply in relation to the giant DPFs and their operators, and it is conceivable that a situation may arise where, even within the framework of indirect application, it may in fact be said that direct application is possible.

In this regard, Kaiser, who also contributes to Chapter 2, section II of this book, advocates “dominant thinking” where even under “certain special circumstances,” “private, large-scale operators can still avail themselves of basic rights,” but are also subject to the basic rights of the users, which are usually in conflict.¹⁹

③ Sprouting of Direct Application in Japan?

In Japan, too, there have been discussions in the framework of public forums that have held private citizens to be bound by fundamental rights. This is the supplementary opinion of Judge Masami Ito in the famous Kichijoji Station (Speech and Flyers) case.²⁰ “When guaranteeing the freedom to communicate one’s claims and opinions to society, it is important to secure a forum for the expression of those claims and opinions. In particular, when the exercise of freedom of expression involves action, a physical place for expression is necessary. If this place is not provided, it is fair to say that many opinions cannot be conveyed to their recipients. Each place to which the general public has free access has its inherent use, but at the same time it often serves as a place for expression. Streets, parks, and squares are examples. We can call this a ‘public forum.’ When public forums are used as places of expression, even though they are subject to restrictions based on ownership and management rights for their intended use, it is necessary to give as much consideration as possible to guaranteeing freedom of expression in light of their function.”

“Public property such as roads, and places subject to private ownership and control, even if they are freely accessible to the general public, are different by nature and cannot be referred to as the same thing. However, when the latter also has the nature of a public forum, the guarantee of freedom of expression cannot be ignored, and in such cases, it is necessary to determine how to adjust the freedom of expression and ownership and management rights according to each specific situation. As such, there may be cases in which it is unacceptable to regulate the act of expression in light of the guarantee of freedom of expression. As for “railroad land” (Article 35 of the Railway Operation Law), which is relevant to this case, it is understood to mean, as the court opinion states, land and areas owned or controlled by a railroad operating company that are directly used for railroad transportation operations, such as the station platforms, halls, and tracks that are directly used for railway transportation operations, as well as station plazas that are inextricably linked to such operations. However, among these, station plazas for example, may have a strong public forum character depending on the specific circumstances, and in such cases, there is a strong possibility of unconstitutionality if the distribution of leaflets in such a place is punished as a violation of the Article. In

¹⁹ Kaiser, Fn. 13, S. 14.

²⁰ Supreme Court of Japan (SCJ), December 18, 1984 Judgement, Keishu Vol. 38, No. 12, p. 3026.

such cases, it must be determined whether or not the distribution of leaflets can be punished on the basis of a similar concept to that of public property.”

This, though a supplementary opinion, can indeed be described as the Japanese version of the Fraport Case Decision. The fact that in the 1980s, the Supreme Court of Japan had already extended the public forum doctrine to include private citizens as well, and had already developed the argument that private citizens should be bound by fundamental rights, is something we can be proud of. However, this view did not have a significant influence on subsequent court opinions, nor was it sublimated by linking it to the theory of private human efficacy in a more generalized manner, as in Germany. In this sense, the German argument is groundbreaking in that it liberated public forum theory from “physical space” to include the digital space, as well as from constitutional freedom of expression. On the other hand, there remains room for further discussion as to what exactly constitutes a situation where private individuals are de facto included as addressees of fundamental rights.

In a recent Japanese case²¹ involving the search engine of Google, a part of GAFA, the Supreme Court stated:

“The search engine operator comprehensively collects information published on websites on the Internet, stores copies of the information, organizes the information by creating an index based on the copies, etc., and provides information corresponding to certain conditions indicated by users as search results based on the index. Although the collection, organization, and provision of this information is automatically performed by the program, the program is designed to obtain results in accordance with the policy of the search engine operators regarding the provision of search results, and thus the provision of search results is an act of expression by the search engine operators themselves. The provision of search results by search engine operators also supports the public in transmitting information on the Internet, and obtaining what they need from the vast amount of information on the Internet, and plays a major role as the foundation of information distribution on the Internet in modern society. If the provision of specific search results by search engine operators were to be deemed illegal, requiring their removal, this would constitute not only a restriction on consistent acts of expression in line with the aforementioned policy, but also a restriction on the above role played by the provision of search results.” (emphasis added by Ishizuka)

