

Mission Unaccomplished: Japan's Anti-Bôryoku-Dan Law

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Concern over the growing involvement of *yakuza* groups in business enterprises and political and administrative decision-making in Japan led to the introduction of the *Law to Prevent Unjust Acts by Organised Crime Group Members*¹ which came into operation on March 1, 1992 (also known as the *Anti-bôryoku-dan Law*, or *Bôtai-hô*). At the heart of the legislation is the proscription (or 'designation') of criminal organisations. After nearly twenty years of operation, opinions about the *Anti-bôryoku-dan Law* remain fiercely divided. This article reviews the available evidence of the achievements and failures of the *Anti-bôryoku-dan Law* and explores the key objectives and provisions of the Act in the light of contemporary patterns of organised crime in Japan.

I. PATTERNS AND LEVELS OF ORGANISED CRIME IN JAPAN

Organised crime in Japan is frequently associated with the *yakuza* (ヤクザ or やくざ), the name for criminal syndicates that have evolved in Japanese society over the last 400 years. The word *yakuza* refers to a traditional card game and means as much as 'worthless'. In Japan, the term is used to refer to individual members of criminal organisations, while law enforcement agencies prefer the term *bôryoku-dan* (暴力団, or violence groups) to refer to the groups themselves.²

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1 *Bôryoku-dan-in ni yoru futô no kôri no bôshi ni kan suru hô*, Law No. 77/1993; an English (or other) translation of the Act was not available at the time of writing.

2 In this article, the two terms are used interchangeably.

Historically, *bōryoku-dan* comprised groups of outsiders including people involved in gambling, low-level crime, or protection rackets.³ Beginning in the 1800s, *bōryoku-dan* gradually began to get involved in more sophisticated and organised crime forms, such as prostitution, extortion, illegal supply of liquor, and the sex and gambling industries. To raise further funds and exercise greater power, the *bōryoku-dan* also set up a range of legitimate businesses and entered into strategic relationships with political figures, often by way of corruption.⁴ The *bōryoku-dan* and its members were largely tolerated by Japanese society and many *yakuza* portrayed themselves (or were portrayed by others) as heroes, Robin Hoods, and modern-day *samurai*. Until the introduction of anti-organised crime laws in 1991, it was also common for some groups to use gang emblems and tattoos to openly display membership.⁵ Peter Hill notes that ‘the *yakuza* apparently enjoyed a position of wealth, security and acceptance, inconceivable for organised crime groups in other advanced democracies.’⁶ Similarly, Keith Maguire remarks that:

Although crime rates in Japan are generally lower than in the West, organised crime is a much more serious problem. Organised crime had been given a role in society which on the one hand leads to serious problems of corruption, but on the other hand contributes to keeping down the worst excesses of street crime and the heroin and cocaine problems that are found in the West.⁷

The *yakuza* took great advantage of the lack of government control and law enforcement that followed Japan’s defeat in the Second World War. During that time, *bōryoku-dan* in cooperation with low-level racketeering groups ran much of the black market for food and basic supplies.⁸ Over the years, the *yakuza* became increasingly influential across Japan and – particularly in the decade of Japan’s ‘bubble economy’ – became more and more involved in the stock market, real estate, and politics. John Huey-Long Song and John Dombrink note ‘an unusual relationship of Japan’s organised crime groups to that

3 P. HILL, The Changing Face of the Yakuza, in: *Global Crime* (2004) 97; K. MAGUIRE, Crime, Crime Control and the Yakuza in Contemporary Japan, in: *Criminologist* (1997) 135.

4 J. RITCH, They’ll make you an offer you can’t refuse: A comparative analysis of international organised crime, in: *Tulsa Journal of Comparative and International Law* (2002) 581–582; P. HILL, Heisei Yakuza: Burst Bubble and Bōtaihō, in: *Social Science Japan Journal* (2003) 2–3.

5 H. SAEKI, Japan: The Criminal Justice System Facing the Challenge of Organised Crime, in: *International Review of Penal Law* (1998) 414. On the early years of the *yakuza* generally, see D. KAPLAN / A. DUBRO, *Yakuza: Japan’s Criminal Underworld* (2003) 3–27.

