Specified Secrets Protection Bill is Violating the International Covenant on Civil and Political Rights

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Introduction

Prime Minister Shinzo Abe's cabinet approved and submitted to the Diet "Specified Secrets Protection Bill" on October 25, after inserting an addition to Miscellaneous Provision, Article 21 that reads "Due consideration should be given to the freedom of reporting and news gathering which contribute to the people's rights to know".

Those who drafted the Bill lack the historical understanding that a large part of "the action of government" which brought about "the horrors of war" cited in the preamble of the Constitution of Japan is about the government's concealing from the public all of the key information on the safety and security of the people until Japan's defeat in World War II, and are oblivious to the fact that the Constitution was established with a strong resolve that "never again shall we be visited with the horrors of war through the action of government". Allowing government officials to monopolize the information belonging to the people, the Bill is a complete denial of the principle of popular sovereignty, and the denial of the Diet as the highest organ of state power, and as the sole law-making organ of the State. It is tantamount to stopping the function of the Constitution with an act, and should be called Enabling Act modeling on the tricks employed by Nazi Germany.

The Bill runs counter to not only the Constitution of Japan, but also the Article 19 (freedom of expression) of the International Covenant on Civil and Political Rights (ICCPR), one of the international human rights instruments, and that Japan ratified in 1979.

The Allies in the World War II, around the end of the war, became deeply regretful that they took a non-interventionist approach to the human rights violations of Nazi Germany and Japan at their early stage on the ground that they were internal affairs related to national sovereignty even though the Allies were aware of the problem, as such non-interventionist approach led to "untold sorrow to mankind" (Preamble to the United Nations Charter). Thus, they established human rights instruments as a system in which international community can intervene into human rights violations of a state at their early stage without infringing national sovereignty as each state can freely choose to join or not to join an instrument, but is obliged to comply with the instrument once the state ratifies it. Japan declared "its intention in all circumstances to conform to the principles of the Charter of the United Nations" when it signed the Treaty of Peace (San Francisco Peace Treaty), and made a come-back to the international community. Prime Minister Abe's cabinet ignores this historical fact, too.

Now, let me discuss why this Bill is a violation of international human rights treaties. First of all, the Bill violates the statutory provisions of the second and third paragraphs of Article 19 of ICCPR. Secondly, Article 19 of ICCPR has established interpretations based on the rich experience of its

review processes. Thus, should a law be enacted in clear violation of human rights within Japan, unremitting effort within the country along with solidarity with international community will be able to scrap such law before it causes the horrors of war again.
Incidentally, I had a chance to read the full text of the Global Principles on National Security and the Right to Information (Tshwane Principles, adopted in June 12, 2013) while I prepared this paper. The document seems to be the best possible and concrete guideline at this time supported by rich experiences and thorough discussion by genuine knowledgeable persons of the field. But in order for this guideline to have not only realistic impact but also legal implications, it needs to be linked to the second and third paragraphs of Article 19, more specifically, the standard of interpretation of its treaty body, the Committee of ICCPR (General Comment 34 discussed later). It is primarily the provisions of the treaty and General Comments that can question the legality or illegality of a specific bill.
Meanwhile, the sixth review of the report from the government of Japan on the implementation of ICCPR is to be held in June 2014.

The Article

1, Article 19, paragraph 1 of the of ICCPR stipulates “Everyone shall have the right to hold opinions without interference”, the paragraph 2 , “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, …..”, and the paragraph 3, “The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals”.
2, Japan’s legal system is such that any international treaties that the state has ratified have the effect as a domestic law without additional legislation, and thus, there is no dispute that international treaties prevail over domestic laws.

Standard of Interpretation of the Committee on ICCPR

1,The treaty body of the Covenant has announced a detailed standard of interpretation in its General Comment 34 (adopted and announced in 2011) which can be used as a guideline for the realization of the rights in the member states, and as a standard in reviewing the reports from governments of its member state. This one is called “General Comment” in order to differentiate itself from “views on individual cases” given to complaints under individual communication procedures set forth by the First Optional Protocol to ICCPR. Individual communication procedure is an innovative system in which an individual can file a complaint of human rights abuse with the Committee of ICCPR, and remedial measures can be taken as the Committee makes recommendations to the state party involved. (As of November 17, 2013, one hundred fifteen countries are parties to the Optional Protocol that was adopted simultaneously with the Covenant. Unfortunately, Japan is not a party to this protocol.)

