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What Japan's Designated State Secrets Law Targets 特定秘密保護法が狙うもの

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The Designated Secrets Protection Bill passed into law on December 13, 2013 and will come into force on the same date this year. The law was railroaded through the Lower House on November 26 last year and then forced again through the Upper House on December 6 by the Liberal Democratic Party (LDP) and Kōmeitō coalition.

Opponents of the secrecy law demonstrate

After its passage, the Abe government convened a 'Preparatory Committee to Monitor the Protection of Information,' which, holding its first meeting on December 25, discussed the establishment of an organization to endorse the official standards which will define secrets. On January 14 this year, the seven-member Information Security Advisory Council was established to fulfil such a task under Article 18 paragraph 2 of the law. With Chief Editor and CEO of the Yomiuri Newspaper Group Watanabe Tsuneo appointed as its chair, the council held its first meeting on January 15.

As the enforcement date of the law approaches, however, a number of outstanding issues continue to be neglected. These include issues surrounding the establishment of a third party organization that will check for abuses when heads of government agencies classify "designated secrets," or a policy on the protection of designated secrets when proposals for such secrets are received by the Diet. Because of this neglect, it is inevitable that there will be future situations that invite the reexamination of this law. This article attempts to clarify the aims of the law, while reflecting anew on its content and examining its problems.

An Overview of the Special Secrets Protection Bill and its Problems

The law authorizes the heads of government agencies to specify as designated secrets information about matters covering the four areas of defense, diplomacy, counterespionage and counterterrorism as published on a separate annex to the law. Among the items that will not enter the public domain is information that must be specifically concealed due to the likelihood that its disclosure would significantly impede Japan's national security. The effective period of a designated secret is up to five years and, in principle, extensions of no more than 30 years can be recognized.

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However, the Cabinet can approve further extensions of up to 30 years. In general, designations cannot therefore exceed a total effective period of 60 years. However, secrets which concern certain issues, including weapons, ordinance, and aircraft used for defense, information that is likely to lead to disadvantages in ongoing negotiations with foreign governments and international organizations, and secret codes, can be kept indefinitely.

According to Article 12 of the law, agency heads will also carry out background evaluations on agency staff who deal with designated secrets and employees of businesses that either through their contractual arrangements retain such secrets or have received the offer of a contract to do so. Such evaluations extend to seven areas, including family relations, criminal and prison records, drug abuse or influence, mental illness, immoderate drinking, and financial circumstances, including credit ratings.

In addition, Article 23 states that any person leaking secrets obtained when they are specifically charged with handling them in the course of their duties will be jailed for up to ten years and fined up to ten million yen. Moreover, anyone who leaks a designated secret they have simply learned in the course of otherwise unrelated official duties will also be jailed for up to five years and fined up to five million yen.

Such is the general content of the law. The first problem, however, is with the law's scope. Not only do the broad areas of defense, diplomacy, counterterrorism, and counterespionage allow for a wide-ranging specification of designated secrets, there is also frequent use of vague terms such as "et cetera" on the separate annex to the law. The scope of the items which may be subject to classification as designated secrets according to the annex is therefore unclear, and excessively wide. One typical example deems matters related to the "operations of Self-Defense Forces, or related estimates, plans or research" as subject to classification under the law. Because of this, one cannot dismiss the danger that agency heads will abuse their discretionary power.

Also, while the effective period of designated secrets is in theory five years, the law, through allowing extensions up to 30 years, or even 60 years subject to Cabinet approval, and exempting certain items from all restrictions, recognizes that there is, in fact, no effective time limit on the designation of secrets. It endorses semi-permanent secrecy.

As a result, the law poses a significant problem in terms of the three fundamental principles of the Japanese constitution: the protection of human rights; popular sovereignty (that is, democracy); and pacifism. For example, the existence of designated secrets without limits greatly restricts the constitutionally guaranteed rights to freedom of information and the people's right to know. Take background evaluation of public officials and private employees under Article 12 of the law, for example. Even though Paragraph 3 of the same article states that such evaluations will be undertaken after first notifying the subjects and gaining their consent, it will be very hard for such subjects to refuse the evaluation in practice. In light of constitutional guarantees of privacy and of freedom of thought and belief, considerable doubts about the law therefore remain.

