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Constitutional Aspects of the National Identification Number System in Japan

Keigo Fuchi*

Introduction

On March 9, 2023, the Supreme Court of Japan handed down a decision regarding the constitutionality of Japan's national identification number system.¹ In *Ishimura v. Japan*, the court held it was constitutional but issued a narrow ruling. In this note, I introduce this court's decision and explain the key to understanding it. I divide the Japanese Supreme Court cases on information privacy into two categories. Then, I assign the 2023 decision to a category in which the disclosure or leakage of personal information, rather than the collection and storage of personal information, is in question. I also point out that the serious threat national identification numbers might pose against a citizen's constitutional rights is not only in making the collection and disclosure personal information easier, but also in making constitutional rights contingent on the discharge of civic duties and, therefore, vulnerable.

I. What is a national identification system?

First, I explain what a national identification system is. It is “a nationwide system for identifying individuals. It consists of linking a database of information about individuals to an identifier, so that individuals can be readily connected to a stream of data about them.”² Typically, such a system contains a national identification number as an identifier, to which various types of personal information are tethered. The government issues ID cards to individuals with a photo and the number under the system on the surface.

However, the range of personal information connected to a national identification system varies. In some systems, only information on taxation and social security is linked. In other cases, more information such as a driver's license and child support may be attached to the system. The amount of personal

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¹ Saikō Saibansho [Sup.Ct.] Mar. 9, 2023, Rei 4 (o) no. 39, 77 Saikō Saibansho minji hanreishū [Minshū] 627 (Japan). An English translation is available at https://www.courts.go.jp/app/hanrei_en/detail?id=1939 (last visited June 28, 2024).

² Daniel J. Solove & Paul M. Schwartz, *Information Privacy Law* 736 (5th ed. 2015).

information necessary to identify an individual also varies. In some systems, such as India's Aadhaar card, an applicant for a card must submit biometric information, including a facial photograph as well as fingerprints and an iris scan.³ In other cases, personal information connected to a system may be limited to name, date of birth, and address.

Therefore, determining whether a country has a national identification system is difficult, if not impossible. It is often said that the United States does not have a national identification system. The idea of a national identification system was rejected in the United States several times in the latter half of the twentieth century.⁴ However, the social security number in the United States is used not only for the Social Security program for which the number was originally established, but also for federal tax matters, participation in many government programs, and obtaining a driver's license.⁵ That's why privacy advocates in the United States have labeled the social security number a *de facto* national identification number and have criticized the abuse of the social security number.⁶

II. A road to the introduction of a national identification number in Japan

In Japan, several identification numbers have been used for a limited policy purpose.⁷ Since 1982, we have had a twelve-digit number on our driver's license card,⁸ and since 1997, we have had a ten-digit "basic pension number" when we enroll in the Japanese public pension system.⁹

However, the unavailability of universal personal identification numbers makes it difficult to achieve policy goals in certain areas. Before the Identification Act of 2002 was enacted,¹⁰ we did not have to present any official certificates when opening a bank account. This lack of identification was problematic for at least two

³ Madison Julia Levine, *Biometric Identification in India Versus the Right to Privacy: Core Constitutional Features, Defining Citizens' Interests, and the Implications of Biometric Identification in the United States*, 73 U. Mia. L. Rev. 618 (2019), 635.

⁴ Solove & Schwartz, *supra* note 2, 736.

⁵ Kathleen S. Swendiman & Emily M. Lanza, Cong. Research Serv., RL30318, *The Social Security Number: Legal Developments Affecting Its Collection, Disclosure, and Confidentiality* (2014) 2-3.

⁶ R. Brian Black, *Legislating U.S. Data Privacy in the Context of National Identification Numbers: Models from South Africa and the United Kingdom*, 34 Cornell Int'l L.J. 397 (2001), 398-99.

⁷ For an overview of the numbers, see Masako Mizumachi, Yasashii Bango Ho Nyumon [An Introduction to the Act on the Use of Numbers to Identify a Specific Individual in Administrative Procedures] 17 (2014) [in Japanese].

