

Right to Know v. the Secrecy Law in Japan: Striking the Right Balance

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I. INTRODUCTION

Japan has one of the oldest unreformed constitutions in the world,¹ and the Administrative Information Disclosure Law (AIDL)² of 2001 fills a long-existing gap in Japanese law. In line with the constitutional principle that sovereignty is inherent to the people, the AIDL endows agencies with the right to request the disclosure of corporate documents held by incorporated administrative agencies to ensure accountability for their actions.³ Nonetheless, the Japanese National Diet recently passed a new Secrecy Bill in Japan which, according to some legal experts,⁴ may cause ambiguity and create issues for the protection of freedom of press and the right to know in the Japanese public society.⁵

This article consists of five sections. Section II discusses Japan's right to know issue. It revisits some of the landmark decisions such as the Hakata Station Film incident, the Nishiyama case and the Lockheed-Scandal, which are useful for the discussion, and the section attempts to provide a comprehensive explanation of the origins of the right to know, emphasizing the important role the notion played in the democratization and

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1 G. HOOK/G. MCCORMACK, *Japan's Contested Constitution: Documents and Analysis* (London 2001) 1.
2 *Gyōsei kikan no hoyū suru jōhō no kōkai ni kansuru hōritsu*, (Law concerning the Disclosure of Information in the Possession of Administrative Agencies), Law No. 42 of 1999 (hereinafter referred to as the Administrative Information Disclosure Law – AIDL).
3 Article 1 of the AIDL.
4 See e.g. T. SHIMIZU, secretary general of the Japan Federation of Bar Associations.
5 A. MIE, *New Secrecy Law Seen Best Serving Bureaucrats*, in: *Japan Times*, 4 November 2013. Available at: <http://www.japantimes.co.jp/news/2013/11/04/national/new-secrecy-law-seen-best-serving-bureaucrats/>.

transparency of public administration accountability. The section also provides justifications for its protection.

Section III delves into detail concerning the provisions of the AIDL in Japan. It concentrates on the scope of the AIDL's overarching aim, which is now somewhat less clear in the light of the recent Secrecy Bill passed by the Japanese Diet in early December of 2013. This section also investigates more recent attempts to address the requirements for enhancing the AIDL and attaining a better protection of the public's right to know.

Section IV discusses the main controversy surrounding the new Secrecy Bill approved by the Japanese Diet. Discussing and clarifying this bill is relevant, given the possibility that the enactment of its current wordings may obstruct or even undermine freedom of press and the citizens' right to know. This section also advocates for the establishment of clear language which narrows down the concept of secret information, seeking to prevent *ex ante* future controversies. According to a survey published in the Wall Street Journal (Japan News Network), 57% of the surveyed people rejected the Secrecy Bill while only 28% were in favor of it.⁶ This data confirms the elevated concern of the general public and reinforces the relevance of addressing these issues in greater detail.

Section V examines the Global Principles on National Security and the Right to Information (Tshwane Principles⁷) and seeks to find responses in the underlying governing rules. The overarching idea that motivated the 22 organizations who contributed substantially to the drafting of the Principles was to set a balanced threshold between the right of access to information (right to know) and national security.

Finally, the aim of section VI is to provide concluding remarks on common themes that permeated these heated legal discussions and to consider the revision of the Secrecy Bill before it comes into effect. However, as this article will demonstrate, the whole issue needs interpretations and clarifications, and the recommendations purported herein are just a starting point for discussions.

6 T. SEKIGUCHI, Abe's Support Drops Sharply in Japan: Polls taken in recent days show a rapid downturn, in: The Wall Street Journal, 9 December 2013, (This data has been taken from a poll of 1,200 people carried out by the Japan News Network. The data collected has a margin of error of 2.8%). Available at: <http://online.wsj.com/news/articles/SB10001424052702304014504579247571473074150>.

7 The Tshwane Principles were drafted by 22 organizations and academic centres with more than 500 experts from more than 70 countries at 14 meetings held around the world, facilitated by the Open Society Justice Initiative. This process culminated in a meeting in Tshwane, South Africa, which gives them their name; see "The Global Principles on National Security and the Right to Information" (The Tshwane Principles), June 12, 2013 www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-in-formation-tshwan-principles [the editors].

