The Asia-Pacific Journal: Japan Focus
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Mr. Hashimoto Attacks Japan's Constitution

Lawrence Repeta

The Hashimoto Survey

On February 6, 2012 Osaka Mayor Hashimoto Toru issued an order to all Osaka City employees compelling them to disclose personal information concerning labor union activity, their support for political candidates, and other sensitive matters. The survey includes such questions as "In the last two years, have you participated in any activities in support of a particular politician?" and "In the last two years, has a co-worker ever requested that you vote for a particular politician?" It goes on to request the identities of such co-workers or others who invited the respondent to participate in political activities. Each respondent must provide name, employee number and work description. (An English translation of the Hashimoto Survey is found at the end of the article.)

Mayor Hashimoto Toru

Although most questions in the Survey require respondents to identify themselves, the Survey also provides directions to a designated "reporting window" that creates the opportunity to snitch on one's enemies anonymously.

Mr. Hashimoto's cover note includes a stiff reminder that he's the boss: "this questionnaire is not a voluntary matter. It requires factually correct responses from all employees by order of the Mayor. In cases where responses are not true, penalties may be applied."

The audacity of this inquiry into workers' political and union activities and relationships is breathtaking. This is an intellectual strip search designed to enable the Mayor to create detailed personal profiles of all Osaka City employees. If these survey results are compiled, Mr. Hashimoto will be able to identify his political supporters and opponents with a few key strokes and then be free to find ways to reward and punish at his leisure. Protections for fundamental rights have been embedded in democratic constitutions all over the world and in international human rights treaties precisely to protect against this kind of abuse of power.

Japan's Constitutional Protections

In Japan's case, most lawyers would quickly point to several constitutional provisions that might protect Osaka employees who seek to keep their political affiliations to themselves. There is Article 19, which guarantees "freedom of thought and conscience," Article 21, which guarantees freedom of speech and association, and Article 28 which guarantees the right to organize. The national bar association issued a statement on February 16 making precisely these points. Noting that government employees enjoy constitutional protections, the JFBA statement labels the Survey as "an excessive restriction (on those protections) clearly lacking in necessity and propriety." For the full text of the statement, see here.

Why would Mayor Hashimoto take such questionable action? Throughout history powerful leaders have declared that extraordinary circumstances compel them to put aside the ordinary rules in order to act decisively in the public interest. The Mayor must think his time has come. In a nation led by colorless men who mumble meaningless phrases in hope they will not offend anyone, Hashimoto is different. He is a charismatic leader, unafraid to speak his mind. People seem to crave this kind of leader; Osaka voters rewarded him with a big majority in last year's mayoralty election.

Like most democratic constitutions, however, Japan's version is designed to place fundamental rights beyond the reach of aggressive politicians. The courts are charged with reviewing the actions of government and determining whether or not they meet constitutional standards.

The right most directly threatened by Mr. Hashimoto may be Article 19 of Japan's Constitution, which declares that "freedom of thought and conscience shall not be violated." The Mayor may well respond that Osaka workers are free to hold any political beliefs and engage in any political activities they like, as long as they tell him what they are. This raises the question whether the right to freedom of thought and conscience includes a right to maintain the privacy or confidentiality of those thoughts. This question has appeared in various forms in cases decided by the Supreme Court of the United States.

U.S. Supreme Court Precedents—the Right to Anonymous Speech

Do people have the right to maintain anonymity in their political behavior? Nearly every country provides for secret ballots in elections, but what about political speech? Mr. Hashimoto tells Osaka workers, for example, that they must disclose whether they have "participated in any activities in support of a particular politician." In a number of cases, the Supreme Court of the United States has upheld the right of anonymous speech. For example, in the landmark 1960 decision in *Talley v. California*, the Court voided a Los Angeles city ordinance that required anyone distributing handbills in the city to disclose their names and addresses on each handbill. The Court declared this unconstitutional, emphasizing "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression."[1]

The U.S. Supreme Court has also stressed that the right to freedom of association is closely related to freedom of speech. According to the Court, "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." The Court has also said that the freedom of association applies to virtually any form of group activity: "Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic,

religious or cultural matters…"[2] The Hashimoto Survey requires respondents to disclose not only their own political activities, but to identify their union memberships and their comrades. This appears to be an attack on both their right to freedom of association and to free speech, due to the inevitable chilling effect produced by Hashimoto's disclosure order.