General Comments are drawn based on the accumulation of concrete cases such as Concluding Observations announced after periodic reviews of reports from governments, and views on individual cases in the individual communication procedure, thus, is not a desk theory.
General Comments are in the website of Japan Federation of Bar Association (Activities of JFBA →International Human Rights and Exchange →International Human Rights Library→ →ICCPR→General Comment of the Treaty Body.)
Even though the Ministry of Foreign Affairs is responsible for the dissemination of information that will be beneficial to the realization of human rights set forth by various international human rights instruments, and would be deeply involved in the designation of specified secrets, it has not posted General Comments in it's website. Ichiro Komatus, who was promoted by the Prime Minister Abe to the head of the Cabinet Legislative Bureau from the International Treaty Division of the Ministry of Foreign Affairs has kept silence about the conformity of the Bill to the Covenant, even though he has been quite vocal on Japan's right of collective defense.
2, Now, let me summarize the parts of General Comment 34 which seem to be relevant to the Bill.
(1) Significance of Freedom of Expression
Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions. Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability (author's note; the principle that in a democratic society, policy decisions and their implementation should be open to the scrutiny of the public, the public should have the right to access the information about them, and the government needs to be able to account for them anytime.) that are, in turn, essential for the promotion and protection of human rights. The obligation to respect freedoms of opinion and expression is binding on every State party (executive, legislative and judicial). States parties are required to ensure that the rights contained in Article 19 of the Covenant are given effect to in the domestic law of the State, in a manner consistent with the guidance provided by the Committee in its General Comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant.
(2) Article 19, Paragraph 2
The following is the summary by the author. Please refer to the original for the detail.
① Paragraph 2 requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers.
② A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society. The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function. The public also has a corresponding right to receive media output.
③States parties should ensure that public broadcasting services operate in an independent manner. They should provide funding in a manner that does not undermine their independence.

④ Article 19, paragraph 2 embraces the right of access to information held by public bodies. The right of access to information includes a right whereby the media has access to information on public affairs.
⑤ Every individual should have the right to ascertain whether, and if so, what personal data is stored in automatic data files, and for what purposes. If such files contain incorrect personal data, every individual should have the right to have his or her records rectified.
⑥ To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information.
⑦ Authorities should provide reasons for any refusal to provide access to information. Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failure to respond to requests.
(3) Article 19, Paragraph 3
① The relation between right and restriction and between norm and exception must not be reversed.
② Restrictions on the exercise of rights may not put in jeopardy the right itself.
③ Restrictions must be provided by law, and must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.
④ A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution.
⑤ Restrictive measures must be the least intrusive instrument amongst those which might achieve their protective function, and they must be proportionate to the interest to be protected.
⑥ Authorities should provide reasons for any refusal to provide access to information.
⑦ Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failure to respond to requests.

Specified Secrets Protection Bill is in Violation of the Covenant
(1) The principle of the Covenant is that the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds should be guaranteed, and designating some information as a secret should be exceptional. Naturally, information on national defense should be the one to be sought, received and imparted. “The right to seek and receive information” corresponds with “the right to know.”
Restricting this right by classifying some information as secret may be done only as an exceptional measure. Because it is the right of the people as sovereign to have necessary information so that they can monitor the Diet and the government, and the Diet can monitor the government, the information should include the important one on the whole process of the acts of the government, not only the information which is already stored as documents or electric data. The proceeding of