II. THE RIGHT TO KNOW IN JAPAN

The right of access to information, also known as the ‘right to know in Japan’ is a well-established human right rooted in many international bodies, such as in the UN General Assembly Resolution which posits: “Freedom of information is a fundamental human right and [...] the touchstone of all the freedoms to which the United Nations is consecrated”. Abid Hussain, UN Special Rapporteur on Freedom of Opinion and Expression, in his 1995 Report to the UN Commission on Human Rights states: “Access to information is basic to the democratic way of life”. The practice of withholding information from the people at large is, therefore, something to watch out for and prevent.⁸

The idea of introducing the ‘right to know’ is, however, a few decades old. Japanese constitutional scholars created this concept as a general principle. One of the first precedents where this right could be found was in the *Kaneko v. Japan* case,⁹ also known as the Hakata Station Film incident.¹⁰ In this event, about 300 students from the Osaka and Tokyo areas congregated in Fukuoka to protest against the visit of the ‘American nuclear-powered aircraft carrier, the U.S.S. Enterprise’. On their way to Kyushu University for a stop-over, the students were confronted by about 870 mobile police and railroad security officers in Hakata Station. Four student activists were arrested, and one was indicted. A dissenting group of lawyers, politicians and other activists brought charges against the Prefectural Police Commissioner, alleging abuse of police authority. The district prosecutor refused to consider such charges and ignored the petition, causing the claimants to file a legal suit before the Fukuoka District Court which, on behalf of the petitioners, requested the four Fukuoka television companies to disclose the film footage recorded during the demonstration for proof of evidence. The television companies appealed to the High Court, arguing a violation of freedom of press; however, the court rejected this counterclaim. Finally, the Supreme Court heard the case and begrudgingly noted that “in a democratic society the reports of the mass media [...] serve the people’s ‘right to know’”, and it endorsed the first court decision.¹¹ This view echoed the words of the claimants who argued for a proper balance between the freedom of press and the right to know as relates to evidence insuring a fair trial.¹² The Supreme Court decision was correct.

8 T. MENDEL, Freedom of Information as an International Protected Human Right, pp. 1–2. Available at: <http://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf>.

9 N. KADOMATSU, Administrative Information Disclosure Law in Japan, in: ZJapanR/J.Japan.L. 8 (1999) 34–37.

10 Kaneko et al v. Japan Sup. Ct. 1969.11.26 [Hakata Station Film Case].

11 H. ITOH/L. BEER, The Constitutional Case Law of Japan: Selected Supreme Court Decisions, 1961–70 (Seattle 1978) 246–247.

12 KADOMATSU, *supra* note 9, 34–37.

Another famous case where the ‘right to know’ is again mentioned, however, in conjunction with state secrets for the first time,¹³ was the 1978 Nishiyama Secret Telegraph case [Nishiyama case]. Mr. Nishiyama, an employee of the Mainichi Newspaper, divulged information with reference to a telegraph which revealed a secret agreement between the Japanese and US government concerning the reversion of the Okinawa Islands. Mr. Nishiyama disclosed this information to a leading congressman who exposed the case during the national Diet assembly.¹⁴ Mr. Nishiyama’s primary source of information was his lover, Mrs. Hasumi Kikuko, who was a Foreign Ministry employee. They were both later arrested and prosecuted for infringing the National Public Employees Law (NPEL) which prohibits “revealing secrets learned while carrying out official duties”. The case was taken in and out of the Japanese courts. Mr. Nishiyama’s appeal was based on the constitutional right to freedom of press,¹⁵ alleging that, in a democratic society, the content of the telegraph should have been made available to the public, its contents should not be deemed ‘secret’ and it therefore falls outside the scope of the NPEL. Nevertheless, the Supreme Court of Japan took the so-called “substantive secret theory” approach contrary to the “formal secret theory”¹⁶ and found Mr. Nishiyama guilty of the charges based on the following circumstances: (a) the courts have discretionary authority to establish what is deemed to be secret under the NPEL provisions and what is regarded to be a “legally unprotected political secret”; (b) the right of secrecy during the government negotiation in the Okinawa case was correct; (c) the failure to disclose information before the National Japanese Diet did not constitute a violation of the constitution and, therefore, was justifiable; (d) Mr. Nishiyama’s professional misconduct and unethical behavior regarding inducement questions his true intentions and the legitimacy of news gathering and freedom of press and speech.¹⁷