⁸ Keisatsu cho kotsu kyoku unten menkyo kacho [National Police Agency, Traffic Bureau, Head of License Division], *Unten menkyosho no bango no keishiki oyobi naiyo ni tsuite* [On the form and contents of a number on the driver's license], <https://www.npa.go.jp/laws/notification/koutuu/menkyo/menkyo19810910.pdf> (last visited June 28, 2024) [in Japanese].

⁹ Japan Pension Service, *Basic Pension Number and Basic Pension Number Notice*, <https://www.nenkin.go.jp/international/japanese-system/basicpensionnumber/basicpensionnumber.html> (last visited June 28, 2024). See also Shigenori Matsui, *Is "My Number" Really My Number?: National Identification Numbers and the Right to Privacy in Japan*, 47 Syracuse J. Int'l L. & Com. 99 (2019), 106-07.

¹⁰ Kinyu kikan to niyoru kokyaku to no honnin kakunin ni kansuru horitsu [the Act on Identification of Customers by Financial Institutions] (Act No. 32 of 2002). This act was superseded by hanzai niyoru shueki no iten boshi ni kansuru horitsu [the Act on Prevention of Transfer of Criminal Proceeds] (Act No.22 of 2007).

reasons. First, the bank accounts may be used for fraudulent purposes. Second, the tax authority may face enormous difficulty in associating financial gains with an individual when it enforces personal income taxation.

From the late 1960s to the 1980s, the government of Japan tried in vain to introduce a national identification number system several times. Around 1970, a universal individual number was proposed to improve administrative efficiency in both national and local governments.¹¹ However, this proposal faced fierce opposition from the people.¹² They feared that they would all be provided with a uniform number to which almost all personal information was linked. In 1979, the government's Tax Commission first recommended the introduction of a taxpayer identification number. However, the government and Diet did not follow the recommendations, and instead enacted an identification system without a number, only for banking transactions.¹³ Postal Service lobbyists fiercely opposed the system because it would reveal illegally exempt postal savings and because they believed that funds would escape from postal savings to other financial instruments. Consequently, the system was abolished without coming into effect.¹⁴

Under the Democratic Party (DPJ) administration (2009–13), the introduction of a national identification number system was seriously considered. In 2013, after the Liberal Democratic Party and Komeito returned to power, the Number Use Act was enacted.¹⁵ The Act enables the identification of an individual through a national identification number for taxation, social security, and disaster prevention (Article 9). All residents of Japan, regardless of their nationality, are provided with a twelve-digit individual number (Article 7). The government issues an Individual Number Card upon request (Article 17), although it strongly recommends having one.

III. *Ishimura*: the lawsuit and the decision

Many human rights advocacy groups have brought lawsuits against the government claiming that the Number Use Act is unconstitutional. One lawsuit filed by a group in Fukuoka reached the Supreme Court. The plaintiffs primarily argued that the government's use and provision of the plaintiffs' personal information, including their identification numbers, under the Number Use Act, illegally infringed upon their right to privacy.¹⁶

In an opinion delivered by Justice Takuya Miyama, the first petty bench of the court considered whether the Number Use Act conflicted with Article 13 of the

¹¹ Keigo Fuchi, *Nihon no Nozeisha Bango Seido* [The Taxpayer Identification Number System in Japan], 67 *Nichizeiken Ronshu* [Journal of Japan Tax Research Institute] 33 (2016), 44-45 [in Japanese].

¹² *Id.* at 45-47.

¹³ *Shotokuzeiho no ichibu wo kaisei suru horitsu* [Act to Revise Income Tax Act] (Act No. 8 of 1980). See Fuchi, *supra* note 11, 49-50.

¹⁴ Fuchi, *supra* note 11, 50-51.

¹⁵ The Act on the Use of Numbers to Identify a Specific Individual in Administrative Procedures (Act No. 27 of 2013). Matsui, *supra* note 9, calls it the "My Number" Act.