The Right to Freedom of Association and the Right to Privacy

Probably the most famous "freedom of association" decision by the U.S. Supreme Court is a case that raised the constitutionality of the Alabama state government's order to the NAACP to disclose the identities of its members. Aware of the close cooperation between the state government, the police, the Ku Klux Klan, and other racist organizations, NAACP leaders refused to disclose the membership list. They knew that if members were identified, they would be subject to retaliation, including police harassment and violent attacks.

In its 1958 decision, the Supreme Court addressed the same right to confidentiality of political associations attacked by the Hashimoto Survey. A unanimous U.S. Supreme Court closely linked the right of association to the right to privacy. In the Court's words, the "privacy in group association may in many circumstances be indispensable to preservation of freedom of association."[3]

In 1960, the Court confirmed that this right of privacy applies to government employees when it struck down an Arkansas statute that "required every teacher, as a condition of employment in a state supported school or college, to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years." Noting that "the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy," the Court held the Arkansas requirement to violate the constitutional freedom of association.[4] Supreme Court decisions like these played an important role in closing an ugly chapter in American history in which Senator Joseph McCarthy and others led a fierce attack on the civil liberties of workers and intellectuals, including the rights to free association, to join unions, and to silence, in the 1950s in the United States.

Every reasonable Osaka employee will try to avoid "displeas(ing) those who control his professional destiny." The Hashimoto Survey will inevitably have a chilling effect on union activities and on political activities – except perhaps for activities in support of the Mayor.

As noted above, in the United States the concept of freedom of association protects individuals who gather to promote a wide range of beliefs, including "economic" matters, thus encompassing union activities. In Japan's case, the right of workers to organize is specifically protected by Constitution Article 28; thus, labor union lawyers argue that the Survey constitutes an unfair labor practice.

Although the U.S. Supreme Court has explained the close relationship between privacy and freedom of speech and association and other rights, neither the Constitution of Japan nor the United States explicitly guarantees a right to privacy. Over the past decade Japan's local and national governments have nevertheless adopted rules protecting "personal information." (*kojin joho*) Article 6 of Osaka city ordinance explicitly prohibits the gathering of information concerning "thought, beliefs and religion" or any other information that may be the cause of social discrimination (*shakaiteki sabetsu*), including "race, ethnic group (*minzoku*), or criminal history." For the text of the ordinance, see here.

It almost seems as if the authors of this rule foresaw the coming of Mr. Hashimoto. Their language tracks Constitution Article 19 and clearly prohibits the city government from gathering the kind of information he seeks. This apparently robust protection, however, is transformed into a very weak reed by further language in Article 6 that empowers the government to set aside the ban when absolutely necessary (*hitsuyo fukaji*).

Judicial Review in Japan and the United States

As noted above, modern democratic societies rely on constitutions to provide the most important protection for individual rights. When government authorities restrict our rights, we rely on the courts to uphold them. In Japan, this is where the most serious problem lies.

Japan is not the United States and the Supreme Court of Japan has taken a very different approach to constitutional interpretation. One will search in vain for precedents like the American cases described above. In fact, in 65 years of litigation under Japan's Constitution, its Supreme Court has never found even a single case where the actions of government have violated the constitutional rights of free speech or freedom of thought and conscience.

Many readers know that a series of cases involving constitutional claims to freedom of thought and conscience were recently decided by Japan's Supreme Court. These cases arose from confrontations between individual teachers and local boards of education, especially the Tokyo Board of Education, over compulsory rituals performed at public school ceremonies. (See "Politicians, Teachers and the Japanese Constitution: Flag, Freedom and the State,") Hundreds of teachers refused orders to stand before the Hinomaru flag and sing the *kimi ga yo* hymn. Penalized with salary cuts, removal from classrooms and assignments to a "re-education camp," and other punishments, they filed suit. To explain their claims of violations to the right to belief and conscience, they filed individual statements with the courts describing the anguish and emotional injury they experience due to the powerful association of these pre-war rituals with worship of a divine emperor, the horrors of war and other features of authoritarian and militaristic government in pre-war Japan.

In 2011, all three panels of Japan's fifteen-member Supreme Court issued final judgments against these teachers, holding that the governmental interest in promoting patriotism outweighs individual rights of conscience. (See Tom Ginsburg's comment here. In a January 2012 ruling on the issue, a panel of the Supreme Court appeared to begin the process of rethinking its support for mandatory participation in these ceremonies. Lonely dissenting opinions were published by two justices who had practiced as private attorneys prior to their appointments to the Supreme Court.