important meetings such as Cabinet meetings should be recorded as data, and stored in searchable forms.
The Bill undoubtedly violates the Covenant as it first stipulates designation of secrets, which should be an exception, without defining the right to know, which should be the norm.
(2) People's right to know cannot be guaranteed unless they can know the information when necessary, or it is meaningful to know it. Even if a state secret needs to stay classified for a certain period of time, the right to know "any information" cannot be guaranteed if the classification is longer than the period when people need the information, or monitoring the information is of significance. As the state of the world affairs and technologies change very fast, a lot of state secrets would become outdated in a very short period of time, and thus it would be meaningless to keep them classified. Therefore, the maximum period of classification should be set, and the secrets should be disclosed after the set period if the monitoring is to be effective.
A bill that may allow the period of classification to be extended indefinitely would be against the Covenant as it would put in jeopardy the right itself. Then, the current state of defense secrets whose existence cannot be known, and which are hushed up one after the other is a clear violation of the Covenant.
At least treaties require subsequent approval (Article 73, Paragraph 3 of the Constitution), but secret agreements which do not even need subsequent approval are an infringement of the Diet's function as the highest organ of state power.
(3) The standard to designate state secrets must be provided by law as it is a restriction on the right to know, otherwise, such standard would be against express provisions.
Article 3, Paragraph 1 of the Bill stipulates that "the head of an administrative body can designate information, among the information listed in the attachment, as a state secret if he believes that it would seriously damage the national security if leaked".
Tshwane Principles 13 states "Only officials specifically authorized or designated, as defined by law, may classify information. If an undesignated official believes that information should be classified, the information may be deemed classified for a brief and expressly defined period of time until a designated official has reviewed the recommendation for classification. The identity of the person responsible for a classification decision should be traceable or indicated on the document, unless compelling reasons exist to withhold the identity, so as to ensure accountability." "Those officials designated by law should assign original classification authority to the smallest number of senior subordinates that is administratively efficient." The Principles demonstrate what "provided by law" means. Even though the Bill says that "heads of administrative bodies" are authorized to classify information, in reality, a number of unidentified government officials would do so, which is totally unacceptable.
The attachment is only a list of 23 broad categories related to defense, diplomacy, counterintelligence and counterterrorism, thus, the list alone cannot be a standard for designation.
(4) In restricting the right to know, proper explanation should be given why there is a need to do so. Words such as "national security" and "significant interference" are too abstract and broad, thus, cannot be definitions of concepts. The Reasons for Proposal of this Bill fail to demonstrate that the

restrictions are “directly related to the specific need on which they are predicated”. Tshwane Principles 11 states “Public authorities are obliged to state reasons for classifying information. The reasons should describe the harm that could result from disclosure, including its level of seriousness and degree of likelihood, maximum duration of classification, and the need to classify at that level and for that period.”

(5) In 1928, Article 1 of Peace Preservation Law was revised, with a vague sentence inserted, “Anyone who has formed an association with the objective of altering the “kokutai”(national polity), and anyone who has joined such an association with full knowledge of its object”. The sentence could be interpreted in anyway at the discretion of government officials (or even judges) as it had no clear definition of the terms. Such a provision cannot be considered as the one “provided by law”. As a result, Peace Preservation Law caused massive damage such as Yokohama Case where editors of even a censored and legal magazine were found guilty, and some died during or after detention following cruel torture and forced confession by the Special Higher Police and through broad interpretation of the Law by judges and public prosecutors. Eigoro Aoki who handled cases of violation of Peace Preservation Law as an associate judge discussed in detail the stretched interpretation of the law in a book he authored during his career titled “Saibankan no Sensou Sekinin” (“War Responsibility of Judges”, Nihon Hyoron Shinsya 1963, Collected Works No1, Tabata Shoten).

We also need to recall Masatarou Miyake, a then presiding judge of the Third Criminal Section of the Supreme Court, who rendered a not-guilty sentence in June 12, 1945, shortly before the end of the Second World War, to a defendant who was found guilty by Sapporo District Court for the violation of Peace Preservation Law, after Miyake traveled to Sapporo in order to interview the defendant in person away from Tokyo which was hit by frequent air raids, and quashed the district court’s ruling for fact finding errors. (“Mikan no Senjika Teikou No. 22, Turugi wo Osameyo Asami Sensaku 2” (“Unfinished Wartime Resistance No. 22; Put Away Your Sword, the Story of Sensaku Asami vol. 2 ”)), Nobuhisa TANAKA, “Sekai” No. 849, November 2013, Iwanami Shoten,)

(6) Miscellaneous Provision, Article 18 reads “The Government, in setting the standard for classification and declassification, or altering thereof, shall hear the opinions of highly knowledgeable people”.