6 HILL, *supra* note 4, 2. See further P. HILL, The Japanese Mafia: Yakuza, Law, and the State (2003), 36–42.

7 K. MAGUIRE, Crime, Crime Control and the Yakuza in Contemporary Japan, in: *Criminologist* (1997) 140.

8 HILL, *supra* note 3, 98; KAPLAN / DUBRO, *supra* note 5, 31–55; MAGUIRE, *supra* note 3, 135–136.

society and to its legitimate institutions' and observe that *bôryoku-dan* 'evolved into wealthy and sophisticated, even semi-legitimate, societal institutions with a strong political presence.'⁹ At that time, the *yakuza* also became involved in an activity known as *sôkai-ya*, a unique form of corporate blackmail,¹⁰ and in corporate crimes such as money lending (*sarakin*), debt collecting and loss cutting, auction obstruction, and bankruptcy management.¹¹ The economic boom also allowed Japanese groups to branch out into the Republic of Korea (South Korea), Taiwan, the Philippines, Hong Kong, and the United States.¹²

Bôryoku-dan are generally made up of several smaller entities and sub-groups which – in combination – form a hierarchical, 'quasi-feudal',¹³ pyramid-style structure. This structure separates senior leaders from lower levels of participants. It also insulates the upper levels from criminal prosecutions as the directors and financiers of big *bôryoku-dan* generally do not physically engage in criminal activities. The hierarchical structure is often supported by ceremonial rituals, strict codes of discipline, punishments and fines, but also membership fees and mentorship among and between different levels (sometimes referred to as father-son, or brother relationships).¹⁴

It has been said that membership in *bôryoku-dan* in Japan peaked with approximately 184,100 members in 1963, prior to the government's 'summit strategy' which resulted in many arrests and prosecutions.¹⁵ Official and unofficial sources suggest that since the mid-1990s, the *bôryoku-dan* and other criminal organisations have over 80,000 regular members across Japan who are involved in a range of criminal activities.¹⁶ It is estimated that 'the *yakuza* generate USD 50 billion annually from their activities.'¹⁷

9 J. SONG/J. DOMBRINK, *Asian Emerging Crime Groups: Examining the Definition of Organized Crime*, in: *Criminal Justice Review* (1994) 232. See also K. SHIKATA, *Yakuza – organised crime in Japan*, in: *Journal of Money Laundering Control* (2006) 417; KAPLAN / DUBRO, *supra* note 5, 175–195.

10 See further, KAPLAN / DUBRO, *supra* note 5, 159–164; HILL, *supra* note 3, 99; HILL, *supra* note 6, 124–128.

11 MAGUIRE, *supra* note 3, 137; HILL, *supra* note 4, 6–8; HILL, *supra* note 6, 116–136.

12 KAPLAN / DUBRO, *supra* note 5, 223–323; SONG / DOMBRINK, *supra* note 9, 232–233.

13 HILL, *supra* note 4, 2.

14 SAEKI, *supra* note 5, 414; HILL, *supra* note 4, 2; HILL, *supra* note 3, 107; HILL, *supra* note 6, 64–91; J. SMITH, *An International Hit Job: Prosecuting Organized Crime Acts as Crimes against Humanity*, in: *Georgetown Law Journal* (2009) 1116–1117.

15 N. TAKEMURA, *Recent Trends of Organised Crime around Japan and (South) East Asia*, paper presented at the symposium *Organised Crime in Asia*, Brisbane, June 2007, 246; HILL, *supra* note 3, 99.

16 RITCH, *supra* note 4, 583–585; SHIKATA, *supra* note 9, 416.

17 SMITH, *supra* note 14, 1117.

Figure 1

Organised crime groups and membership in organised crime groups
Japan 2000 – 2005¹⁸

	2000	2001	2002	2003	2004	2005
<i>Total number of organised crime group members (as of December 31)</i>	83,600	84,400	85,300	85,800	87,000	86,300
<i>Designated organised crime groups¹⁹</i>	25	24	24	24	24	21
• <i>incl. major groups</i>	3	3	3	3	3	3

Since 2000, Japan's Ministry of Justice has published an annual *White Paper on Crime* which contains extensive data on the number of organised crime groups and their members, and the offences group members are involved in. These reports suggest that the total number of organised crime group members has increased from 79,300 in 1995 to 86,300 at the end of 2005.²⁰ About half or 43,300 are seen as regular members. Since 2001, there are 24 'designated organised crime groups' in Japan,²¹ and for the past five years the *White Paper* has identified three 'major organised crime groups': the