There can be no doubt that the light regard for freedom of thought and conscience displayed by the Court in these cases emboldened Hashimoto and his advisors to push the envelope. Hashimoto has also persuaded the Osaka City Assembly to pass an ordinance requiring teachers to stand and sing the *kimi gay yo* anthem. See link. The Supreme Court itself opened the door to the Hashimoto Survey. Recent reports indicate that Hashimoto may recognize that he's gone too far and withdraw the Survey. But in view of the supine posture adopted by the Supreme Court when confronted by claims for protection of individual rights, we can expect Mayor Hashimoto and others to continue to crack the whip, seeking ways to impose their preferred rituals and beliefs on members of Japanese society who do not share them.

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society in the "Handbook of Japanese Culture and Society," edited by Theodore C. Bestor and Victoria Bestor. He is the author and translator of the survey.

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Notes

[1] Talley v. California, 362 U.S. 60 (1960)

[2] Both quotations are from NAACP v. Alabama, 357 U.S. 449, 460-61 (1958)

[3] NAACP v. Alabama, 357 U.S. 449, 462 (1958).

[4] Shelton v. Tucker, 364 U.S. 479 (1960).

Osaka City Government Survey

February 9, 2012

To All Employees

Concerning this Survey

Illegal and improper political and union activities by city employees have appeared one after another.

I have requested Special Advisor Nomura Shuya to conduct a thorough investigation to clarify the circumstances. It is my intention to drain and remove this festering wound. (*nou wo dashikiritai*)

As an initial step, I am conducting the attached survey under the supervision of Special Adviser Nomura.

Please complete the survey with the following points in mind.

1. This survey is not voluntary. This is an order from the office of the Mayor requiring all employees to provide accurate factual responses. Those not providing accurate responses will be subject to punishment.

2. The answers to the survey questions will be seen only by a special team composed of members individually appointed by Advisor Nomura. (All members will be from outside City Hall.)

These answers will not be seen under any circumstances by your superiors, the Office of Personnel Management, or any other employee of City Hall.

Survey responses will be collected via the official portal or an affiliated department. All precautions have been taken so that there will be no leaks of information. Therefore, if you answer the questions truthfully, please be assured that there will be no trouble in the workplace, and no detriments from a personnel point of view.

In addition, in the event that you truthfully report your own illegal acts, the degree of punishment will be reduced from the standard; there will be no dismissals except in especially egregious cases.

With the foregoing in mind, please respond truthfully and accurately.

Osaka Mayor

Hashimoto Toru (signed)

Reference **(Attachment)**

Use the "Survey Site" of the official portal for your responses. Paper responses will not be accepted, so please use the "Survey Site."

Q1 Please write your name.

Q2 Please write your employee number.

Q3 Please indicate your department.

Q4 Please indicate the nature of your work.

(Translator's note: This question is followed by a list of 49 work categories.)

Q5 Please indicate your rank.

(Translator's note: This question is followed by a list of 10 ranks.)

Q6 Have you participated in any labor union activities conducted by Osaka City Hall unions concerning work conditions? (Those presently not affiliated with unions please answer citing past experiences).

Note: You need not write the names of persons who invited you. You can submit such information anonymously to the reporting window identified at the end of this survey.

1. I was not invited. I participated on my own.

2. I participated because I was invited.

What was the nature of the activity?

Who invited you?

The place where you received the invitation?

The time you received the invitation?

3. I have not participated, but have been invited.

What was the nature of the activity?

Who invited you?

The place where you received the invitation?

The time you received the invitation?

4. I have never participated nor been invited.

5. I have never joined a union.

Q7 In the last two years, have you participated in any activities in support of a particular politician? (This includes cases where you provide addresses of acquaintances or similar information to political campaigns or attend public speeches by politicians.) (Please answer regardless of whether or not you are a member of a union.)

Note: You need not write the names of persons who invited you. You can submit such information anonymously to the reporting window identified at the end of this survey.

1. I was not invited. I participated on my own.

2. I participated because I was invited to do so by a union.

What was the nature of the activity?

Who invited you?

The place where you received the invitation?

The time you received the invitation?

3. I participated because I was invited by someone outside the union (e.g., a superior).

What was the nature of the activity?

