MAJOR JUDICIAL DECISIONS

Jan.–Dec., 2003

1. Constitutional Law

X v. Waseda
Supreme Court 2nd P.B., September 12, 2003
Case No. (*jyu*) 1656 of 2002
57 MINSHU 973; 1837 HANREI JIHO 12; 1134 HANREI TAIMUZU 98

Summary:

A case in which the Supreme Court ruled that the University acted illegally by sending police a list of people who applied to attend a university-sponsored lecture meeting by former Chinese President Jiang Zemin, saying it violated the applicants' privacy by disclosing personal information without their consent.

Reference:

Civil Code, Articles 709 and 710.

Facts:

Y (the university) planned a lecture meeting inviting former Chinese President Jian Zemin as a main speaker, who visited Japan as a state guest, and carried it out on November 28, 1998. Y consulted the Metropolitan Police Department before the lecture meeting, which was in charge of guarding him. The Metropolitan Police Department required Y to submit a list of people applying to attend a lecture meeting in advance and Y agreed to it. In the list was mentioned such information as a student identification number, a name, an address and a phone number, which each student had filled in. Y, however, did not notify the students that it was sending a list to the police and thereby did not obtain their consent. X (three undergraduate students at Y) sued Y for damage claiming that Y's sending a list to the police without their consent would constitute a civil wrong violating their privacy. At an inferior court, they argued the undeserved punishment by Y for their obstructing the lecture as well as Y's violation of their privacy.

Tokyo District Court (October 17, 2001) and subsequent Tokyo High Court (July 17, 2002) dismissed X's claim saying that Y's disclosure would not deviate from social convention and thereby would remain a legal action. X appealed to the Supreme Court demanding compensation only from Y for violating their privacy. This has a companion case where plaintiffs argued a single issue on the privacy violation caused by Y from the outset. Although they lost the case at Tokyo District Court (April 11, 2001), their claim was approved at Tokyo High Court (January 16, 2002), and the appeal from Y was turned down.

Opinion:

Reversed and Remanded by a 3 to 2 decision.

(1) Opinion of the Court:

With regard to the information Y required in advance from those who wished to attend this lecture meeting, the student identification numbers, names, addresses, telephone numbers, and the information that the person is a student who actually attended the lecture meeting, were simple information, and to this extent the necessity for secrecy was not so urgent. However, even with respect to the aforementioned personal information,

it is natural that a principal would want no more information than is necessary to be disclosed to others whom the person would not let know, and because this expectation should be protected, the personal information involved in this case should deserve legal protection as the Appellants' private information.

Because this type of private information may harm the individual rights and interests depending on how it is handled, it must be treated with great care. Although it can be considered easy for Y to ask for the consent of students with respect to the disclosure by clearly specifying that the list they fill in would be submitted to the third party, Y did not take the measures of obtaining the appellants' consent and disclosed the personal information to the police without their permission. These actions taken by Y betrayed Appellants' reasonable expectation that the private information they voluntarily provided would be appropriately managed, and therefore constitute a civil wrong as an invasion of Appellants' privacy.

(2) Dissenting Opinion:

Even though the personal information involved in this case is one concerning privacy, it is the kind of information that the appellants would voluntarily reveal on necessity in basic social interactions or simple information used for personal identification, and therefore, due to its nature, the degree of sense of expectation not to be known by others is low. The list of this case was formed in order to smoothly carry out the management and administration of the lecture meeting of this case. There was a great need for security in this case because the lecture meeting was to be given by a state guest, the President of the People's Republic of China, and thereby there was a justifiable reason for Y to submit the copy of the list of this case to the Tokyo Metropolitan Police Department, which was responsible for security, upon its request. Considering both the party to which the personal information was disclosed and the method of disclosure, the action taken by Y coincides with its own purpose as a promoter of the lecture meeting to ensure full security for the lecture meeting, and it is clear that Appellants did not suffer any substantial injury as a result of the disclosure.

Taking all of the above facts into consideration, the disclosure of the

personal information of this case cannot be deemed an illegal act that exceeded the acceptable limit under social convention.

Editorial Note:

The notion of privacy has been developed mainly in the U.S. since 1890 when Samuel D. Warren and Louis D. Brandeis wrote a famous article titled "The Right to Privacy" (4 HARV. L. REV. 193), where privacy was characterized as "the right to be left alone". Nowadays also in Japan, it is undisputable that privacy is an interest protected in tort law and invasion of it will constitute a civil wrong. Despite the fact that the right of privacy is not explicitly guaranteed by the Constitution of Japan, there exists a broad consensus that it is implied in Article 13 of the Constitution, which provides the right to the pursuit of happiness or being respected as individuals, though there remains still a continued controversy concerning the contents and scope of privacy.