18 JAPAN, MINISTRY OF JUSTICE, White Paper on Crime 2001, available at <http://hakusyo1.moj.go.jp/en/46/nfm/mokuji.html> (accessed 18 Apr 2009); JAPAN, MINISTRY OF JUSTICE, White Paper on Crime 2002, available at <http://hakusyo1.moj.go.jp/en/47/nfm/mokuji.html> (accessed 18 Apr 2009); JAPAN, MINISTRY OF JUSTICE, White Paper on Crime 2003, available at <http://hakusyo1.moj.go.jp/en/49/nfm/mokuji.html> (accessed 18 Apr 2009); JAPAN, MINISTRY OF JUSTICE, White Paper on Crime 2004, available at <http://hakusyo1.moj.go.jp/en/50/nfm/mokuji.html> (accessed 18 Apr 2009); JAPAN, MINISTRY OF JUSTICE, White Paper on Crime 2005, available at <http://hakusyo1.moj.go.jp/en/53/nfm/mokuji.html> (accessed 18 Apr 2009); JAPAN, MINISTRY OF JUSTICE, White Paper on Crime 2006, available at <http://hakusyo1.moj.go.jp/en/53/nfm/mokuji.html> (accessed 18 Apr 2009).

19 Designated organised crime groups under the Law to Prevent Unjust Acts by Organised Crime Group Members, *supra* note 1.

20 See also HILL, *supra* note 3, 106.

21 It appears that this number has not changed since the *Law to Prevent Unjust Acts by Organized Crime Group Members* was first introduced in 1991. SAEKI (*supra* note 5, 416) notes that 24 *bōryoku-dan* groups were designated between 1992 and 1996.

Yamaguchi-gumi (山口組, designated since June 1992),²² *Inagawa-kai* (稲川会, designated since June 1992),²³ and the *Sumiyoshi-kai* (住吉会, designated since June 1992).²⁴ Their members account for over 76 percent of all organised crime group members in Japan.²⁵

In 2004, organised crime group members were found to be involved in nearly 30,000 criminal offences (not including traffic violations). Data provided by the Ministry of Justice of Japan shows that members of these groups are particularly dominant, inter alia, in gambling offences (58.9%), illegal confinement (54.3%), drug offences, especially those involving methamphetamine (44.5%), and extortion (39.8%).²⁶ *Bôryoku-dan* groups also contribute disproportionately to Japan's otherwise very low firearms crimes and control substantial parts of Japan's sex and adult entertainment industries.²⁷

Japan's rapidly growing economy in the 1970s and '80s was also a magnet for foreign criminal organisations that sought to take advantage of local conditions. The available information suggests that for the most part these foreign organisations collaborated rather than competed with local *bôryoku-dan*. They often supplied commodities, such as narcotics, weapons, or sex workers, that are not easily available in Japan.²⁸ Taiwanese groups, for instance, became very actively involved in supplying women from Taiwan to work in brothels and entertainment venues in Tokyo's Shinjuku district. There are several accounts of criminal organisations from Taiwan working hand in hand with Japanese groups in this industry. During anti-organised crime campaigns in Taiwan, several key figures relocated to Japan, sometimes resulting in violent clashes and gangland killings involving Taiwanese groups operating in Japan.²⁹

Some overseas groups began to withdraw from Japan as the economy started to slow in the 1990s. More recently, there have been accounts of criminal organisations from North Korea (DPRK) and Iran being involved in the illicit methamphetamine trade in Japan, sometimes in cooperation with local groups.³⁰

22 For more on the *Yamaguchi-gumi* see, for example, UNODC, Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries, Appendix B; KAPLAN / DUBRO, *supra* note 5, 113–123.

23 For more on the *Inagawa-kai* see, for example, KAPLAN / DUBRO, *supra* note 5, 135–143.

24 For more on the *Sumiyoshi-kai* see, for example, *ibid.* at 123–135.

25 JAPAN, MINISTRY OF JUSTICE, *White Paper on Crime 2006*, available at <http://hakusyo1.moj.go.jp/en/53/nfm/mokuji.html> (accessed 18 Apr 2009).

26 JAPAN, MINISTRY OF JUSTICE, *White Paper on Crime 2005*, available at <http://hakusyo1.moj.go.jp/en/53/nfm/mokuji.html> (accessed 7 Oct 2008). SONG / DOMBRINK, *supra* note 9, 232; SHIKATA, *supra* note 9, 416; HILL, *supra* note 5.

27 TAKEMURA, *supra* note 15, 249.

28 HILL, *supra* note 3, 111–112.

29 K. CHIN, Heijin – Organized Crime, Business, and Politics in Taiwan (2003) 194; KAPLAN / DUBRO, *supra* note 5, 260–262.

30 UNODC, Amphetamines and Ecstasy: 2008 Global ATS Assessment (2008) 34; HILL, *supra* note 3, 105; TAKEMURA, *supra* note 15, 247.