The ruling parties did hold talks on amendments to the draft law concerning freedom of information and the people's right to know before it was passed. This resulted in the inclusion in the bill of language to the effect that "sufficient consideration has to be given to freedom of news coverage and of information that contributes to the public's right to know." Regulations were also included in Article 22 of the law to the effect that "data

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collection for news coverage shall be regarded as an activity conducted in the course of legitimate business if its objective is to further the public good and to the extent that it is not recognized as having been conducted by illegal or extremely inappropriate means." However, because this is merely a [voluntary] regulation [and not an enforceable provision], it is difficult to imagine it playing a role as a brake on the designation of secrets and their abuse.

Furthermore, the principle of popular sovereignty adopted in the constitution assumes at face value that the administration of national matters will be carried out in accordance with the will of the people. There is a danger, however, that regarding some national matters as secrets and placing them outside the public view—even those relating to defense, diplomacy, counterespionage, and counterterrorism—will undermine the very foundations of this principle. Not disclosing to the people, who are sovereign, the information that is necessary for national administration, or limiting their means of collecting such information, will push democracy into a state of dysfunction and leave the principle of popular sovereignty hollow.

As is clear from its inclusion in the separate annex to the law, moreover, the concept of designated secrets concerning "defense" is contrary to Article 9 of the constitution, if such secrets are deemed as military secrets. Such measures will therefore render constitutional pacifism as nothing more than a mere shell.

A Milestone on the Road to Becoming a Country That Wages War

So why do we need a Designated Secrets Protection Law? … The following was presented as one of the motives for submitting the Designated Secrets Protection Bill to the Lower House: "The increasing importance of information related to the maintenance of the security of Japan and its citizens in the context of complicated international affairs raises fears that the development of an advanced telecommunications network society will lead to the danger of such information being disclosed."

Certainly, such problems as the internet leaks, discovered in October 2010, of the Police Public Security Agency (*keishichō kōanbu*) intelligence related to investigations of international terrorism, as well as the January 2010 incident where the Japanese Coast Guard's (JCG) Senkaku Islands collision video was posted by a JCG officer on YouTube, have been raised as reasons to strengthen the duty of confidentiality that public officials are supposed to maintain. Justifying the Designated Secrets Protection Law on the basis of these events is, however, absurd. In the former case, the leak of the terrorism investigation information was due to inadequate police information control systems. In the latter, meanwhile, there were doubts about whether the Senkaku collision video even qualified as a "secret" under the National Public Service Law (*kokka kōmuin hō*), and, as a result, the punishment was limited to only one month's suspension. It was impossible to build a criminal case on the grounds that the officer breached his duty of confidentiality.

Article 109 of the National Public Service Law stipulates up to one year imprisonment and fines of up to 500,000 yen for breaking the duty of confidentiality stipulated in Article 100 of the law. Article 96 Paragraph 2 of the Self Defense Forces Law, meanwhile, provides for penalties of imprisonment for up to five years for leaking "defense secrets." In addition, Article 2 of the Secrecy Protection Law Pursuant to Such Matters as the U.S.-Japan Mutual Defense Assistance Agreement (*nichibei sōgo bōei enjo kyōtei nado ni tomonau himitsu hogo hō*, hereafter, the U.S.-Japan Mutual Defense Secrecy Protection Law) provides for the protection of "special defense secrets," and Article 3 also provides for punishments of up to 10 years imprisonment for such activities as the

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detection, collection, and disclosure of these secrets. There is absolutely no truth to the assumption that under existing laws public officials have frequently breached their legal duty of confidentiality or that defense secrets and special defense secrets have often been leaked through espionage.