The Hakata Film incident and the Nishiyama case served as legal precedents and the sheer amount of other cases – such as the Lockheed-Scandal of 1976 where renowned politicians including the former Prime Minister Tanaka were accused of and charged with bribery and corruption – triggered a heated debate that called for the elaboration and enactment of a disclosure of information law during the 1980s and 1990s.¹⁸ Different organizations and legal scholars submitted various proposals, such as the Japan Civil Liberty Union’s (JCLU) proposal for an Information Disclosure Law submitted in 1979, and the Citizens Movement for Information Disclosure (CMID) which published “A Declaration of the Right to Information Disclosure” and “The Eight Principles of Information Disclosure” in the beginning of the 1980s. These consumer protection groups,

13 L. BEER, Freedom of Expression: The Continuing Revolution, in: Luney/Takahashi (eds.), Japanese Constitutional Law (Tokyo 1993) 237–238.

14 KADOMATSU, *supra* note 9, 34–37.

15 BEER, *supra* note 13, 237–238.

16 KADOMATSU, *supra* note 9, 34–37.

17 BEER, *supra* note 13, 238.

18 KADOMATSU, *supra* note 9, 34–37.

environmental activists, journalists, lawyers, administrative and constitutional law scholars and partisans contributed to the fight against corruption. The progressive enactment of information disclosure ordinances by different Japanese prefectures was started by the Yamagata prefecture and followed by Kanagawa, Saitama, Tokyo, Osaka and Nagano until the year 1998, at which time all prefectures had information disclosure ordinances in place.¹⁹ The enactment of these ordinances proved relevant in the middle of the 1990s, when a watchdog group network verified the exorbitant amount of money spent by public officials under the “food expenditure” budget which amounted to approximately 2,950 Million Yen during the 1993 fiscal year. Another case that was brought to the public’s attention about the importance of disclosing information was the AIDS scandal, where approximately 1,806 hemophilia patients were unintentionally infected with HIV due to negligent medical practices. By the end of the 1980s, a group of patients sued the Japanese government and requested the disclosure of information from the Ministry of Health and Welfare (MHW), but the Ministry refused to cooperate, arguing that such documents did not exist. Nevertheless, at the beginning of 1996, under the auspices of a new government, the documents that proved the liability of the doctors and government officials were seized from the MHW.²⁰

The movement that started as a grass root citizen’s initiative and concluded later with the AIDL was also influenced and supported by the upsurge of taxpayer information disclosure suits. Part and parcel of this trend was the general concern for government over-expenditure during the mid-1990s crisis. A good example of this development is the Bunkyo Ward Metropolitan Tokyo case concerning a \$495 million civic center building. When the newly elected councilwoman, Mrs. Wakabayashi Hitomi, requested the unit cost of such building, ward officials declined to disclose such information. Therefore, the case went to court, and, in July 1999, ward officials finally released the information after it became obvious they would lose the case.²¹

III. THE ADMINISTRATIVE INFORMATION DISCLOSURE LAW IN JAPAN

In April 2001, and after more than 20 years of lobbying and debates, the AIDL in Japan created, for the first time, a legally binding law regulating access to information concerning government documents. The obligations enshrined in this law mirror the US Freedom of Information Act (FOIA), which served as a paradigm. The FOIA has been used, since its enactment in 1966, by millions of Americans to disclose various sorts of

19 Y. MIKI, *Japan’s Experience – Developing Information Disclosure System and Fighting for Corruption to Utilize the System*, International Clearing House, Japan, 2. Available at: http://iacconference.org/documents/10th_iacc_workshop_Japans_Experience.pdf.