II. ORGANISED CRIME UNDER JAPAN'S CRIMINAL LAW

Japan's *Criminal Code* of 1907³¹ is modelled after Germany's criminal law which was conceived in the late 19th century. Part I of the Japanese Code sets out the general principles of criminal liability, which includes standard provisions relating to complicity such as liability of joint principals (Art. 60), accessory liability (Art. 62), and also incitement (Art. 61). The Code does not contain provisions relating to conspiracy and there are no specific offences for participating in criminal organisations. Outside the *Criminal Code*, there is some sentencing legislation which allows for the imposition of higher penalties on 'acts of intimidation, assault, and destruction of property committed by several individuals, or by showing the force of an enterprise or a group'.³²

1. Law to Prevent Unjust Acts by Organised Crime Group Members 1991

Work on a new *anti-bōryoku-dan* law began in November 1990³³ and in May 1991 the Diet passed (without much debate) the *Law to Prevent Unjust Acts by Organised Crime Group Members* which came into operation on March 1, 1992 (also referred to as the *Anti-Organised Crime Group Law*, *Anti-bōryoku-dan Law*, or *Bōtai-hō*).³⁴

Several triggers led to the introduction of this law. In the late 1980s, concerns arose over the growing involvement of *yakuza* groups in legitimate and quasi-legitimate business enterprises. Simultaneously, some groups sought to influence political and administrative decision-making through violent interventions in civil affairs, a practice known as *minbō*. Furthermore, some high-profile conflicts between several gangs (sometimes killing innocent third parties) and corruption scandals in Japan led to further calls to legislate against criminal organisations. Lastly, pressure from the United States and the international community was growing on Japan to increase its efforts to suppress the illicit drug trade and other forms of organised crime.³⁵ Since its introduction, the *Bōtai-hō* has seen two significant amendments in 1993 and 1997.³⁶

The law has been described as 'mainly an administrative and regulatory law aimed at the prevention of illegal acts rather than a substantive criminal law'.³⁷ Membership in a criminal organisation is not a criminal offence in Japan. At the heart of the legislation is the proscription (or 'designation') of criminal organisations. The power to designate a

31 *Keihō*, Law No. 45/1907, as amended by Law No. 54/2007; English transl.: <http://www.japaneselawtranslation.go.jp> (accessed 6 May 2010), German transl.: K. SAITO / H. NISHIHARA, *Das abgeänderte Japanische Strafgesetzbuch vom 10. August 1953* (Berlin 1953) (as of 1954).

32 SAEKI, *supra* note 5, 419; the title and English translation of this Act were unavailable at the time of writing.

33 The draft of the *anti-bōryoku-dan* law is discussed in HILL, *supra* note 6, 155–157.

34 *Supra* note 1.

35 HILL, *supra* note 6, 138–146; HILL, *supra* note 4, 8–9; KAPLAN / DUBRO, *supra* note 5, 210.

36 See further HILL, *supra* note 6, 163–166.

37 SAEKI, *supra* note 5, 417; HILL, *supra* note 3, 102. See also SHIKATA, *supra* note 5, 419, who refers to the Act as 'executive law, rather than a justice law'.

group is vested in the Public Safety Commissions of Japan's 47 prefectures, which are independent administrative panels that supervise local police forces and their activities. The Commissions hold public hearings and, with the consent of Japan's National Public Safety Commission, can declare an organisation that meets the statutory requirements a 'designated organised crime group' or an 'alliance of designated organised crime group'. The organisations under consideration may partake in the hearings and also have the right to have the decision by the Commissions judicially reviewed.³⁸ As mentioned earlier, Japan's three largest and most notorious groups, the *Yamaguchi-gumi*, *Inagawa-kai*, and *Sumiyoshi-kai* were all designated in June 1992.

Bôryoku-dan are broadly defined in Art. 2 (2) as 'a group of which there is a risk that its members (including members of its component groups) will collectively or routinely promote illegal violent behaviour'.³⁹ The Public Safety Commissions may designate *bôryoku-dan* groups using criteria set out in a definition of 'designated *bôryoku-dan*' in Art. 3 of the *Law to Prevent Unjust Acts by Organised Crime Group Members*, which contains elements relating to the purpose, structure, and activities of the organisation.⁴⁰

- Structurally, the law requires that the organisation have a hierarchical structure and be controlled by a leader.
- Further, the group has to have a certain number (percentage) of members with prior convictions. Specifically, the law requires that the ratio of members with a criminal record within the group be higher than that ratio in the general population.⁴¹
- The objective of the group has to be economic gain by way of intimidation, threats or force.
- The group encourages or facilitates activities of the group members, individually or collectively, involving either 'illegal acts typically committed by *bôryoku-dan* members', such as gambling, drug trafficking, prostitution, or loan sharking, or 'illegal violent acts' such as murder, bodily harm, robbery, coercion, extortion et cetera.⁴²