It was not until the "After the Banquet" [*Utage no Ato*] case (Tokyo District Court, September 28, 1964), where the plaintiff claimed that the novel written by Yukio Mishima illegally revealed his private life, that the notion of privacy had been articulated in the history of the Japanese jurisprudence. And there the court not only conceptualized privacy as the right for a private life not to be disclosed except for a legitimate reason to do so, but also formulated the conditions in which the damage caused by privacy infringement ought to be redressed as follows; the contents disclosed concerns those which are the facts of his/her private life or seemingly so; ordinary people will not expect such information to be disclosed if they put themselves in the plaintiff's place; the facts are unknown to society at large and thereby a plaintiff is actually offended or feels uneasy. Since then the Supreme Court has decided this type of case without using the term privacy, though it plainly premised its judgement on the notion of privacy. In two famous cases, "a nonfiction 'The Reversal' [*Gyakuten*]" case (Supreme Court 3rd P.B. February 8, 1994), which was concerned with the disclosure of a plaintiff's previous conviction, and "A Fish Swimming in Stone" [*Ishi ni Oyogu Sakana*] case (Supreme Court 2nd P.B. March 14, 2003) where, the plaintiff, allegedly the model of the novel, argued that the novel disclosed private information such as personal history, physical characteristics, and her family relationships,

the Supreme Court found a privacy invasion examining the aforementioned three requirements, regardless of not using the term privacy.

Recently among academics, another notion of privacy, that is, the right to control his/her personal information for themselves, has become more and more popular. This might reflect the present highly developed information-oriented society, where people have to control non-sensitive information as well as sensitive information, though the former is expected to be disclosed to some extent for social interactions.

Given the background as noted above, it will be obvious that the Opinion of the Court relied not on the three-requirements-theory, but on the control-personal-information-theory, in contrast with the Dissenting Opinion. The Dissenting Opinion found that simple information, chiefly used for identification, such as name, address and phone number, would be less important than sensitive information like one's thought, creed and financial conditions, and so the disclosure of simple information would not easily pass the three-requirement muster. The Dissenting Opinion next weighed the interests of the appellants against those of the appellees, the urgent necessity of security during the lecture meeting, and eventually decided in favor of the latter. On the contrary, the Opinion of the Court reasoned that even non-sensitive information should be protected from unreasonable disclosure without the principal's consent, perhaps because such information would have commercial value for those who plan advertising by direct mail or telemarketing, or still worse, would be enough for those who commit stalking or spamming. In this way, non-sensitive information might be more valuable than sensitive information depending on the context. Therefore the Opinion of the Court affirmatively recognized the right to control personal information including non-sensitive information personally, and so decided that disclosure without a principal's consent alone will constitute a civil wrong violating privacy, regardless of the nature of information.

Today, for everybody, controlling all of one's personal information for oneself gets more and more difficult, as information technology is developing rapidly. This decision characterized privacy as the right to control personal information personally, and announced that those who handle other persons' information for their own purpose should act carefully and must not supply them to the third party without prior con-

sent of individual concerned. The significance of the decision cannot be overestimated.

2. Administrative Law

Isobe v. Prime Minister
Nagoya High Court, Kanazawa Branch, January 27, 2003
Case No. (*gyo-ko*) 12 of 2000
1818 HANREI JIHO 3; 1117 HANREI TAIMUZU 89

Summary:

This "Monju" case is a review by an appellate court on an appeal that was already been reported in the Waseda Bulletin of Comparative Law, vol. 20, 143–153 (MIZUSHIMA, Asaho/TSUCHIYA, Kiyoshi). The appellate court vacated the judgment, confirmed that the permission to establish Monju by the defendant was invalid, and reversed.

Facts:

In 1980, the Power Reactor and Nuclear Fuel Development Corporation (which has been reorganized as the "Japan Nuclear Cycle Development Institute" since 1998) applied to the defendant, the Prime Minister for permission for the Corporation to be able to establish Monju (a prototype fast breeder reactor) in Tsuruga City, Fukui Prefecture. In 1983, after review by the Atomic Energy Commission and the Nuclear Safety Commission, the defendant permitted this application. In 1985, residents living around Monju filed a suit against the Corporation for an injunction against the construction and the operation (civil action), and filed a suit against the defendant seeking for an invalidity confirmation of the permission to establish Monju by the defendant (administrative litigation).

The district court denied all the plaintiffs' standings and dismissed the petition (Fukui District Court, December 25, 1987, 38 GYOSHU 1829). But the appellate court recognized the plaintiffs' standings only