20 KADOMATSU, *supra* note 9, 34–38.

21 J. MARSHALL, *Credible Commitments: Taxpayer Suits and Freedom of Information in Japan* (Annual Meeting of the American Political Science Association 2001) 16–26, Available at: <http://js.huntingdon.edu/jlewis/FOIA/AsiaFOIA/MarshallJonAPSA01a.pdf>.

information of public interest such as documents regarding environmental matters, food and drug safety and other confidential government information of public interest.²²

The first case after the AIDL was created took place on 13 December 2001, when some “self-appointed” Japanese citizens requested relevant data concerning an international exposition event planned for 2005. The defendant in this case was the Economics and Trade Bureau of the Chubu District Office of the Ministry of Economics, Trade and Industry. The defendant lost the proceeding after having to disclose much of the relevant information including a list of potential banks for financing the event.²³

As hinted above, the AIDL fills a gap in Japanese law; however, as in any law there is always room for improvement. Therefore, there are a few provisions which need to be taken into consideration in order to strike the right balance with the Secrecy Law, which will be discussed in the following section. To start with, the AIDL should rephrase the purpose of the law and include the aforementioned “right to know” which was intentionally left out of the original version of the law, partly in view of the fact that the Supreme Court, although having mentioned this in the abstract and recognizing this right implicitly, had decided not to extend it to a “positive right of access to government-held information”. Then again, in a 2009 watershed case²⁴ concerning a secret pact made between Japan and the US, two justices of the Japanese Supreme Court affirmed that the “right to know” does exist and is implied in the Japanese constitution. This recognition has also been expressly mentioned in almost 40 of the prefectural ordinances previously mentioned above. Granting a constitutional right to the “right to know” and making an explicit reference in the AIDL could help to expand the definition and scale of the right.²⁵

IV. SECRECY LAW IN JAPAN

In 1985, the Liberal Democratic Party submitted a draft for secrecy legislation in Japan which epitomized some concerns in respect of inhibiting the freedom of free speech; thus it was ultimately rejected.²⁶ The new secrecy bill passed in December 2013, however, reinitiates these past discussions. Some legal and media experts are worried that the broad definition given to ‘official secrets’, and the harsh penalties of imprisonment

22 L. REPETA/D. SCHULTZ, Japanese Government Information: New Rules for Access. The 2001 Information Disclosure Law, and a Comparison with the U.S. FOIA (The National Security Archive 2002) 1.

23 L. REPETA, Government Transparency: Japan’s Information Disclosure Law of 2001, in: Freedom of Information Review 106 (2003) 56.

24 Supreme Court, 15 January 2009 (Petty Bench) 63(1) Minshū 46, per Izumi and Miyakawa JJ.

25 J. RHEUBEN, Enhancing the Right to Know in Japan: Translation of and Commentary on Proposed Amendments to the Information Disclosure Law, in: ZJapanR / J.Japan.L. 34 (2012) 264–254.

26 E. SLAVIN, Legal experts worry Japan’s secrecy law may silence journalist, in: Stars and Stripes, 17 December 2013. Available at: <http://www.stripes.com/news/legal-experts-worry-japan-s-secrecy-law-may-silence-journalists-1.257943>.

extended to 10 years for public servants and up to 5 years for journalists²⁷ will undermine freedom of press and shut down the disclosure of information and the right to know for Japanese citizens. Critics identify this law with the new governmental agenda to strengthen the military and to revise the post-war Japanese constitution drafted under US influence. The new act provides a broad definition of “special secrets” that should be kept confidential and categorizes them into four groups i.e.; defense, diplomacy, counter-terrorism and counter-espionage. However, the concern is that this new law will strike down the public’s right to know because of its failure to define a specific concept regarding information to be kept secret, raising the possibility that administrative branches could freely decide what kind of information should be kept secret at their own discretion. According to Kōichi Nakano, Professor at Sophia University, the law could certainly have a “chilling effect on journalism in Japan”.²⁸

Among the dissenting opinions there are many civic, academic and human rights groups in addition to other society groups such as the Japan Federation of Bar Associations, Amnesty International Japan, Human Rights Watch, the International Association of Journalists and PEN International; also the UN High Commissioner for Human Rights has expressed dissent.²⁹ Another organization advocating against the secrecy law is the “Open Society Foundation”. In the words of Sandra Coliver, senior legal officer at the Justice Initiative, this law “represents a step backwards for Japan” which “[...] threatens public accountability”. Frank La Rue, UN special reporter on freedom of expression, has also questioned and criticized the provisions of the law on the grounds of its vagueness and ambiguity in conceptualizing the concept of secrecy too broadly which “[...] includes serious threats to whistle-blowers and even journalists reporting on secrets”.³⁰

Another organization which opposes to this bill is Human Rights Now. Among their main concerns are: (a) the wide definition given to ‘secret information’: which might encompass a wide range of information regarding defense, diplomacy, counterintelligence and counterterrorism without specifying clear criteria in establishing what exactly is secret even though the bill dictates that such criteria should be based upon expert consultation; (b) lack of democratic surveillance: no democratic control framework exists

27 “Japanese secrecy law raises fears over public’s right to know”, The Strait Times, 26 October 2013. Available at: <http://www.straitstimes.com/the-big-story/asia-report/japan/story/japanese-secrecy-law-raises-fears-over-publics-right-know-2013>.

