

Japan’s New Conspiracy Law Expands Police Power

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Ever since the Meiji Period (1868-1912), treaties and the laws of other countries have been used to justify laws the Japanese people neither want nor need. The most recent use of this technique involves a treaty called the U.N. Convention against Transnational Organized Crime.

Never heard of it? According to the Abe administration, implementing the treaty was important enough to justify creating hundreds of new criminal offenses, most comprising an entirely new *category*, namely “planning the execution of a serious crime for a terrorist or other organized crime group.”¹ Most writers are using the word “conspiracy,” not just because it describes the new crimes more concisely, but also as this whole endeavor is widely regarded as the repackaging of past government efforts to add conspiracy to law enforcement’s arsenal.



Protest against new Organized Crime law

The official rationale for what may prove to be this century’s most dramatic expansion of state coercive powers in Japan is that it is required in order for the nation to implement the U.N. Transnational Crime Convention.² Abe and government spokesmen also claim it will be a tool to fight terrorism, an especially important issue as Tokyo prepares to host the Olympics.

Among the grounds for suspicion of the government’s intentions, there hasn’t been any serious effort to articulate concrete deficiencies in existing laws — such as bad guys who got away because of them — that will be remedied by the new ones. In fact, I read the Convention in vain for mention of a requirement to criminalize conspiracy, other than in connection with money laundering.

The fact that a U.N. treaty is central to the justification for the new law might explain why the government seems particularly annoyed at concerns expressed by a U.N. expert regarding the law’s potential for arbitrary use and infringement of civil liberties.³

Under the new law, it will potentially be a separate offense for two or more people to plan (i.e., discuss) the commission of dozens of crimes already on the books. Some make sense if terrorism is the target: Conspiring to have possession of cluster bombs, land mines or biological weapons? Sure, lock ‘em up! Planning to violate the Plant Variety and Seed Protection Act? Amazingly, this is also included in the list of 277 offenses appended to the statute.

Some offenses have the potential to arise in a

range of day-to-day affairs: conspiring to avoid consumption tax or favor some creditors over others — even directors “conspiring” to pay dividends in violation of a corporation’s charter may become a crime.

Remember, we are not talking about people actually committing the crime and seeing that proven in court; discussing or planning will itself be an offense.

Three reasons to be skeptical

According to the Ministry of Justice, these laws will not – cannot – be used against the average citizen or group.⁴ Why? First, the conspiracy offenses will only apply when committed by organized crime groups. Second, the types of crimes that are covered are clearly listed. Third, for a conspiracy to be punishable, not only must there be planning, but also action in furtherance of it.

“It will only apply to criminal organizations” is not very comforting given that, in connection with “the public order situation,” the NPA’s annual white paper regards the Japan Communist Party and populist demonstrations as worthy of special attention, lumped together with ultranationalists, hate groups and the remnants of the Aum Shinrikyo doomsday cult.⁵ The Justice Ministry’s own Public Security Intelligence Agency also openly refers to the JCP as one of many “organizations and forces that threaten to impact public safety.”⁶ Moreover, according to a 1999 leak of internal PSIA documents, the Agency actually conducts surveillance of groups that present such fearsome threats to society as Amnesty International and the Pen Club.⁷

Once a group gets marked for this type of attention, it may not be hard to become a “criminal organization” — particularly if its members are conspiring to commit crimes! That said, the “criminal organization” requirement will doubtless mean nobody in government can ever be guilty of conspiracy.

As for clear definition, the sheer length of the list of new offenses offers little comfort that the law won’t become the 21st century version of the Peace Preservation Act, the 1925 statute used in prewar Japan to round up members of Japan’s nascent communist party and other groups bold enough to make statements that challenged the *kokutai*, a society based on veneration of a divine emperor.

Finally, the “action in furtherance” requirement will almost certainly prove meaningless if mundane acts can be shown in hindsight to have been part of a criminal scheme. Trivial things already serve as a pretext for arrest: Earlier this year three men were arrested for sharing the costs of a rental van used for anti-nuclear tours. Why? For “operating an unlicensed taxi service.”⁸ If conspiracy had been a separate crime here, they could have been nicked merely for reserving the van (an act in furtherance).