¹⁶ 77 *Minshū*, at 644.

Constitution of Japan and held the Act constitutional. The decision first declared that “Article 13 of the Constitution provides that citizens' liberty in private life shall be protected against the exercise of public authority, and it can be construed that, as one of the individuals' liberties in private life, every individual has the liberty of protecting one's personal information from being disclosed to a third party or made public without good reason.”¹⁷ This is a verbatim statement of the court's general statements in *Hashimoto v. Moriguchi City*.¹⁸ Let us call this constitutional right articulated by the court the right against disclosure of personal information by others.

Next, the decision considered whether the administrative agencies' use and provision of personal information under the Act violated the constitutional right against the disclosure of personal information of the plaintiffs.¹⁹ Here, the court's review centered on whether the relevant provisions of the Act justified intervention with the right. On the one hand, the court found that the Act has a justifiable administrative purpose. On the other hand, the court found that the relevant provisions of the Act limited the use and provision of personal information to the justifiable administrative purposes.

While the court approved the purpose of the Act and the use and provision of personal information under it, the court did not stop there. Instead, it reviewed whether the personal information connected to the identification number is in immediate danger of unauthorized disclosure to a third party through leakage or illegal data matching.²⁰

The court did not find any immediate danger, for these three reasons. First, there are several measures to prevent the leakage of personal information, including criminal sanctions and monitoring by a third party. Second, the risk of leakage or unauthorized use of personal information is low because personal information connected to the identification number is stored in a decentralized network and transferred individually as encrypted data. Third, the disclosure of national identification numbers does not necessarily result in the disclosure of tethered personal information.

In conclusion, the court clarified that the administrative agency's disclosure or leakage of personal information -- or the possibility thereof -- is justified as a reasonable constraint on a citizen's constitutional right to not have one's personal information disclosed to a third party or made public without good reason.²¹

¹⁷ 77 Minshū, at 652.

¹⁸ Saikō Saibansho [Sup.Ct.] Mar. 6, 2008, Hei 19 (o) no. 403, 62 Saikō Saibansho minji hanreishū [Minshū] 665, 682 (Japan). An English translation is available at https://www.courts.go.jp/app/hanrei_en/detail?id=1276 (last visited June 28, 2024).

¹⁹ 77 Minshū, at 653-54.

²⁰ 77 Minshū, at 654-56.

²¹ 77 Minshū, at 656.

IV. An analysis of the case law in Japan regarding personal information from *Hasegawa* to *Ishimura*

Article 13 of the Constitution of Japan stipulates as follows.

All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

In *Hasegawa v. Japan*, handed down in 1969, the Supreme Court of Japan recognized people's liberty in private life and held the following:²²

"This provision [Article 13 of the Constitution] can be construed to mean that citizens' liberty in private life should be protected against the exercise of state power, including police power. As part of such citizens' liberty in private life, any person has the right to not have his face or appearance photographed without consent or good reason. Apart from whether such a liberty can be referred to as a right of portrait, it must be said that if a police officer, without good reason, has photographed the face or appearance of a citizen, such an act should be regarded as being in violation of the purport of Article 13 of the Constitution, and therefore it is unconstitutional."

In retrospect, *Hasegawa* was the first case in which the court recognized the right against one's personal information gathered under the auspices of people's liberty in private life. Although no facial recognition technology exists, the face or appearance of an individual is used as a biometric identifier.²³

In 1995, the Supreme Court added fingerprints as another example of personal information protected by the right. In *Fujiyoshi v. Japan*, referring to *Hasegawa*, the court held that "since Article 13 of the Constitution can be construed as stipulating that the people's liberty in private life shall be protected from the exercise of state power, each individual, as part of her liberty in private life, has the freedom of not being compelled to be fingerprinted without due cause, and it is against the purport of Article 13 and therefore unconstitutional for the state organ to compel any individual to be fingerprinted without just cause."²⁴

In several cases decided between the 1980s and the 2000s, the Supreme Court did not have to apply nor refer to Article 13 of the Constitution when it protected personal information collected by others from leakage or disclosure. Some

²² Saikō Saibansho [Sup.Ct.] Dec. 24, 1969, Sho 40 (a) no. 1187, 23 Saikō Saibansho keiji hanreishū [Keishū] 1625 (Japan). An English translation is available at The Constitutional Case Law of Japan: Selected Supreme Court Decisions, 1961-70 (Hiroshi Itoh & Lawrence Ward Beer, eds., 1978), at 178-82.