The existence of a criminal organisation alone does not create any criminal offences. Liability only arises if orders made under the Law are violated,⁴³ specifically if a *yakuza* member makes threatening demands or is otherwise involved in extortion or racketeering activities on behalf of the group. The complete list of activities (which was expanded with the 1993 and 1997 reforms) is set out in Art. 9.⁴⁴ The Law allows for injunction

38 JAPAN, MINISTRY OF JUSTICE, White Paper on Crime 2005, available at <http://hokusyo1.moj.go.jp/en/53/nfm/mokuji.html> (accessed 7 Oct 2008); SAEKI, *supra* note 5, 415, 416; HILL, *supra* note 3, 102; HILL, *supra* note 6, 159.

39 HILL, *supra* note 6, 158.

40 Cf. C. BLAKESLEY, The Criminal Justice System Facing the Challenge of Organized Crime, in: *International Review of Penal Law* (1998) 74–75.

41 Cf. similar requirements in Art. 467.1 Criminal Code (Canada) (now amended).

42 SAEKI, *supra* note 5, 416; cf. HILL, *supra* note 4, 9; HILL, *supra* note 3, 102; HILL, *supra* note 5, 158–159.

43 SHIKATA, *supra* note 9, 419.

44 The complete list of activities is set out in HILL, *supra* note 6, 160.

orders to be issued against members of organised crime groups who engage in threatening or coercive activities. These orders may be made at the request of victims.⁴⁵ Any violation of an injunction order is a criminal offence and may result in imprisonment or a fine. In 1997, this offence was extended to apply to persons of authority, informal members, and business associates of designated organised crime groups.⁴⁶ Additionally, an organised crime group member who is likely to repeatedly violate provisions under the *Law to Prevent Unjust Acts by Organised Crime Group Members* may be placed under a recurrence preventive order. The law also allows victims of organised crime to recover any lost property and seek compensation from the criminal organisation.⁴⁷ In 1997, additional measures were introduced to prevent intra-gang turf wars and to authorise police to close gang offices and prohibit public displays of emblems and insignia. The legislation is also accompanied by a range of measures relating to education, public awareness campaigns, and rehabilitation of former gang members.⁴⁸

2. *Law for Punishment of Organised Crimes, Control of Crime Proceeds and Other Matters 2000*

Since the mid 1990s, there have been calls on Japan to improve the anti-organised crime laws and direct enforcement measures more specifically against the profit and other wealth accumulated by large-scale criminal enterprises. Demands for law reform in this field were further fuelled by the sarin gas attack on Tokyo's subway by the *Ômu shinrikyô* sect on March 20, 1995. While not connected to organised crime, this terrorist incident raised concerns about the operation of secret organisations in Japan.⁴⁹

In August 1999, Japan further enhanced its organised crime control regime with the enactment of the *Law for Punishment of Organised Crimes, Control of Crime Proceeds and Other Matters*⁵⁰ which came into force in February 2000. This legislation is designed to enhance the penalties for persons who commit a criminal offence as part of an organised crime group:

A person who commits specific penal code offences under the Law will be additionally punished in the case where (i) the offence is committed as a group activity by an organisation that intended to commit an act corresponding to the offense or (ii) the offence is committed for the purpose of obtaining illegal interests for the group.⁵¹

45 HILL, *supra* note 4, 9; HILL, *supra* note 3, 102.

46 HILL, *supra* note 4, 10; HILL, *supra* note 6, 165.

47 JAPAN, MINISTRY OF JUSTICE, White Paper on Crime 2005, available at <http://hakusyo1.moj.go.jp/en/53/nfm/mokuji.html> (accessed 7 Oct 2008); SAEKI, *supra* note 5, 417.

48 HILL, *supra* note 3, 102; HILL, *supra* note 6, 161–163.

49 See further KAPLAN / DUBRO, *supra* note 5, 206–209; SAEKI, *supra* note 5, 419.

50 *Soshikiteki na hanzai no shobatsu oyobi hanzai shûeki gisei-tô ni kan suru hôritsu*, Law No. 136/1999.

51 JAPAN, MINISTRY OF JUSTICE, White Paper on Crime 2002, available at <http://hakusyo1.moj.go.jp/en/47/nfm/mokuji.html> (accessed 7 Oct 2008).

The Act also contains additional provisions against money laundering and for the confiscation and seizure of proceeds of crime and other assets of criminal organisations.