Who invited you?

The place where you received the invitation?

The time you received the invitation?

4. I have not participated but have been invited to do so by a union.

What was the nature of the activity?

Who invited you?

The place where you received the invitation?

The time you received the invitation?

5. I have not participated but have been invited to do so by someone outside a union (e.g., a superior).

What was the nature of the activity?

Who invited you?

The place where you received the invitation?

The time you received the invitation?

6. I have never participated nor been invited.

Q8 In the last two years, has a coworker ever requested that you vote for a particular politician? (Please answer whether or not you

are a member of a union.)

Note: You need not write the name of the person who requested you to vote. You can submit such information anonymously to the information window identified at the end of this survey.

1. I have been so requested.

a. Request from a union (including union officers).

Who requested you to vote?

b. Request from someone unrelated to a union (e.g., a workplace superior).

Who requested you to vote?

The place where you received the request?

The time you received the request?

2. I have not been so requested.

Q 9 The following questions concern so-called "Introduction Cards." (This is a card with the purpose of providing information concerning relatives and acquaintances to the political campaign of a specific candidate.)

Note: You need not write the name of the person who handed you the card, requested that you hand out the cards, or told you not doing so would be a disadvantage. You can submit such information anonymously to the information window outlined below this survey.

(1) In the last two years have you ever been handed an "Introduction Card?"

1. Yes, and I accepted it.

Who gave you the card?

Where? (e.g., at the office)

When? (e.g., during a lunch break)

2. Yes, however I did not accept it.

Who gave you the card?

Where?

When?

3. I distributed "Introduction Cards."

Who requested you to hand out the Cards?

What was the means of distribution?

4. I have never been handed an "Introduction Card."

(2) Please answer only if in question (1) you answered that you "accepted."

Did you fill in and return the card?

1. I filled in the card with information about my acquaintances, relatives, etc. and returned the card.

2. I returned the card without filling in any information about my acquaintances, relatives, etc.

3. I did not return to the card.

(3) Please answer only if in question (2) you answered that you filled in the card and returned it. What was the reason for filling in the card and returning it?

1. Because I wanted to support the candidate mentioned in the card.

2. I was told that I would suffer some disadvantage if I did not cooperate.

Who told you?

Where were you told?

When were you told?

What kind of disadvantage?

3. I was not directly told that not cooperating would be a disadvantage, but I thought that not filling in the card and returning it would result in a disadvantage.

Why did you feel that way?

What kind of disadvantage did you think would result?

Q10 Do you think union officers are given preferential treatment at the workplace? (Please answer whether or not you are a member of a union.) If that is the case and it is difficult to specify such preferential treatment, explain the concrete circumstances.)

1. Yes

Reason:

The reason it is difficult to specify:

2. No

Q11 The following questions concern hiring. (Choose all that apply. Please answer whether or not you are a member of a union or not.)

1. Some people have been given preferential treatment in hiring based on the recommendation of a politician.

2. Some people have been given preferential treatment in hiring based on the recommendation of a union officer.

3. Some people have been given preferential treatment in hiring based on the recommendation of a city employee.

4. Some people have been given preferential treatment in hiring based on the recommendation of someone other than a politician, union officer, or city employee. (Specify:)

5. I myself have been given preferential treatment in hiring based on the recommendation of one of the above.

(Specify: _____)

(Note: As a response to the lack of transparency in hiring of current employees, I am considering the establishment of a research system (*kenshu seido*); there will be no terminations solely because such a hiring took place.)

6. There are no cases of someone receiving preferential treatment in hiring based on a recommendation.

Q12 In the last two years, has an election ever become a topic of conversation at the workplace? (Choose all that apply. Please answer whether or not you are a member of a union.) Also, did you feel as if the intent of the conversation was to request your vote?

1. The topic came up during a chat with coworkers during break.

2. The topic was raised by a union officer during work hours in a conversation related to his/her official duties.

3. The topic was raised by a union officer during work hours, however the topic was not raised in a conversation related to his/her official duties.

4. The topic was raised by a superior during work hours in a conversation related to his/her official duties.

5. The topic was raised by a superior during work hours, however the topic was not raised in a conversation related to his/her official duties.

6. The topic was raised by co-workers or subordinates during work hours in a conversation related to their official duties.

7. The topic was raised by co-workers or subordinates during work hours, however the topic was not raised in a conversation related to their official duties.