²³ For biometric identification, see e.g., Margaret Hu, Biometrics and an AI Bill of Rights, 60 Duq. L. Rev. 283 (2022), 286.

²⁴ Saikō Saibansho [Sup.Ct.] Dec. 15, 1995, Hei 2 (a) no. 848, 49 Saikō Saibansho keiji hanreishū [Keishū] 842 (Japan). An English translation is available at https://www.courts.go.jp/app/hanrei_en/detail?id=236 (last visited June 28, 2024).

of these cases were disputes between private citizens; therefore, the Constitution was not applicable. In other cases, the court was able to protect personal information through the interpretation of statutes. However, in these cases, the court declared that several types of personal information are protected against disclosure to the public, even if others had already gathered such information.

In *Ikemiya v. Kyoto City*, handed down in 1981, the court made clear that “a person's previous convictions and criminal records are matters that directly affect the honor and reputation of the person, and an individual who has previous convictions and criminal records has a legally protected interest in preventing the information from being disclosed without reason.”²⁵ In *Kono v. Isa*, handed down in 1994, the Supreme Court held that the holding of *Ikemiya* “equally applies irrespective of whether the facts concerning the person's previous conviction were disclosed by a public agency, or by a private individual or organization.”²⁶ Moreover, in 2003, the court held that personal information including the fact that an individual is a student who, through one's own will, had applied for participation in the lecture of Jiang Zemin (the head of the People's Republic of China at that time), is legally protected as a part of one's right or interest of privacy and that the holder of such information (Waseda University) was “not allowed to disclose more information to others than is necessary without being based on the will of the individual.”²⁷

In *Hayashi v. Shinchosha, Co.*, the Supreme Court differentiated between the right against one's personal information being gathered and the right against others disclosing one's personal information.²⁸ In this case, the plaintiff, an accused in a well-known criminal case, sued a publisher for damages, arguing that the publisher defamed her by illegally taking photographs of her in the courtroom with her arms handcuffed and her waist tied with a rope, and by publishing the pictures and drawings based on the images in its photography magazine. Citing *Hasegawa*, the court first declared that “anyone has a legally protected personal interest not to have one's face or appearance photographed without consent or good reason.”²⁹ It also stated that “it is reasonable to construe that anyone has the personal interest not to have the photographs of one's face or appearance published without good reason.”³⁰ It further proclaimed that “anyone has a personal interest not to have illustrations of one's face or appearance published without good reason.”³¹ While the lower courts had analyzed the right to not have one's face photographed, the

²⁵ Saikō Saibansho [Sup.Ct.] Apr. 14, 1981, Sho 52 (o) no. 323, 35 Saikō Saibansho minji hanreishū [Minshū] 620 (Japan). An English translation is available at

²⁶ Saikō Saibansho [Sup.Ct.] Feb. 8, 1994, Hei 1 (o) no. 1649, 48 Saikō Saibansho minji hanreishū [Minshū] 149 (Japan). An English translation is available at https://www.courts.go.jp/app/hanrei_en/detail?id=1300 (last visited June 28, 2024). “Kono” is a name used in Japan to represent the family name of a person whose identity is intentionally concealed. See also Shigenori Matsui, *The Constitution of Japan: A Contextual Analysis* (2011) 203-04.

²⁷ Saikō Saibansho [Sup.Ct.] Sep. 12, 2003, Hei 14 (ju) no. 1656, 57 Saikō Saibansho minji hanreishū [Minshū] 973 (Japan). An English translation is available at https://www.courts.go.jp/app/hanrei_en/detail?id=650 (last visited June 28, 2024).

