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Japan's Designated Secrets Protection Law Would Foreclose Criticisms of the Government

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Translation and Introduction by Hase Michiko

On December 6, 2013, Japan's Diet (national assembly) passed a controversial Designated Secrets Protection bill, having rushed it through both chambers in barely a month. Both the Liberal Democratic Party [LDP]-led administration that proposed the bill and the LDP-dominated Diet brazenly disregarded many voices of opposition, expressed in the public comments collected by the government (77% against and 13% for the bill), public opinion polls showing twice as many respondents opposing the bill as those in favor, daily demonstrations in front of the Diet building, and statements by an array of professional organizations: lawyers, journalists, academics, writers, film directors and actors, religious leaders as well as human rights and civil rights advocates. The law, promulgated December 13, 2013 and slated to take effect in a year's time, gives the government potentially unchecked power to designate government information as special secrets, some for an indefinite time, and to punish leakers much more harshly than now. Critics of the law fear that it will further restrict citizens' already limited access to government information and intimidate public officials, journalists, and citizens, thereby severely eroding the people's constitutionally guaranteed right to know. Despite the grave and far-reaching implications of the legislation that could seriously jeopardize democracy in Japan, the Abe Shinzo administration rammed the bill through the Diet in less than a month: the administration introduced the bill on November 7, and the Diet spent only 67-68 hours to deliberate it, a strikingly brief time compared with more than 210 hours each that the Diet had spent deliberating the 2005 Postal Service Privatization Act and the 2012 legislation relating to the comprehensive reform of social security and tax systems, commonly known as the tax hike legislation.

Although the bill has been passed, critics believe there is much work to be done: continuing to expose and criticize what is in the law and the process through which it was passed, attempting to prevent it from taking effect and, if that is not possible, monitoring and challenging its implementation so as to curb unbridled government power.

The article below was originally published in Japanese in the October 2013 issue of *JCLU [Japan Civil Liberties Union] Newsletter*. Although it was written before the passage of the legislation, we publish an English translation here because we believe the issues Professor Sakaguchi raises remain relevant and need to be shared with readers of English. -**HM**

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The Abe administration is pushing to pass a Designated Secrets Protection bill to harshly clamp down on leaks of state secrets. The government's draft bill identifies four categories of information as "special secrets"—"defense," "diplomacy," "prevention of activities that threaten security," and "prevention of terrorist activities"—and aims to drastically increase the maximum penalty, which is currently one year in prison under the National Public Service Act. Not only public officials who leak "designated secrets" but anyone who asks them to leak the information would also be punished.

The [governing] Liberal Democratic Party [LDP] is seeking to revise the Constitution to make the emperor Head of State and severely limit the people's freedom and rights. If the proposed bill becomes law, the people could completely lose control over the government even without constitutional revisions.

The Japan Civil Liberties Union invited Professor Sakaguchi Shojiro (constitutional law), Director of the Law School, Hitotsubashi University, to discuss some of the concerns raised by the proposed legislation.

(Reported by Kitakami Hidenori, a JCLU board member)

Secrets Protection Law Designed to Maintain Power

State power loathes being criticized. To maintain power, it prefers not to let damaging information come out.

If the State is empowered to prevent disclosure of state information, it could claim that such prevention would not raise issues of "freedom of expression."

The United States has armed forces and a law to protect state secrets. If Japan wants to conduct joint military operations with the United States, it has to comply with the U.S. secrecy law.[1] This is the background for the proposed secrecy law.

However, the draft bill reveals the government's intent to cast the legislation's scope much more broadly than that.

Lessons of the Fukushima Nuclear Disaster

As with the LDP's proposed constitutional revisions, I feel that the administration is proposing such an overreaching law because it looks down upon the people as gullible.

It's been only two and a half years since the nuclear disaster in Fukushima.

Since immediately after the accident, both the government and Tokyo Electric have been extremely reluctant to disclose information. Given the fact that the Japanese government is already prone to secrecy, we need to scrutinize the proposed law very carefully.

"Freedom of the Press" Would Be Gutted

What impacts would the designated secrets protection law, if passed without revisions, have on the press?

On freedom of the press and state secrets, the Supreme Court decision in the case of leaked Ministry of Foreign Affairs [MOFA] secrets[2] comes to mind.

According to the decision, a person will not be punished for instigating disclosure of state secrets if they are obtained through legitimate methods of news gathering. Although I agree with this conclusion in principle, I can't help doubting that it could provide sufficient protection for freedom of the press because it depends on how it's applied.