An article about a fire on board a Chinese submarine in the May 31, 2005, edition of the Yomiuri Shimbun, where an Air Self Defense Forces colonel was suspected of providing secret defense information to a journalist, is seen as the first case concerning a leak of "defense secrets." However, by October 2008 the case resulted in the colonel being dishonorably discharged, and immediately thereafter ended with the suspension of his indictment.

In an earlier, August 2002, case, a Maritime Self Defense Forces (MSDF) lieutenant colonel was indicted for leaking "special defense secrets" after he gave a CD with copied information about Aegis class vessels to other MSDF instructors. This was seen as the first case concerning a leak of special defense secrets since the U.S.-Japan Mutual Defense Secrecy Protection Law went into effect in 1954. Although the defendant was found guilty twice and the Supreme Court also effectively confirmed his guilt by quashing his appeal, the judgment merely resulted in an incarceration period of two years and eight months and a suspension from duty for four years.

To the extent that these few cases can be considered precedents, it is clear that there are no circumstances that require punishments of up to ten years in prison and fines of up to ten million yen, as contained in the comprehensive Designated Secrets Protection Law, even if those punishments are to protect information concerning defense, diplomacy, counterterrorism, and counterespionage.

If that is the case, what circumstances justify the Designated Secrets Protection Law? They lie partly in the context of the General Security of Military Information Agreement (GSOMIA) concluded between the U.S. and Japanese governments in August 2007. One of the undertakings at the core of this agreement is that a nation in receipt of military information will not, without the understanding of the nation that supplied that information, transfer it to a third party (Article 8), and, furthermore, the agreement contains a promise that the nation in receipt of military information will take measures to protect it equivalent to those of the nation that supplied the information (Article 2).

The newspaper article mentioned above about the fire on board the Chinese submarine even stated the model number of the submarine. However, this information was apparently supplied to the SDF by U.S. military authorities, and it has been revealed that, as a result of this incident, the SDF came under intense American pressure regarding the protection of military information the United States provides.

Considering that civilian ships and fishing vessels work in the affected areas, information about a Chinese submarine that has caught fire and is drifting in the Japan Sea is necessary for the maintenance of public safety. Keeping such information from the public should therefore be seen as unforgiveable from the perspective of protecting life and private property. The model number of the Chinese submarine that drifted after catching fire could probably have been easily identified just by heading to the affected area. However, military logic dictates that such information must be concealed. Nations conceal the fact that their militaries possess (or, indeed, do not possess) such information in order to invite conjecture about their intelligence collection capabilities. Thus, the fact of whether a nation possesses it or not must be treated as a military secret, even if such information is in fact readily available to all.

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Endorsing such logic means accepting the type of thinking that assumes as secret even those matters that are in fact not secret at all. It also means that the truth about whether secrets are known is also to be treated as confidential. While it is justified as necessary to keep others guessing about the level of intelligence collection capabilities, it acts as nothing other than a mechanism to increase the scope of secrecy.

The U.S.-Japan GSOMIA, incidentally, should be viewed within the context of increasing military integration with the United States. Military intelligence is considered crucial to the expansion of joint operations, which go beyond Japan's traditional maintenance of bases and host nation support. The Designated Secrets Law has therefore been posited as necessary for intelligence sharing with the United States. Such a comprehensive law was also desirable for the entire joint weapons industry, particularly for purposes of military intelligence sharing in the joint development of weapons and missile defense technology.

To complement the Designated Secrets Law, the Abe administration submitted to the Diet an Amendment to the Law to Establish the Security Council of Japan. It was passed by the Upper House on November 27 last year, virtually at the same time as the Designated Secrets Law. While expanding the scope of "Japanese security" to encompass "dealing with matters of national defense and serious emergency situations," Article 1 of the amendment changes the "Security Council of Japan" to a "National Security Council," expands and strengthens the authority of the council, chaired by the prime minister, and clarifies its role as a "control tower for war." The National Security Council was launched on December 4, and on January 7 this year, the Office of the National Security Council was established by the Cabinet Secretariat. Former Vice Minister of Foreign Affairs Yachi Shōtarō was named as its first director.