This decision reflects the consideration Google’s freedom of expression, emphasizing the importance of the service to the public. If so, it seems to add weight to that consideration. If so, then the importance of the service and its public role work in Google’s favor, contrary to the direction taken in Germany.²² On the other

21 SCJ, January 31, 2017 decision, Minshu, Vol. 71, No. 1, p. 63.

22 A similar logic can be found in the Hakata Station case (SCJ, November 26, 1969 decision, Keishu, Vol. 23, No. 11, p. 1490), in which the court held that “the freedom of reporting for the press is also fully worthy of respect in light of the spirit of Article 21 of the Constitution” because the press “serves the ‘right to know’ of the people. However, this case was a “case against the state” in which the court’s order to submit a television film was challenged, and there is room for doubt

hand, if Google cannot assert freedom of expression (or freedom of expression is fundamentally inferior), as in Germany, the importance of the service and its public role may indeed be factors that justify the search service itself. Still, for each infringing effect, the proportionality of the purpose and the means (the legitimacy of the purpose, and the suitability, necessity, and appropriateness of the means) must be questioned from the perspective of whether the state's infringement of constitutional rights is justified.

This case, in which the plaintiff sought to remove search results related to his arrest record and other information, saw the Supreme Court establish an equitable framework in favor of Google, stating as follows:

“If the legal interest in not disclosing the facts is clearly superior, it is reasonable to interpret that the court may request the search service provider to remove the URL or other information from the search results.” (emphasis added by Ishizuka)

Conversely, it may be worth reconsidering whether this case falls under the “special circumstances” in which, as Kaiser suggests, the “dominant thinking” favorable to users should be applied.

(2) **Obligation to Protect Fundamental Rights**

It is usually in judicial situations that the private effect of constitutional rights becomes an issue. As can be seen from the use of the terms “direct application” and “indirect application,” the argument is based on the application of the law (in this case, the Constitution), or specifically, the application of the Constitution by the judiciary. However, the Constitution is not only significant in the courtroom. In the first place, it is preferable that disputes that would lead to a trial do not happen, and for the purpose of complex interests involving multiple actors, it is better if various procedures are stipulated so that the constitutional interests of each can be more smoothly coordinated. To do this, legislation to protect and coordinate constitutional rights is often necessary.

Constitutional rights—especially those called liberty rights—traditionally require the state not to infringe on rights. But recently, not only that but constitutional rights are seen as obliging the state to protect a person's rights from being violated by a third party. This means that the constitutional right requires not only state inaction (non-regulation) but also state action (to regulate third party violators). This is called the obligation to protect fundamental rights²³ and is an established precedent in Germany by the Federal Constitutional Court. And it is first and foremost the legislature that must fulfill this obligation.

For example, DPFs may violate interests that should be protected by constitutional rights by leaving posts that violate the rights of honor, privacy, and copyright, or by deleting users' posts and accounts. However, as already mentioned, the rights guaranteed by the Constitution are not, in principle, directly addressed to the DPF, so that the violation of human rights by the DPF does not directly become a constitutional issue (as

as to whether the importance and public nature of the service should be emphasized even in cases against private parties.

23 See Go Koyama, “Theory of the Obligation to Protect Fundamental Rights,” in Makoto Oishi and Kenji Ishikawa (eds.), *Constitutional Disputes* (Yuhikaku, 2008), p. 86 et seq.

mentioned above, private interpersonal effects can be taken into consideration).

By contrast, since the obligation to protect fundamental rights obligates the state to protect constitutionally guaranteed interests, the question of the constitutional addressee does not arise. The legislature, as part of the state, must protect citizens' rights to freedom of expression (Article 21 of the Constitution), honor and privacy (Article 13), and copyright (Article 29), and is constitutionally mandated to enact laws to prevent DPFs, which are a third party, from infringing on these rights. Of course, in order to reconcile the interests of private parties, there is a possibility of conflict between them in a way that each has a constitutional interest, and the legislature is granted discretion as to the specific degree and how to protect them, but it is not considered constitutionally permissible to leave them alone without taking any action.