To begin with, it would be too late if a public official or a reporter, arrested for violating the secrecy law, were cleared of charges after many years of litigation. Reporting would require a strong determination on the part of both informers and reporters to struggle through a long period of physical detention and litigation. It is obvious that the secrecy law would accelerate the trend to refrain from reporting even important facts if such reporting is risky.

In terms of freedom of the press, I cannot think highly of the Supreme Court's judgment on what constitutes "legitimate reporting activity" in the MOFA case. The Court brought moral issues into deciding whether or not the reporter's actions were legitimate reporting, and determined that they were not because he had extracted the information about the secret deal through sexual relations with the leaker. The problem with that decision is that the Supreme Court muddled its legal judgment with a moral judgment.

A protest meeting in central Tokyo on November 21, 2013 drew more than 10,000 people.

Intimidation Effects of Aptitude Evaluation

The proposed secrecy law introduces a system of evaluating government officials[3] on their aptitude for handling designated secrets. The evaluation would become a crucial factor in a public official's performance evaluations. It is hard to imagine that a person who has been found unfit to handle designated secrets could attain a position of responsibility.

Current and potential government officials would restrain themselves to avoid doing anything that could raise suspicion. The proposed law is lacking in protecting privacy in that even spouses' personal information could be subject to scrutiny.[4]

I feel uncomfortable with the provision that administrative agencies could comprehensively determine who and which posts would be subject to aptitude assessments. Such a system is prejudicial and could be expanded without limits.

Public Security Police's Unlawful Investigations Would Be Hidden in Total Darkness

The proposed legislation also covers government information to "prevent terrorist activities."

In 2010] we learned from information leaked from the Tokyo Metropolitan Police Department that its Public Security Bureau had been conducting unlawful surveillance and investigation against Muslim institutions and individuals.[5] It appears that the disclosure resulted from a power struggle within the police; however, the information might not have come out had it been a designated secret [under the proposed law].

Isn't it a greater problem that the police has secretly branded Muslims as "potential terrorists" and conducted illegal surveillance against them? In the category of information "to prevent terrorist activities" as a designated secret, therefore, I believe there have to be more procedural mechanisms to prevent such abuses.

There was a case where a national government official who was active in the Japanese Communist Party [JCP] was arrested when he was distributing JCP flyers on a day off. He was prosecuted for violating the National Public Service Act which prohibits political activities by national government employees. Public security police had kept JCP members under surveillance on the suspicion of violating the Public Offices Election Act, and arrested the official after investigating every person who stopped in the office he visited. Enormous amounts of police work and time resulted in the official's acquittal.[6]

I'd have to say that legislating secrecy while leaving bodies like the public security police intact would make Japan an even more stifling society.

"Press-Release" Journalism Would Worsen

Japanese journalism tends to be "press-release journalism," relying on information released by government agencies rather than its own investigation. In that, I feel Japanese journalism is weaker than journalism overseas.

So far, much of the information the people should know has been disclosed by whistleblowers. Under the secrecy law, however, public employees would no longer be able to blow the whistle. If no information is forthcoming, no one can express anything even if "freedom of expression" is guaranteed.

Without whistle-blowing, journalism would depend on government releases even more heavily than now.

Adding "Considerations for Freedom of Expression" Is Meaningless

We have to be vigilant when the government, in response to criticisms of the secrecy bill, proposes to "insert a clause to take into consideration freedom of

expression and freedom of the press."[7]

When the Diet enacted a series of war contingency laws in 2003-04, the civil protection bill[8] came under attack on grounds that it violated the people's rights. The government added a clause that "the people's freedom and rights" guaranteed under the Constitution must be respected.

However, that clause, while it may have some political effects, is totally devoid of legal significance. Whether or not written in the letter of the law, the fundamental rights are guaranteed under the Constitution as a matter of course.

Still, the media reported as though the clause had great significance, and the people accepted that characterization.

A clause stating such a banality has no binding effect on the government. The problem is that the mass media and the people buy into the illusion that such a meaningless clause is meaningful.

The Necessity of "Freedom of Expression"

Many members of the general public may be wondering why "freedom of expression" has to be protected so strenuously. I believe we must answer that question upfront by informing them of the threats posed by the secrecy law and the (LDP's) proposed constitutional revisions.

Guaranteeing "freedom of expression" does not necessarily lead to a rose-colored society, but rather involves risks of hurting citizens. To keep watch on politics and maintain an open society, isn't it necessary to guarantee "freedom of expression," even though it involves risks? I think we should be having these discussions and raising these questions.