Along with these initiatives, the Abe administration has a burning desire to formulate a new official opinion that will change conventional constitutional interpretations, by authorizing the exercise of the right of collective self-defense. Although the "Committee on Reconstructing the Legal Basis for National Security," established by the prime minister as his own advisory body and headed by former Ambassador to the United States Yanai Shunji, is still deliberating, the Abe Administration, expecting the committee to compile its report soon, will attempt to use the report to authorize the exercise of the right of collective self-defense in the regular Diet session that ends on June 22. Abe has championed the concept of "Positive Pacifism." However, the message that he is trying to convey with that term is that, under the auspices of cooperation with the United States, Japan will not rule out engagement in war in order to demonstrate its presence to the rest of the world.

Collectively, these developments under the Abe administration must be seen as a movement to increase pressure on the constitution by pushing for reinterpretation and passing unconstitutional laws. While the administration outwardly celebrates the renunciation of war and claims the message of pacifism in the preamble of the constitution as its own, it is changing the essence of Article 9, which states that Japan shall not maintain war potential or recognize the right of belligerency. It is clear that the enactment of the Designated Secrets Law, working in conjunction with the establishment of the National Security Council, the authorization to exercise the right to collective self-defense, and the establishment of a National Security Law, plays its part in the government's strategy of changing the constitution through reinterpretation.

The conclusion of this strategy is explicit constitutional revision along the lines of the "Draft Amendment of the Japanese

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Constitution" revealed by the Liberal Democratic Party on April 27 last year. Article 9 Paragraph 2 of this draft constitution emphasizes the establishment of a "Military for National Defense" (*kokubōgun*) with the prime minister as its supreme commander and calls for the enactment of laws related to the protection of highly classified military information. In the interim, the Designated Secrets Law is designed to assist in changing the constitution through reinterpretation so that ultimately the government can carry out explicit constitutional revision. It acts as a milestone on the road to becoming "a nation that wages war."

Strengthening Control Over the People

An essential factor in becoming such a nation is the creation of an attitude whereby citizens are mobilized to go to battle. When the state goes to war, it is not elite state leaders that are mobilized for battle, but the nameless general populace. If the latent reserve forces that are the general population harbor doubts about war, it is impossible to carry it out. An uncritically loyal civilian population is required, in order to ensure that military protocol is maintained and military capabilities are deployed. It is therefore desirable to keep from the public all kinds of facts and other truths about war in order to maintain an attitude conducive to popular mobilization. Even if this state of affairs does not come close to the Law to Protect Military Secrets and the Peace Preservation Law enacted in pre-war Japan, the problem is illuminated by more recent documents such as the secret Pentagon Papers and the study of America's war in Vietnam.

Thus, there is a danger that the Designated Secrets Protection Law will perform the function of masking from popular view once and for all facts that may be used to manipulate the state and its citizens. By imposing a ten year prison sentence or ten million yen in fines for leaking matters defined as "designated secrets," and then not allowing the general public to know what is classified as such, this law will encourage a psychology of caution, where public officials and regular workers in the defense industry will hold their tongues about matters they learn about at work, even if such matters do not have anything to do with officially designated secrets.

These developments could result in restrictions on the media's news gathering activities and the reduction of news content, limiting the people's right to know. As noted above, it is assumed under the principle of popular sovereignty adopted in the constitution that national affairs will be transacted according to the will of the people. However, labelling important matters related to national affairs secret, even in the fields of diplomacy, defense, counterterrorism, or counterespionage, and keeping them away from the citizens' gaze presents the danger that the very principles of citizenship will be undermined. Keeping information vital to the administration of national affairs from the people, who are sovereign, will lead to democracy becoming dysfunctional, as the principle of popular sovereignty itself is hollowed out. Then, the people's very position as "sovereign" will be degraded until they are mere "objects" of state rule and control.