In such cases, the argument in 2 (1) ② mentioned before may also come into play. In fulfilling its obligation to protect fundamental rights, the legislature must balance both the rights of the defendant and the rights of the plaintiff, but if the DPF, as the defendant, is shackled with fundamental rights restraints equivalent to the state, the rights of the defendant could be disregarded or at least undervalued than the interests of the plaintiff.

① Protection of Personal Information (Right to Privacy)

The European Charter of Fundamental Rights, the EU's catalog of human rights, explicitly provides for the right to data protection in its Article 8 (paragraph 1), stating that "Everyone has the right to the protection of personal data concerning him or her." The controversial GDPR (EU General Data Protection Regulation) aims to protect personal data from private companies, and the GDPR can be seen as the EU's fulfillment of its obligation to protect individuals from private companies under the same right.

In Japan, at least certain personal data is considered to be protected under the right to privacy arising from Article 13 of the Constitution. The Act on the Protection of Personal Information, which was established to ensure the proper handling of personal information by businesses, can be considered legislation that fulfills the obligation to protect the right to privacy²⁴ (of course, it can be constitutionally questioned whether the current legal system is adequate²⁵).

② Protection of Human Rights from Social Media

In Germany, the Network Enforcement Act (commonly known as NetzDG or the 'Facebook Act') was enacted in 2017 to reduce the posting of illegal content on social media in violation of certain criminal law provisions. The law "imposes on social media operators the obligation to remove illegal content, to respond to complaints to fulfill such obligations, to develop procedures, and to report on the status of responding to complaints, and provides for a fine to be imposed for violations of these obligations."²⁶ Clearly illegal content must be removed within 24 hours of a filed complaint, and all illegal content must be removed or blocked within one week of a complaint.

24 See Yamamoto, *supra* note (11), p. 125 et seq. (Masatomo Suzuki and Yamamoto remarks).

25 As a critical opinion, Yamamoto, *supra* note (11), p. 87 et seq.

26 Hidemi Suzuki, "Germany's Social Media Countermeasures Law and Freedom of Expression," *Media Communication* 68, no. 1 (2018), p. 1. See also the same "2021 Amendment to Germany's Social Media Countermeasures Law," *Media Communication* 72, no. 1 (2022), p. 1.

The EU has also enacted the Digital Services Act (DSA) in 2022, which includes measures to deal with illegal content, transparency requirements and reporting obligations, and service design requirements. The DSA will take precedence over the German Network Enforcement Act, so after February 2024, when the DSA goes into effect, the German Network Enforcement Act will no longer be applicable.

③ Protection of Human Rights from AI

The EU is moving forward with regulations for AI, which is expected to be used more widely in the future in various fields. 2021 saw the publication of the AI Regulation Bill, which is already in the process of being enacted. The AI Regulation Bill adopts a risk-based approach, and the higher the risk of AI, the stricter the regulations become. Article 5 of the bill, for example, prohibits subliminal techniques that act subconsciously, and the abuse of a person's physical or mental vulnerabilities. This could be considered a regulation that, in effect, protects the right to self-determination.

(3) Human Rights Strategies for the Behemoths

As described above, there are two major human rights strategies that can be used against the Behemoth-like DPF operators. The first is to apply constitutional rights constraints to the Behemoth in (civil) courts. Although constitutional rights constraints traditionally only apply to Leviathans, by treating Behemoths as equals to Leviathans, similar constraints are applied to Behemoths and as much as possible create an “equal arms” situation with private citizens.

Second would be to command the Leviathan to make rules to ensure that the Behemoth does not violate human rights. Constitutional rights work on the Leviathan to create human rights protection legislation, regulating the Behemoth through law, establishing procedures for actions that risk violating human rights, and setting sanctions for violations. This would force the Leviathan to preemptively coordinate the interests between the Behemoth and citizens.