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Notes

[1] Translator's note: This passage refers to the U.S.-Japan General Security of Military Information Agreement [GSOMIA] signed in 2007. Article 6, clause (b) of the agreement reads: "The recipient Party, in accordance with its national laws and regulations, shall take appropriate measures to provide to the CMI ["Classified Military Information"] a degree of protection substantially equivalent to that afforded by the releasing Party." Diplomatic Cable "AGREEMENT REACHED ON GSOMIA TEXT". U.S. prosecutions for disclosing state secrets are based on the Espionage Act of 1917, which provides for up to 10 years of imprisonment for a violation--hence the maximum penalty of 10 years for public officials convicted of Japan's proposed secrecy law. For a discussion of the U.S. experience and a critical examination of Japan's proposed law, see Lawrence Repeta, "A New State Secrecy Law for Japan?,"*The Asia-Pacific Journal*, Vol. 11, Issue 42, No. 1, October 13, 2013.

[2] Translator's note: Also called the "Okinawa reversion secret pact case" or the "Nishiyama case," this case involved a leak of secret diplomatic cables exchanged between the U.S. and Japan negotiating the return of Okinawa, then under U.S. military rule, to Japan. In June 1971, the two governments signed an agreement for Okinawa reversion, which took place on May 15, 1972. In 1971, Nishiyama Takichi, then a reporter for the *Mainichi Shimbun*, obtained classified diplomatic documents that showed the existence of a secret pact in which Japan agreed to give the U.S. $4 million to restore farmland that had been requisitioned for bases. In 1972 Nishiyama and the MOFA clerk who gave him the documents were arrested for violating the National Civil Service Act. Prosecution, and the media covering the case, focused on how Nishiyama got his scoop, especially his personal relationship with his source. The trial and its media coverage turned the case into a sex scandal and never probed the state secret that Nishiyama had uncovered. In 1974, the Tokyo district court acquitted him, while giving the MOFA official a suspended six-month sentence. Prosecution appealed Nishiyama's case, and two years later Nishiyama was convicted and given a suspended four-month sentence. In 1978, the Supreme Court dismissed Nishiyama's appeal. In 1994 the United States declassified the secret documents, some of which came to be known in Japan in 2000 and 2002. In 2006 a former high-ranking MOFA official who had been involved in the negotiation of the deal openly admitted its existence. Still, to this day the Japanese government has steadfastly denied the existence of the secret deal and refused to acknowledge the existence of the secret documents. For further information, see Kyodo News, "Secret Details of Sordid Okinawan Reversion Deal Revealed," published in *The Asia-Pacific Journal*, May 17, 2007. Even when the Nishiyama case is brought up in relation to the secrecy law today, the focus is on the reporter's news-gathering method and not on the state secret he exposed.

[3] Translator's note: The law contains a provision stipulating that employees of contractors will also be subject to aptitude assessments. At a committee hearing in the Upper House on November 28, 2013, Mori Masako, the minister in charge of the bill, stated that not only national government officials but local government officials and contractors would also be subject to aptitude screenings.

[4] Translator's note: In the law, screened personnel's criminal records, drug abuse, mental illnesses, drinking habits, financial records are listed. Also included in the evaluation is personal information (name, date of birth, address, and [past] nationality) of the screened person's family (spouse, children, parents, siblings, as well as the spouse's parents and children) and even non-family members who reside in the same dwelling as the screened person.

[5] Translator's note: In October 2010, 114 electronic files containing detailed personal information of nearly 1,000 Muslims were leaked through file-sharing software. The information was collected by the Public Security Bureau of the Tokyo Metropolitan Police, which had been established during the Koizumi administration after 9.11. For the Muslim community's reactions to the leak, see David McNeill, "Muslims in shock over police 'terror' leak," *Japan Times*, November 9, 2010.

[6] Translator's note: Although the official was convicted in the district court, he was acquitted in the high court and the Supreme Court.

[7] Translator's note: As predicted by Mr. Sakaguchi, the government inserted into the bill a clause that "freedom of the press or reporting that contributes to guaranteeing the people's right to know shall be given sufficient considerations" (Article 22 of the revised bill that passed the Lower House on November 26, 2013; my translation). The full text of the revised bill is available here.

[8] The official name is the Act concerning the Measures for Protection of the People in Armed Attack Situations, etc., enacted and enforced in 2004 (link). The law specifies "the responsibilities of the national and local governments, cooperation of the people, measures for evacuated residents, measures for relief of evacuated residents etc., measures related to response to armed attack disaster, and other necessary measures." This translation is extracted from Law Concerning Measures to Protect People in the Event of ... - ICRC.