III. OBSERVATIONS AND ASSESSMENT

From the outset, it is noteworthy that the criminalisation of *bôryoku-dan* and *yakuza* in Japan has not been without difficulty given the way in which the organisations and their members are firmly entrenched in Japanese society. Thus the creation of laws to proscribe *bôryoku-dan* organisations is a milestone of great symbolic significance, even if their enforcement has sometimes been slowly forthcoming.⁵² Hill, for instance, describes the *Bôtai-hô* as 'epoch making' because it is 'targeting activities that were hitherto immune from legal intervention'. He further remarks that '[t]he *Bôtai-hô* was seen as a clear break in that, for the first time, there was a legal definition of *bôryoku-dan* and a law existed that specifically and explicitly identified these groups as a social evil to subject to special controls.'⁵³

Japan's organised crime laws adopt a unique model that is partly inspired by the United States' *Racketeer Influences and Corrupt Organizations (RICO) Act*⁵⁴ but also includes features of laws that proscribe organisations and criminalise activities committed on their behalf.⁵⁵ Mere membership and participation in a criminal organisation are not criminalised.

In the absence of complete English translations of the statutes, it is difficult to make comprehensive and critical comments about Japan's anti-organised crime laws and about their practical application using primary sources. The literature remains divided about the fairness, legality, and effectiveness of Japan's *Law to Prevent Unjust Acts by Organised Crime Group Members 1991*.

One criticism of the *Anti-bôryoku-dan Law 1991* (Japan) has been that it is an administrative statute that 'has nothing to do with punishing serious crimes committed by organised crime members'.⁵⁶ David Kaplan & Alec Dubro note that '[m]uch of what it attacks was already illegal and the law's scope and penalties are relatively limited.'⁵⁷ The application of the Law is limited to the violent demands set out in Art. 9 if they are used to exploit a group's reputation in order to secure economic or other benefit.

52 Cf. SAEKI, *supra* note 5, 418.

53 HILL, *supra* note 6, 168 [emphases removed].

54 Racketeer Influenced and Corrupt Organizations 18 USC §§1961–1968 (hereinafter *RICO*).

55 Cf. HILL, *supra* note 4, 9.

56 SAEKI, *supra* note 5, 419.

57 KAPLAN / DUBRO, *supra* note 5, 211.

Hill remarks that:

From the comparative weakness of the penalties and the restriction of the *Bôtai-hô* to one area of *yakuza* activity, it is apparent that, *ceteris paribus*, the introduction of this law cannot achieve the goal, declared by the police, of eradicating these groups. At best, and assuming that it actually works as described, it will only drive out gang participation in *minbô*, protection, and those other categories of ‘violent demand’ covered by Article 9, without reducing the many other overtly criminal enterprises in which the *yakuza* are engaged. In fact, there are very good reasons for believing that the *Bôtai-hô* will fail to achieve even that.⁵⁸

Japanese scholar Hitoshi Saeki, in contrast, views the fact that the Law does not ban certain organisations *per se* and does not create a membership offence as a major advantage. For any criminal liability to arise, the accused has to engage in a criminal act; there is no guilt by association and no criminal liability arises merely from the status or role held by *bôryoku-dan* members.⁵⁹

The existing laws do not criminalize the creation of criminal organisations and membership in them. The constituting elements of organized crime groups set out in Art. 3 *Law to Prevent Unjust Acts by Organised Crime Group Members 1991* require a considerably higher threshold than most other jurisdictions in the region. The deterrent effect of the law may thus be rather limited.⁶⁰ Official records show that after the introduction of the new laws, the number of organised crime members initially dropped, but the number has grown again slightly since the mid 1990s.⁶¹ Some more recent reports suggest that *bôryoku-dan* have difficulties finding new and younger members.⁶² On the other hand, it has been noted that criminalising membership in an organised crime group would also create a practical enforcement problem in a country that has well over 80,000 *yakuza* members. ‘Would criminalisation result in trebling the overall prison population? Regardless of the cost of such a measure, would it be desirable?’ asks Hill.⁶³

There have been some concerns that the *Bôtai-hô* may violate constitutionally guaranteed rights such as the freedom of association (Art. 21 *Constitution of Japan*) and the principle of equality of all citizens (Art. 14).⁶⁴ However, public protest against the laws and legal challenges by notorious groups such as the *Yamaguchi-gumi*, *Sumiyoshi-kai*, and the *Aizu Kotetsu*, have thus far been unsuccessful.⁶⁵ Fears that the Law may be unjustly used against left-wing groups and trade unions have been described as un-