3 Constitutionalization of the Digital Space

Such strategies presupposes that the Behemoth is within a certain scale, because: ① if the Behemoth of the digital society becomes too large, citizens will have no choice, and even if they are legally free, they will de facto have no freedom; and ② both strategies assume a balance of interests in the judicial and legislative arenas (including the executive that enforces them), but this will not work unless the Behemoth is contained within the forum of the Leviathan and listens to what the Leviathan has to say. It is necessary to touch on this point as well.

(1) Liberalization of Society: Issue for Legal Freedom

The Constitution contains provisions on various rights. For example, the so-called freedom rights—the freedom of religion, freedom of expression, freedom of occupation, freedom of person, and inviolability of home—are guaranteed. These freedom rights guarantee legal freedom. In other words, freedom from re-

strictions by the state. However, just because people are free from restrictions by the state does not mean that they can do absolutely anything they want. There are still social restrictions.

A clear example of this is the relationship between freedom of occupation and antitrust law. Even if one is legally allowed to start a business, if there is already a monopolist in that industry, it would be practically impossible to start up a business. In this case, although freedom of occupation is not legally restricted, it would not be possible to exercise it in practice.

Today, many countries impose legal restrictions on monopolistic businesses to avoid such a situation, because even if freedom of occupation is legally ensured, it is meaningless if it cannot be exercised in practice, and to protect the benefits of a market economy. According to the prevailing view of constitutional jurisprudence, such antitrust regulations constitute a restriction on occupational freedom because occupational freedom includes the freedom to operate a monopoly business.²⁷ In contrast, if one believes that occupational freedom does not include the freedom to run a monopoly, but rather protects the free operation of business in society, then it follows that antitrust law is rather a law that promotes occupational freedom.²⁸ Whether the Constitution requires the establishment of social preconditions for the exercise of freedom (social freedom²⁹) is an issue to be examined on a clause-by-clause basis.

Whether the dynamic of “state regulation vs. legal freedom” or “social restrictions vs. social freedom” is focused on depends on the circumstances. For example, in a society with many restrictions, social liberalization must occur before the removal of state discipline can lead to freedom. In such a case, the state must first promote the liberalization of society (however, once society becomes free and state regulation comes to the forefront, legal freedom will then become more important).

The 1798 French Declaration of the Rights of Man and of the Citizen did not provide for freedom of association and is said to have taken an anti-association individualist position, where “associations of the same trade (corporations) were considered to protect the privileges of the few at the expense of the many, and unduly restricting individual freedom.”³⁰ The realization of this ideal was achieved through the 1791 d’Allarde Law, which banned guilds and guaranteed freedom of business, and the Le Chapelier Law, which prohibited trade associations. The main objective of the Le Chapelier Law was “to create a free labor market by banning not only feudal and privileged guilds, but also workers’ unions.”

In Germany, during the Stein-Hardenberg Reforms in Prussia of early 19th century, the October Imperial Decree liberated the peasants from their serfdom, granting various freedoms. At the same time, an imperial decree for freedom of business was also issued, which led to the North German Federal Business Decree, and

27 See Masami Ito, *Constitution* [3rd ed.] (Koubundou, 1995), p. 360 et seq.

28 Higuchi, *supra* note (8), p. 85 et seq., calls this “substantive freedom by the state” and cites the Antitrust Law and other laws as examples.

29 Go Koyama, “‘Constitutional Rights’: The Specifics (12),” *Hogaku Seminar* No. 59 (2014), p. 68: “Free occupational choice and occupational activity are realized through free competition in society, in addition to freedom from restrictions by the state. Article 22 Paragraph 1 (of the Constitution) is understood to include the objective value determination of the order of free competition in addition to the guarantee of subjective rights” (text in parentheses by Ishizuka).