²⁸ Saikō Saibansho [Sup.Ct.] Nov. 10, 2005, Hei 15 (ju) no. 281, 59 Saikō Saibansho minji hanreishū [Minshū] 2428 (Japan). An English translation is available at https://www.courts.go.jp/app/hanrei_en/detail?id=783 (last visited June 28, 2024).

²⁹ 59 Minshū, at 2433-34.

³⁰ 59 Minshū, at 2434.

³¹ 59 Minshū, at 2435.

right to not have one's photograph published, and the right to not have illustrations of one's face published simultaneously, the Supreme Court distinguished these three rights. Although the essence of the court's distinction was between photographs and illustrations, the contrast between the collection and disclosure of personal information was also illuminating.

As previously mentioned, the Supreme Court in *Hashimoto* set forth a constitutional right against the disclosure of personal information by others.³² Thus, the court now derives several rights regarding personal information from Article 13 of the Constitution of Japan. On the one hand, it recognizes the right against one's personal information being gathered, as in *Hasegawa* and *Fujiyoshi*. On the other, it authorizes the right against disclosure of personal information by others, as in *Hashimoto* and *Ishimura*.

In *Hashimoto* and *Ishimura*, the plaintiffs sought an injunction against using their personal information keyed to the identification number under consideration.³³ To determine whether to grant an injunction, the court examined whether there was an immediate danger of disclosure. In both cases, it did not find any immediate danger of disclosure.

Although I agree with the court's conclusion in *Ishimura*, I think the decision left an issue that national identification numbers may cause unanswered. The national identification may make civic responsibilities a necessary condition for a constitutionally protected right or interest. In other words, once we have a national identification number and connect various kinds of personal information about an individual, it is possible to give the individual an incentive to discharge civic duties, such as payment of taxes and child support, through a threat to withhold beneficial governmental benefits, such as social security benefits, a driver's license, and possibly a right to vote. The question left unanswered by the court is the extent of the link between duty and benefits that the Constitution permits. In some cases, the link might deprive a person of their liberty or autonomy and, therefore, become unconstitutional, especially when essential benefits are at issue.

However, the constitutionality of these measures is difficult to analyze. There are at least two reasons for this difficulty. First, we cannot review whether the level of intervention in an individual's constitutional rights (e.g., denial of a driver's

³² See *supra* note 18.

³³ In Japan, Article 199 of the Civil Code of 1896 stipulates that a possessor may apply for an injunction against a potential trespasser. It is generally believed that a property owner may apply for an injunction, too. Moreover, the Supreme Court, in a decision in 1986, held as follows: "It should be construed that a person whose reputation, objective appreciation he receives from society concerning his worth such as his character, virtue, reputation, trustworthiness, etc., has been illegally injured may seek not only claim for damages (Article 710 of Civil Code) or an order requiring the defamer to take suitable measures for the restoration of the injured reputation (Article 723 of Civil Code), but also an injunction to remove existing defamatory act or to prevent defamation that should occur in the future. Because reputation is an eminent legal interest under the protection of the law as with life and body, it would be said that a right to reputation as a right of the person is exclusionary in the same way as a property right." Saikō Saibansho [Sup.Ct.] June 11, 1986, Sho 56 (o) no. 609, 40 Saikō Saibansho minji hanreishū [Minshū] 872, 877 (Japan). An English translation is available at https://www.courts.go.jp/app/hanrei_en/detail?id=82 (last visited June 28, 2024). See also Matsui, *supra* note 26, 198-99.

license) is proportional to the level of harm to the conduct of the person (e.g., child support arrearages) because the intervention is not a penalty; therefore, the level of the intervention is not required to be proportional to the undesirability of the conduct. Second, there is a trade-off between the effectiveness and cruelty of the measures. The more harshly a measure intervenes in constitutional rights, the more effectively it achieves its policy goals.