58 HILL, *supra* note 6, 167.

59 SAEKI, *supra* note 5, 416, 417.

60 Cf. SHIKATA, *supra* note 9, 419.

61 KAPLAN / DUBRO, *supra* note 5, 211–212.

62 HILL, *supra* note 4, 11.

63 HILL, *supra* note 6, 174.

64 See further, *ibid*, at 169.

65 *Ibid*, at 202–204; and HILL, *supra* note 3, 103.

warranted, as the Law requires that the group consist of a proportion of members with criminal records.⁶⁶

The process of designating *bôryoku-dan* has been criticised by some scholars. It has been pointed out that relevant definitions in the *Law to Prevent Unjust Acts by Organised Crime Group Members 1991* are very vague and open to subjective interpretation by the Public Safety Commissions and the National Public Safety Commission.⁶⁷ Hill also highlights the fact that the functions of Public Safety Commissions are often carried out by police.⁶⁸ He further noted that the Law inadequately deals with corruption and does little to disentangle the close relationship between the *yakuza* and Japan's political, financial, and law enforcement communities.⁶⁹

While the number of *yakuza* supporters today is small in comparison to the 1960s, the introduction of the anti-organised crime laws also resulted in a further consolidation of *bôryoku-dan*. The number of criminal organisations may have dropped, but the existing syndicates are larger and more sophisticated than ever before.⁷⁰ It was shown earlier that the three main organisations alone account for nearly 75 percent of all *yakuza* members.

Official figures support the view that the Japanese legislation was able to halt the growth in *bôryoku-dan* membership and that numbers have levelled out since the 1990s.⁷¹ But the experience of Japan has also shown that the legislation quite immediately pushed the organisations and their members further underground, and reduced the chances of cooperation between gang members and the police. Some organisations have split and regrouped under different names. The *Yamaguchi-gumi* also instantaneously instructed its members to remove emblems, conceal tattoos, and abandon or hide insignia to conceal membership. Some organisations set up legitimate front companies to conceal their operations or diversify their incomes by engaging in non-traditional *yakuza* crimes such as fraud, robberies, loan sharking, and theft.⁷² There have also been suggestions that the *yakuza* is increasingly resorting to violence. Saeki, for instance, expressed concern that

if people become more resistant to the illegal demands of the *bôryoku-dan*, *bôryoku-dan* members may begin to rely on violent acts more often than in the past. Destroying the positive self-image of *yakuza* members may also lead them to resort to violent acts more easily.⁷³

66 SAEKI, *supra* note 5, 416, 417; HILL, *supra* note 6, 169–170.

67 HILL, *supra* note 6, 170.

68 *Ibid.*, at 171.

69 HILL, *supra* note 6, 171.

70 HILL, *supra* note 3, 99, 110; KAPLAN / DUBRO, *supra* note 5, 212.

71 TAKEMURA, *supra* note 15, 246.

72 SHIKATA, *supra* note 9, 417; HILL, *supra* note 3, 103–104; HILL, *supra* note 4, 10, 15; KAPLAN / DUBRO, *supra* note 5, 212; HILL, *supra* note 6, 196–201; SMITH, *supra* note 14, 1118.

73 SAEKI, *supra* note 5, 418.

This view is shared by other observers.⁷⁴ The new measures may have also led to a displacement of criminal activities and may have contributed to Japanese organisations exploring opportunities abroad.⁷⁵ On the other hand, some authors have noted that the laws have significantly reduced the violence used by different gangs against each other.⁷⁶

IV. SUMMARY AND CONCLUSION

Japan's *Law to Prevent Unjust Acts by Organised Crime Group Members* creates a system of positive prohibition which involves the labelling of certain groups as criminal or illegal by way of proscribing or declaring them. Moreover, Japan has instituted mechanisms to place individual members and associates of criminal organisations under injunction orders which prohibit them from engaging in certain activities or from associating with other members.

This system is designed to outlaw groups and individuals that are seen as dangerous, violent, or as otherwise constituting a risk to public safety. This labelling approach shares similarities with laws dealing with terrorist organisations in that they create lists of prescribed organisations and criminalise support of other associations with them.

The rationale and method of this labelling model has been fiercely criticised. Many commentators have expressed concerns about the elements, indicia, standard of proof, and other methods used to outlaw organisations. Labelling an organisation as illegal effectively criminalises the very existence of a group on the basis of conduct in which that group may engage in the future. The administrative process set up in Japan is also said to lack clarity, consistency, and safeguards, and creates a risk of collusion between different branches of government and the judiciary. The set standards to establish the existence of a criminal organisation are also well below the standard of 'beyond reasonable doubt' used in criminal trials, and the general rules of evidence do not apply.