30 Hisanori Murata, “A Trial Theory of the History of Freedom of Association in France,” *Hougaku-ronshu* of Kansai University, vol. 49, no. 1 (1999), p. 56.

then to the Weimar Constitution of 1919, Article 153 (paragraph 3), which guaranteed freedom of business (Gewerbefreiheit).³¹

The zaibatsu dismantling and agrarian reforms that were part of the economic democratization policies promoted by the GHQ in postwar Japan may have had various objectives, but at least in their effect, they promoted social freedom in that they removed obstacles to the social exercise of economic freedom.

(2) Is the Digital Space a Medieval Society?

In transitioning from a medieval class-based society to modernity, it is assumed that the behemoths, as massive social entities, have disappeared, and that too-big-to-control associations no longer emerge, particularly in the economic domain, due to factors such as antitrust laws. However, Behemoths are born not only in the economic sphere, but also in the spheres of expression and self-determination.

Relative to this, the digital society has a short history and few state regulation tailored to its characteristics. The digital society is inhabited by Behemoths that have grown to enormous size through the gaps and loopholes in regulation. And the history of digital society tells us that it has yet to pass through the anti-association stage³² and has therefore not become liberalized or constitutionalized.³³ People rely on a variety of systems and platforms to live in the digital society, most of which are run by private companies. Intermediate organizations that are too large not only distort the economic market, but also have the potential to sacrifice constitutional human rights such as the right to privacy and the right to self-determination, as well as affect elections, the very foundation of democracy.³⁴ For various human rights to be actually guaranteed, DPFs must not be too big to control. In this regard, the Facebook case in Germany, in which the constitutional interest of consumer self-determination as well as the fairness of transactions were considered in the abuse of a superior bargaining position prohibited under the antitrust law, is instructive.³⁵ In addition, with regard to the nature of merger regulations for DPF operators, it may be worth considering the use of the “comprehensive business capabilities” concept taking into account the characteristics of DPFs (see Chapter 3, section II).

Conclusion

So at the end of the day, can the Constitution be a behemothic straitjacket?

This article has focused on the Constitution, particularly focusing on the addressee of its rights. The problem is that the Behemoth is not the addressee of the Constitution and the rights it establishes. As a pre-

31 Masahiro Akasaka, “The Concept of Freedom of Occupational Execution and Freedom of Business,” *Rikkyo Hogaku* vol. 91 (2015), pp. 134 et seq., 127.

32 See Yoichi Higuchi, “Comparative Constitutional Law, 3rd Edition,” (Seirin Shoin, 1992), p. 520.

33 See Yamamoto, *supra* note (11), p. 217 et seq.

34 See Eijiro Mizutani, “Fake News and Legislative Politics,” *Socio-Informatics*, vol. 8, no. 3 (2000), p. 52 et seq., including on the Cambridge Analytica case.

35 Takahiro Arai, “Digital Platforms and the Right to Informational Self-Determination,” *Digital Society and the Constitution*, a web series by Japan Institute of Constitutional Law (2022).

scription for controlling the Behemoth, we have examined: ① making the Behemoth the addressee of constitutional rights in certain cases (direct third-party effect); and ② deriving an obligation for the Leviathan to control the Behemoth (obligation to protect fundamental rights). Approach ① has already begun to take shape in Germany, and approach ② is an established legal principle in Germany, and the logic appears to be actively used in the EU although the term “obligation to protect fundamental rights” itself is not often used.

Moreover, the exercise of constitutional rights does not occur in a vacuum. Just because someone is free from state regulation does not mean they are free to do anything, and must exercise their rights within the context of social conditions. In fact, it is a prerequisite that society be free in order for rights to be exercised in practice. Creating the conditions for this is not generally mandated by constitutional rights. Modern society is premised on a state of freedom in which intermediate groups do not have too much power, but that premise may not necessarily be shared in the digital society. In such cases, one might say that human rights need to take into account their own preconditions.

If the Behemoth grows too large for either of these strategies to work, it will be necessary to incorporate the DPF into the Constitution and make it part of the governance structure. One method of controlling DPFs has also been presented, similar to the concordat between the church and state.³⁶ The question of how to evaluate the relationship between the state and the DPF will be discussed in Chapter III of this book.

³⁶ Yamamoto, *supra* note (11), p. 318 et seq.