Devil is in the detention

Some might argue Japan is just adding crimes that have long been part of Anglo-American law to its own arsenal. This is true, but the real issue is not any individual offense, but how they are prosecuted.

Criminal procedure is deeply political and each country has a different historical experience with the use of prosecutions as a political weapon. Virtually everything Americans take for granted as basic rights in the criminal process — the right of an accused to know the nature of the charges against them, to the assistance of counsel, to cross-examine hostile witnesses — under English common law were initially only accorded to defendants in treason cases.⁹ Treason was easy to allege and difficult to rebut if the charge was “someone unnamed has alleged you said threatening things about the king,” and punished horrifically — perfect for taking out rival courtiers.

Anglo-American criminal procedure thus

reflects centuries of painful constitutional evolution towards minimizing the ability to use criminal prosecutions to crush political enemies. Japan has had a very different evolution, with power-sharing, turn-taking and near-constant one-party rule in the postwar period having made brazenly partisan prosecutions of leading politicians rare (though they do happen). What political use of the criminal justice system has taken place has instead focused on smothering dissent from government outsiders: arresting communists, labor organizers and student and community activists, often for trivial offenses.

Moreover, Japanese criminal procedure lacks arraignment proceedings — an initial hearing where an arrested suspect learns of the charges against him or her and can start preparing a defense with the assistance of counsel. Instead, the first time a person who has been arrested in Japan may see a judge is if a prosecutor asks one to issue a warrant to detain him in order to facilitate further investigations of the alleged crime. Judges grant such warrants in over 96 percent of cases based mainly on the prosecutor's say-so and a presumption of guilt.

Through renewals and other techniques, law enforcement can detain suspects for weeks, sometimes longer, *before deciding whether to prosecute*. During this period they can question suspects from dawn until dusk, with limited access to a lawyer. (“You can’t talk to your client until we have finished questioning him” is literally the logic of the code of criminal procedure here.) Moreover, although a suspect may be arrested for one crime, it may be a pretext for investigating another, leading to further arrests that restart the detention clock.

Thus, without conspiracy being added to the mix, Japanese law enforcement authorities already have broad powers to punish people they don’t like *without ever putting them on trial*. A few days or weeks in jail may not seem

like much, but think how quickly your life would be ruined if you suddenly disappeared, unable to contact anyone, pay your bills or go to work? All that is required to mete out this punishment is a pretext for an arrest. A recent example is the shocking five-month pre-trial incarceration of an Okinawan leader of protests against U.S. military base expansion. Incredibly, throughout this period the police even denied their victim visits from family members or anyone other than his attorneys. Even more incredibly, this brutal treatment was approved by judges charged with overseeing the system.¹⁰

The Constitution prohibits arrests except for crimes in progress or pursuant to an arrest warrant. In fiscal 2015 Japan’s courts rejected only 62 of 100,880 requests for such warrants.¹¹ Conspiracy will thus add countless new pretexts to arrest and punish almost anyone. Already complicit in this system, the judiciary cannot be expected to check abuses.

The incredibly coercive nature of pre-charge detention creates an environment where suspects may be eager to agree with whatever version of events police want. Offering confessions or statements implicating other suspects — even if misleading or untrue — may be the fastest way of escaping the punishment already being administered. The Constitution prohibits convictions based solely on confessions but is silent as to those based on testimony of a single witness. Should they choose to, police and prosecutors may soon be able to use the dark, secret confines of interrogation chambers to manufacture conspiracies by turning average citizens into witnesses against each other based solely on allegations of conversations and mundane acts.