8. The topic has never been raised.

Q13 Please select from the following list union and election activities which are thought to not be improper. (Choose all that apply. Please answer whether or not you are a member of a union.)

1. I find no problem with union activities held outside work hours and at the workplace.

2. Even if during work hours, I find no problem with union activities held outside the work place.

3. I find no problem with electioneering activities held outside work hours and at the workplace.

4. Even if during work hours, I find no problem with electioneering held outside the work place.

5. I do not consider asking for one's coworkers' relatives' contact information to be electioneering.

6. I do not consider distributing postcards supporting a candidate to one's coworkers to be electioneering.

7. I do not consider asking one's coworkers to attend a candidate's speech to be electioneering.

Q14 The following questions are concern how you felt about Osaka City public relations activities during the past 2 years. (Choose all that apply. Please answer whether or not you are a member of a union.)

1. The contents of documents distributed to city residents have supported the policies of specific candidates.

(Specify:)

2. Benefits directed to city residents have increased prior to elections.

(Specify:)

3. Advertising broadcast over television and radio have increased prior to elections.

(Specify:)

4. The policies of specific candidates were promoted through coordinated activities of city residents.

(Specify:)

5. Other.

(Specify:)

6. I have not particularly noticed anything.

Q15 Please describe any other concerns or observations regarding union or election activities in Osaka City.

( )

Q16 Are you a member of a union?

1. I am a member.

2. I am not currently a member, however I was one in the past.

What is the reason for you no longer participating?

a. I am no longer qualified to be a member.

b. Other.

For those who selected "other," please explain. (This question is voluntary.)

3. I have never been a member.

Please explain why you have never joined a union. (This question is voluntary.)

Q17 What do you feel are/were the merits of being a member of a union? (Please choose all that apply. Even if you are not currently a member of the Union, please answer this question. This question is voluntary.)

1. I do not feel there are any particular merits, but everyone is a member and so I joined too.

2. Because you can get along better with coworkers.

3. Because you can participate in a lot of recreational activities.

4. Because by joining, information becomes easier to acquire.

5. Because it would have a positive impact on promotions and transfers.

6. Other. (Explanation:_____ _____)

Q18 What do you feel is the strength of unions? (Please choose all that apply. Please answer regardless of whether or not you are a member of a union.)

1. Unions can improve work conditions.

2. It is easy to be hired with the recommendation of a union officer.

3. Unions have the power to influence policies of the City government.

4. Unions can have a positive influence on promotions and transfers of employees.

5. One can acquire much information related to the City government's policies.

6. One can acquire muchinformation related to employment personnel.

7. One can network with powerful figures in the local community.

8.Other. (Explanation: _____.)

Q19 What do you feel are the disadvantages of not joining (or quitting) a union? (Choose all that apply. Please answer regardless of whether or not you are a member of a union.)

1. It had a negative influence on relationships at the workplace.

2. There is a risk that it will negatively affect opportunities for promotion.

3. There is a risk of being transferred to an undesirable place.

4. Necessary information for accomplishing work tasks will become harder to obtain.

5. Powerful figures in the local community will keep an eye on you and make life difficult.

6. Other. (Explanation:_____ _____)

Q20 Have you ever discussed improvement of compensation or other work conditions with a union? (If you are not presently a

member of a union, please respond concerning past experiences.) If you have, what were the places and times?

1. I have discussed treatment at the workplace with a union.

Where did the discussion take place?

When did the discussion take place?

2. I have never discussed treatment at the workplace with a union.

Q21 Do you know in what ways the dues you have paid are being used by unions?

1. I am receiving ample explanation on how the dues are being used.

2. I am not sure, but I believe the funds are being properly used.

3. I am not sure, and I am troubled about whether or not the funds are being properly used.

4. I am not sure and I do not particularly care about the way the funds are used.

Q22 Following the 2005 "Employee Preferential Treatment Problem," efforts were made to make employer-employee relationships more fair. How did this affect your workplace? (Please answer whether or not you are a union member.)

1. Employer-employee relationships throughout the city have been made fairer, including in my workplace.

What were the previous problems?

2. Employer-employee relationships have been made more equal throughout the city, however the problem still persists in my workplace.

What is the current problem?

3. Nothing has really changed, and inequality in the employer-employee relationship still exists.

4. Other opinions. Please explain.

"Reporting Window" Report Deadline: March 15, 2012 (Thursday)

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