28 L. SIEG / K. TAKENAKA, Japan secrecy act stirs fears about press freedom, right to know, Reuters, 24 October 2013. Available at: <http://www.reuters.com/article/2013/10/24/us-japan-secrecy-idUSBRE99N1EC20131024>.

29 “Government without oversight”, Japan Times, 6 December 2013. Available at: <http://www.japantimes.co.jp/opinion/2013/12/06/editorials/government-without-oversight/>.

30 Japan’s new state secrecy law threatens public accountability, Open Society Initiative, 6 December 2013. Available at: <http://www.opensocietyfoundations.org/press-releases/japans-new-state-secrecy-law-threatens-public-accountability>.

under Art. 3 of the Secrecy Bill and only “a chief of an administrative agency” can decide what kind of information should be kept secret; (c) lack of protection for whistle-blowers: under the current framework of the Whistleblowers Protection Act there is no scheme of protection in cases of criminal prosecution. This means that governmental officers might be accused of crimes in cases of whistle-blowing; and (d) threats to freedom of press: according to Art. 24 of the Secrecy Bill, “a person that colludes with, abets and agitates someone else to disclose a secret will be sentenced to imprisonment of less than 5 years”, which exposes journalistic activities and clearly violates the freedom of press and expression.³¹

As far as whistle-blowing concerns, Japan decided to strengthen and enact the protection for whistle-blowers after a raft of corporate scandals. This decision was taken right after the 2003 Izumi Cooperative Whistleblower case,³² where the Osaka District Court established that termination of a contract as a way of retaliation was not valid. The court also upheld that whistle-blowing was justifiable if the information disclosed was beneficial to the public and such information was authentic (true). The Japanese Whistleblower Protection Act³³ came into force in April 2006 and grants protection from retaliation and reprisals.³⁴ However, the Japanese Whistleblower Protection Act is very limited in scope, and it does not contain provisions that cover other infractions such as “tax, public elections and political funds regulations”. This means that whistle-blowers are not protected if they disclose information concerning the misallocation of funding by public officers.³⁵

V. THE TSHWANE PRINCIPLES

The Global Principles on National Security and the Right to Information (Tshwane Principles)³⁶ are a set of global principles that stems from international and national laws, standards and good practices. They were drafted by 22 worldwide organizations and academic institutions. The principles set a threshold on the right to know information and freedom of expression which echoes the laws of modern democratic societies as

31 “Human Rights Now strongly opposes the Japanese special secrets bill”, Human Rights Now, 28 November 2013. Available at: <http://hrn.or.jp/eng/news/2013/11/28/human-rights-now-strongly-opposes-the-japanese-special-secret-bill/>.

32 Ōsaka Izumi Cooperative Society (whistle-blowing) Incident, Ōsaka District Court, Sakai Branch Judgment, June 18, 2003, Rōdō Hanrei, [Labour Reports], no. 855:22.

33 Japanese Whistleblower Protection Act (Act No.122 of 2004). Available at: <http://www.cas.go.jp/jp/seisaku/hourei/data/WPA.pdf>.

34 H. MIZUTANI, Whistleblower Protection Act, 95, 101 and 116. Available at: http://eforum.jil.go.jp/english/JLR/documents/2007/JLR15_mizutani.pdf.