While the Japanese approach may be helpful in identifying and labelling some criminal organisations, it is of no use to act against flexible criminal networks that do not carry a particular name and have no formal organisational structure. It also creates the risk that outlawed groups will consolidate, move further underground, and engage in more clandestine, more dangerous, and more violent operations. Alternatively, other groups may simply resurface under a different name, thus circumventing the legislation.

In comparison to the anti-organised crime laws in other countries, liability under Japan's *Law to Prevent Unjust Acts by Organised Crime Group Members* is much more restricted. A criminal offence will only be made out if a *yakuza* member makes threatening demands or is otherwise involved in extortion or racketeering activities on behalf of

74 HILL, *supra* note 3, 100; HILL, *supra* note 4, 3–4.

75 KAPLAN / DUBRO, *supra* note 5, 212.

76 HILL, *supra* note 4, 10, 12; HILL, *supra* note 3, 109.

the group or if an injunction order is violated. While Japan's law has thus avoided criticism relating to overbreadth and creating guilt by association, the limited scope of the *Anti-bôryoku-dan Law 1991* has come under attack for having 'nothing to do with punishing serious crimes committed by organised crime members'.⁷⁷

In the so-called 'war on organised crime', Japan's *Law to Prevent Unjust Acts by Organised Crime Group Members* is seen by some as the ultimate weapon. But the expectation that this law will achieve what no other law, policy, or law enforcement strategy – however harsh – has ever accomplished has not been met with success. This is perhaps not surprising given that the introduction of the *Anti-bôryoku-dan Law* was driven by particular incidents and political interests, and not by empirical research.

Organized crime continues to exist throughout Japan, regardless of the existence of specialized offences. Critics argue that the *Law to Prevent Unjust Acts by Organised Crime Group Members* failed to achieve its objectives. If the fight against organised crime is indeed a war, then Japan's *Anti-bôryoku-dan Law* has not been able to secure a victory. Its mission has not been accomplished.

ZUSAMMENFASSUNG

Besorgnis über die wachsende Beteiligung von Yakuza-Banden (Bezeichnung krimineller Syndikate in Japan, die von der örtlichen Polizei auch bôryoku-dan genannt werden) an gewerblichen Unternehmen führte zur Einführung des Gesetzes zur Vorbeugung unrechtmäßiger Handlungen durch Bandenmitglieder der organisierten Kriminalität, welches am ersten März 1992 in Kraft trat (auch Anti-bôryoku-dan-Gesetz oder Bôtaihô genannt). Kern dieses Gesetzes ist die Ächtung bzw. Bezeichnung krimineller Organisationen. Das alleinige Bestehen einer kriminellen Organisation erfüllt keinen Straftatbestand. Eine Verantwortlichkeit entsteht erst, wenn Verfügungen, die aufgrund des Gesetzes erlassen wurden, missachtet werden, insbesondere wenn ein Yakuza-Mitglied Forderungen unter Einsatz von Drohungen geltend macht oder im Auftrag der Gruppe anderweitig an (Schutzgeld-)Erpressungen beteiligt ist.

Nachdem das Anti-bôryoku-dan-Gesetz nun fast zwanzig Jahre in Kraft ist, bleibt seine Bewertung heftig umstritten. Auf der einen Seite ist anzumerken, dass die Kriminalisierung von bôryoku-dan und Yakuza in Japan angesichts der Tatsache, dass diese Organisationen und ihre Mitglieder fest in der japanischen Gesellschaft verwurzelt sind, nicht ohne Schwierigkeiten gewesen ist. Daher ist die Schaffung von Gesetzen zur Ächtung von bôryoku-dan Organisationen ein Meilenstein von großer symbolischer Bedeutung. Auf der anderen Seite wurde das Gesetz als administrative Vorschrift kritisiert, die „nichts mit Bestrafung schwerer Verbrechen von Mitgliedern der organisierten Krimi-

77 SAEKI, *supra* note 5, 419.

nalität zu tun hat“⁷⁸, da sie nicht die Schaffung krimineller Organisationen und die Mitgliedschaft in ihnen pönalisiert.

Die Gesetzgebung hat die Organisationen und ihre Mitglieder weiter in den Untergrund gedrängt. Einige Organisationen haben sich aufgespalten und unter neuen Namen neu gruppiert. Andere haben rechtmäßige Unternehmen als Fassade gegründet, um ihre Tätigkeiten zu verbergen oder ihre Einkommensquellen zu mehren, indem sie sich in für Yakuza bisher untypischen Bereichen wie Betrug, Raub, Kreditwucher und Diebstahl betätigen.

78 H. SAEKI, Japan: The Criminal Justice System Facing the Challenge of Organised Crime, in: *International Review of Penal Law* (1998) 419.