In fact, the mechanisms of control are steadily being prepared. One of these mechanisms is the Law Concerning Matters Such As Codes to Distinguish Designated Individuals in Administrative Procedures. This law was proposed under the government of the Democratic Party of Japan (DPJ) in the name of "reforming taxation and social security into a unified system," but was temporarily withdrawn in November 2012 after the Lower House was dissolved. After the change of government in December 2012, the bill was reintroduced to the Diet by the Abe administration under the premise of raising the consumption tax. After gaining the support of

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the LDP, DPJ, and Kōmeitō, it was approved by the Lower House on May 9 and the Upper House on May 24, to be passed into law on May 31. From 2015, citizens will be issued with "individual numbers," number cards will be delivered, and their systematic use will begin. Originally, this was a law to use the same numbers for taxation and social security, so it was abbreviated as the "Shared Number Law." However, through the revision process, this was softened to the "My Number Law," obscuring the current law's true content.

This law will furnish every citizen with an "Individual Number Card" with 11 columns of information, including such items as their individual number, their name, address, date of birth, gender, and a photograph. An IC chip will be embedded in the card, which will be used when dealing with official matters. The individual numbers will be used for a wide range of tasks, expected to include: the administration of payments, benefits, and eligibility for social security; employment insurance, medical insurance, and nursing care insurance; child support allowances and the administration of all manner of independence and lifestyle support benefits; the administration of student loans and their repayment; the administration of public housing; the provision of support funds after disasters; and work related to tax statements and reports.

The merits of unified management through the application of such individual numbers to a wide range of transactions will be promoted as: optimizing government operations while raising the level of convenience for the citizen; maintaining an appropriate relationship between social security payments and the tax burden; and, through simplified processes, reducing the burden on citizens. However, it is precisely because the premise is that the state will hold all personal information and manage it in a unified way that one cannot ignore the dangers inherent in this situation.

In terms of the personal data that government agencies will attempt to exchange with one another, this law will include a great variety of sensitive information…. For example, information such as the following will naturally be included: where somebody lives; where they are employed; how much they earn, how much property they own; the status of their tax payments; what type of illness that person has had, where these illnesses were treated, and how much they paid for medicine; and how much they have paid for services such as social security. Also to be included will be items like academic, employment, and criminal records.

This law has attracted various forms of criticism. There is the danger that private information will be leaked and also the fear that because the construction and maintenance of the network that will supply the information comes at a huge cost, it will become a hotbed for commercial interests. However the most essential problem lies with the attempt by the state to hold and unify all personal data. With rapid current developments in computerization, the law significantly circumscribes the "right to control one's own information," or, in other words, "the right to choose whether and to what extent to disclose such information," one of the most important aspects of the right to privacy guaranteed by Article 13 of the constitution.

However, because it allows for the total capture of information concerning individual citizens, it is an extremely convenient law from the point of view of a controlling state. Indeed, with this type of law already in place, with all citizens already considered to be placed under either the latent or substantive watch of the state, the Designated Secrets Protection Law will acquire deeper significance.

Because the Designated Secrets Protection Law allows for personal background evaluations of public officials and workers in private companies that are contracted to handle

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designated secrets, it will only take a revision of the law to allow access to individual numbers for such purposes, and a wide array of personal information about the subjects of evaluations will then be made available to officials. Of course, subjects will have to give their consent before such evaluations, but because refusal would raise questions about their loyalty to the state and to society, such a refusal would in practice be difficult. The individual's right to privacy, as well as freedom of thought, speech, and belief, will be challenged by an increasingly serious crisis.

When seen in this light, the Designated Secrets Protection Law, through its combination with such mechanisms as the individual number system allows for the exercise of great power in the government and control of citizens. It is nothing other than a way to restrict the various human rights guaranteed under the constitution. However, limiting those rights is one of the objectives of the Designated Secrets Protection Law, and, in fact, this should be seen as its true form.

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