35 L. WOLFF, New Whistleblower Protection Laws for Japan, in: ZJapanR/J.Japan.L. 17 (2004) 213.

36 Global Principles on National Security and the Right to Information (Tshwane Principles). Available at: <https://www.fas.org/sgp/library/tshwane.pdf>.

well as regional court decisions. The principles acknowledge the governmental right to keep certain information secret from the public under specific terms and circumstances which justify an “identifiable harm”. Nevertheless, in the view of the Open Society Initiative, which participated in drafting these principles, the Secrecy Bill does not meet the standard proposed by the Tshwane Principles.³⁷

In accordance with the fundamental principles of international law, the limitations and restrictions imposed by public authorities on the right of access to information “must be set out clearly and narrowly in law”. Principle 3(a) of the Tshwane Principles posits: “Prescribed by law. The law [setting out restrictions on access] must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to understand what information may be withheld, what should be disclosed, and what actions concerning the information are subject to sanction”.³⁸ In addition, Principle 3(c) prescribes: “Protection of a legitimate national security interest. The narrow categories of information that may be withheld on national security grounds should be set forth clearly in law”. The Secrecy Bill fails to achieve these criteria and instead proposes a list of about 23 indistinctly and imprecisely formulated terms which may fall within the scope of secrecy under national security justifications.³⁹

With regard to the protection of whistle-blowers, the Tshwane Principles stipulate categories of information relevant to the public’s right to know which should be considered as “protected disclosure” such as: (a) criminal offenses; (b) human rights violations; (c) international humanitarian law violations; (d) corruption; (e) dangers to public health and safety; (f) dangers to the environment; (g) abuse of public office; (h) miscarriages of justice; (i) mismanagement or waste of resources; (j) retaliation for disclosure of any of the above listed categories of wrongdoing; and (k) deliberate concealment of any matter falling into one of the above categories. The Tshwane Principles also underline that the law ought to provide a protection from retaliation to public personnel who make the information publicly available, apart from whether the information is deemed to be classified or confidential, as long as the person making the disclosure has “reasonable grounds” to consider that the information falls under one of the aforementioned categories. The motives are immaterial except when the disclosure is deliberately false. The person making such disclosure should not bear the burden of proof or have to provide any evidence whatsoever.⁴⁰ Principle 41 provides immunity from civil and criminal liability for protected disclosures. This means that a person should neither be prosecuted for the disclosure of classified or confidential information, in a criminal investigation,

37 MIZUTANI, *supra* note 34, 95–116.

38 T. MENDEL, Japan: Harsh Secrecy Law Fails to Respect International Standards, in: Centre for Law and Democracy, 5 December 2013. Available at: <http://www.law-democracy.org/live/japan-harsh-secrecy-law-fails-to-respect-international-standards/>.

39 Ibid.

40 Principles 37–38 of the Tshwane Principles.

nor should the person be charged in civil proceedings, including claims for damages and defamation proceedings.⁴¹ Where the disclosure of information falls outside the scope of the so-called “protected disclosure”, the Tshwane Principles recommends that the law “should provide a public interest defense if the public interest in disclosure of the information in question outweighs the public interest in non-disclosure” considering the following: (a) “whether the extent of the disclosure was reasonably necessary to disclose the information of public interest”; (b) “the extent and risk of harm to the public interest caused by the disclosure”; (c) “whether the person had reasonable grounds to believe that the disclosure would be in the public interest”; (d) “whether the person attempted to make a protected disclosure through internal procedures and/or to an independent oversight body, and/or to the public, in compliance with the procedures outlined in Principles 38–40”; and (e) “the existence of exigent circumstances justifying the disclosure”.⁴²

VI. CONCLUSION

At the upper end of the spectrum, it could be said that the right to know and freedom of press are inextricably entwined and rooted in the Japanese society, and the AIDL has come to reinforce these constitutional rights and fill the remaining lacunae. In addition, the sheer amount of legal precedents and prefectural ordinances during the last two decades have solidified this concept in the minds of Japanese citizens. However, at the other end of the scale, this democratic process is nuanced by the new Secrecy Bill that might hinder people’s right to know and obstruct freedom of press and the transparency in respect of public accountability.