But the fact remains that the standard for classification would not be set by law, and instead, heads of administrative bodies would be granted discretionary power, which is an infringement of the Diet’s function as the highest organ of state power, and against express provisions of the Covenant. "Knowledgeable people" are talked much as if they were meaningful. But only big fans of the Prime Minister or his poodles would be selected arbitrarily as we have seen in the recent appointment of the Management Committee members of NHK (Japan Broadcast Company), and there would not be much point in listening to the opinions of "knowledgeable people". By the way, recent appointment of NHK Management Committee members runs counter to the requirement that "(states) should provide funding in a manner that does not undermine their independence" (GC34-16).

"Knowledgeable people" are appointed in many areas such as safety review of nuclear power plants, but there is no guarantee that they are independent from government officials, instead they are no less than the cover for officials.

(7) In order for a third party body on classification and declassification to be effective, rather than setting up a new scratch team, it should be an independent body like the one in the US. It should be set up as a department in an agency independent of administration like the National Diet Library which was “established as a result of the firm conviction that truth makes us free and with the object of contributing to international peace and the democratization of Japan as promised in our Constitution”（National Diet Library Act, Preamble）, and whose director is “appointed by the presiding officers of the two Houses after conferring with the Steering Committees of both Houses, with the approval of the Houses” and “remain in the office as long as he/she is in good faith and faultless in the exercise of his/her duty” (Article 4) . The government should also provide enough funding to support its independence.

(8) Restrictions should be least intrusive and they must be proportionate to the interest to be protected. Confidential information leak on Aegis ships in 2007, which is said to be the worst of this kind in the history of Self Defense Force, was caused by abhorrently lax internal discipline, and those who were responsible got away with a suspended two and a half year jail sentence. Strengthening the internal discipline under current laws is enough. It has not been explained why there is a need to give heavy punishments such as a fine of up to ten million yen, and imprisonment of up to ten years, on a wide range of acts such as instigation, attempted leakage, and conspiracy by not only government officials but also by those who are not. This is totally against the rule of proportionality.

(9) The Bill says that a person can be found guilty for leakage of a state secret even if the content of the secret is not disclosed in a trial “as the external form of evidence” will be used to assume that information is a “state secret”. But in order for this logic to hold true, a prerequisite that the government has never lied needs to be established. But we have witnessed a series of false propaganda such as the announcement from the Imperial Headquarters before the end of the Second World War, and the myth about the safety of nuclear power plants after the war. About the secret agreements between Japan and the U.S., Japanese government has continued to deny their existence, even though they became known as the relevant public documents were disclosed by the U.S. government after the sentence on Nishiyama case became final,

Finding someone guilty based on the assumption using the “external form of evidence” would be a violation of the Covenant, Article 14-2 "the right to be presumed innocent until proved guilty according to law". Besides, normalizing such a process would be tantamount to setting up a “extraordinary tribunal” prohibited by the Constitution of Japan, Article 76-2, and denial of the right of the accused to “a speedy and public trial by an impartial tribunal” and the rights to be “permitted full opportunity to examine all witnesses” (the Constitution, Article 37-1 and 2). It is obvious that the Bill is in violation of the Constitution and the Covenant.

If the evidence to prove the innocence of an accused person comes out in the open due to the public disclosure of the National Archives and Records Administration of the U.S., but if no redress is

provided to the person due to the expiration of the statute of limitations, the person's right to "have an effective remedy" (ICCPR, Article 2-3 (a)) will be violated.

Conclusion

Before and during the World War II, our predecessors couldn't prevent "the horrors of war through the action of government", suppressed by the Military Secret Law and Peace Preservation Law. Now, we have the Constitution of Japan and the International Covenant on Human Rights that came out of the painful lessons. We can defend human rights not only through our effort within the country but though the solidarity with the international community. We are now enjoying far more "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers" that we did before the Covenant was ratified. At this stage, we need to realize again that "the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant"(ICCPR, Preamble).

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