By vastly expanding the universe of possible crimes, the ability of law enforcement to conduct surveillance of “suspects” will also be enhanced. Wiretaps require warrants, but these will also be rubber-stamped by courts. The

broad scope of conspiracy crimes means the bar for starting investigations and conducting less intrusive surveillance activities will also be effectively lowered. As illustrated by the comprehensive police surveillance of Japan's Muslim community - approved by the courts - that bar is already near the ground.¹²

In his 1753 "Commentaries on the Laws of England," Sir William Blackstone categorized conspiracy as a "crime against public justice" and wrote specifically of conspiracies "to indict an innocent man of felony falsely and

maliciously." Japan's version of the crime will no doubt be used to protect public order; hopefully the cost to public justice will not be too great.

This is a revised and expanded version of an article by the same author that originally appeared in The Japan Times on June 14, 2017. Colin P.A. Jones, Conspiracy theory becomes frightening reality (<http://www.japantimes.co.jp/community/2017/06/14/issues/conspiracy-theory-becomes-frightening-reality-japan/>) (Japan Times, June 14, 2017)

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Notes

¹ The most significant changes are accomplished through the addition of a long list of offenses in Article 6-2 of the Act on Punishment of Organized Crimes and Control of Crime Proceeds (Act No. 136 of 1999). However since at the time of writing many of the amendments had not yet taken effect, the changes are not yet reflected in the version of the law on the government's "e-gov" website. At the time of writing the full text of the amendments together with a synopsis and Q&A were available at the Ministry of Justice website (http://www.moj.go.jp/keiji1/keiji12_00142.html).

² See here (<https://www.unodc.org/unodc/en/treaties/CTOC/>).

³ Letter from UN Special Rapporteur on the right to privacy Joseph Cannataci to Prime Minister of Japan dated May 18, 2017. See here (http://www.ohchr.org/Documents/Issues/Privacy/OL_JPN.pdf).

⁴ See MOJ Q&A regarding amendments here (http://www.moj.go.jp/keiji1/keiji12_00142.html).

⁵ See National Police Agency Police White Paper (<https://www.npa.go.jp/hakusyo/h28/honbun/index.html>) (2016 edition), chapter 6.

⁶ Public Service Intelligence Agency 2017-2018 (<http://www.moj.go.jp/content/001180543.pdf>) (annual report, page 7).

⁷ See Kenzo Akiyama, "The Frightening Reality of the Public Security Intelligence Agency" Hogaku Seminar No. 619 July, 2006. pp. 124-25 (Japanese). For an English summary of the case, see Lawrence Repeta, "Japan's Bar Associations and Human Rights Protections" (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1917524), (Part II) Omiya Law Review No. 4, Feb. 2008.

⁸ Jake Adelstein, Japan's Terrible Anti-Terror Law Just Made 'The Minority Report' Reality

(<http://www.thedailybeast.com/japans-terrible-anti-terror-law-just-made-the-minority-report-reality>).

⁹ See, John Hostettler, *Fighting for Justice: The History and Origins of Adversary Trial* (2006).

¹⁰ See Lawrence Repeta, "The silencing of an anti-U.S. base protester in Okinawa (<http://www.japantimes.co.jp/opinion/2017/01/04/commentary/japan-commentary/silencing-an-ti-u-s-base-protester-okinawa/#.WUjYjBN96u4>)," Gavan McCormack and *Asia-Pacific Journal*, "There Will Be No Stopping the Okinawan Resistance (<http://apjjf.org/2017/15/McCormack.html>): an Interview with Yamashiro Hiroji

¹¹ Judicial Statistics (Courts in Japan Website); criminal justice statistics for the year ending March 31, 2016, table 15 (*reijō jiken no kekka kubun oyobi reijō no shubetsu* [warrant cases by result and type of warrant]). See here (<http://www.courts.go.jp/app/files/toukei/622/008622.pdf>).

¹² Jarni Blakkarly, "Shadow of surveillance looms over Japan's Muslims (<http://www.japantimes.co.jp/community/2016/07/13/issues/shadow-surveillance-looms-japans-muslims/>)," and "Spying on Muslims in Tokyo and New York — 'Necessary and Unavoidable'?" (<http://apjjf.org/2016/18/APJ.html>.)" *The Asia-Pacific Journal*, Volume 14, Issue 18, Number 2. (Sept. 15, 2016).