This article advocates for a more transparent process during the preparation of the Secrecy Bill before it comes into effect. It should be reviewed in collaboration with a panel of experts and third-party organizations in an open public consortium. One of the salient points of such reform is to narrow down the definition of secret information and specify the categories and sub-categories of secret and sensitive information as well as limiting the discretionary power given to governmental authorities in deciding what kind of information should be kept secret. The Secrecy Bill should legislatively construe the concept of secret information more narrowly while relaxing and expanding the people’s right to know as provided in the AIDL.⁴³

In this respect, we may now turn back to the Nishiyama case and pose the hypothetical question of what would have happened if Mrs. Hasumi had turned in the concealing pact behind the telegram on her own instead of giving it to Mr. Nishiyama? Would the

41 Principle 41 of the Tshwane Principles.

42 Principle 43 of the Tshwane Principles.

43 See e.g. the opinions of K. OKADA and H. SEBATA, in: Mainichi Japan, Defend people’s right to know despite secrecy law: experts, 9 December 2013. Available at: <http://mainichi.jp/english/english/newsselect/news/20131209p2a00m0na015000c.html>.

law have given her protection as a whistle-blower? Or, similarly, in the Hakata Station Film incident, what would have happened in a hypothetical situation where a consciously informed police would have accused a colleague of him?⁴⁴ And, most importantly, is the current Secrecy Bill in the position of providing the necessary guarantees for the protection of conscientious citizens who believe that some state administrative acts must be disclosed on behalf of the public interest? It seems that the last question must be answered negatively, and the Tshwane Principles can help shed some light in this respect. Whistle-blowers and journalists need to be assured that the Secrecy Bill will not hamper or negatively affect their work. Although Art. 21 of the Secrecy Bill considers freedom of press and expression, the imprecise terms covering such concepts gloss over various aspects and should be more specific. As for the protection of whistle-blowers concern, the Secrecy Bill should set forth an immunity clause for governmental officers who deem it relevant to disclose information to the general public.⁴⁵

In light of the above, this article recommends raising the threshold of protection and using the Tshwane Principles as a yardstick to balance the right to know against the Secrecy Bill in cases where disclosure of information regarding human and constitutional rights violations, public health, environmental protection, civilian's safety as well as information related to nuclear weapons and mass destruction should prevail (Principle 10). In addition, it also recommends strengthening the protection provided to whistle-blowers in accordance with Principles 40, 41 and 43. Last but not least, the article advocates guaranteeing the secrecy of the source of information and the protection of civilians, other than government officials, so that they will not be accused of conspiracy and information disclosure (Principles 47 and 48).⁴⁶

National security and the right to know are frequently seen as two conflicting rights. However, striking a fair balance between them is crucial for safeguarding human rights in a democratic society and is fundamental for its security, welfare and development.⁴⁷

SUMMARY

The 'right to know' information is a well-established human rights principle protected under the umbrella of public international law. In Japan, this right stems from the Japanese constitution, and its provisions were enshrined in the Administrative Information Disclosure Law (AIDL) of 2001. However, in December 2013, the Japanese National Diet passed a Secrecy Bill which caused uproar among legal experts, the media and other civic and human rights organizations, mainly due to its failure to adequately de-

44 BEER, *supra* note 13, 238.

45 Human Rights Now, *supra* note 31.

46 Ibid.

47 The Tshwane Principles (Open Society Foundation) 6–7.

fine the concept of secret information, which may undermine and hamper journalistic activities and freedom of the press. The 'special gravitas' question of striking the right balance between the legitimacy of state secrets and the public's right to know still persists in Japan. This article attempts to answer some of these lingering questions and strives to find a solution.

ZUSAMMENFASSUNG

Das „Recht zu Wissen“ ist ein allgemein anerkannter Grundsatz der Menschenrechte, der im Völkerrecht verankert ist. In Japan leitet sich dieses Recht aus der dortigen Verfassung ab und war im Gesetz zur Offenlegung von Verwaltungsinformationen von 2001 festgeschrieben. Im Dezember 2013 hat das japanische Parlament jedoch ein Gesetz zum Schutz von Staatsgeheimnissen verabschiedet, das Empörung unter juristischen Fachleuten, der Presse und Menschenrechtsorganisationen verursacht hat, da der zentrale Begriff der geheim zu haltenden Information nicht mit der erforderlichen Präzision definiert ist, was die journalistische Arbeit behindert und die Freiheit der Presse gefährdet. Die zentrale Frage nach der richtigen Balance zwischen legitimen Staatsinteressen an der Geheimhaltung von Informationen und dem Recht der Öffentlichkeit auf Information ist für Japan noch nicht beantwortet. Der Beitrag versucht Teile einer Antwort zu formulieren.

(Die Redaktion)