

Ethnic and Religious Profiling: Police Surveillance of Muslims and Human Rights in Japan

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I. The Hunt for Terrorists and Ethnic and Religious Profiling

In societies governed by the rule of law, what limitations should apply to police surveillance? What protections should be accorded to religious and ethnic minorities who may be subject to police profiling? Does police profiling of members of minority groups unfairly discriminate against them or violate fundamental rights such as the right to privacy or to practice religion? Questions like these are at the heart of ongoing litigation in Tokyo concerning police surveillance of Japan's Muslim community.

In recent weeks, two separate United Nations human rights treaty bodies expressed their concern that ethnic and religious profiling by Japan's police violate fundamental rights. In typically restrained diplomatic language, the UN Committee to Eliminate Racial Discrimination wrote that "profiling based on stereotypical assumptions that persons of a certain 'race', national or ethnic origin or religion are particularly likely to commit crime may lead to practices that are incompatible with the principle of non-discrimination." The Committee urged the government of Japan to "ensure that its law enforcement officials do not rely on ethnic or ethno-religious profiling of Muslims."¹

Contrary to these recommendations, in a decision rendered in January of this year, Tokyo District Court approved police action based on Muslim profiling, on the ground that it is "necessary and inevitable" in order to protect Japan against the threat of international terrorism.² The court made no reference at all to international human rights law embodied in treaties ratified by Japan, even though there is no doubt that such law is binding in Japan.

Police surveillance of Muslims was brought to the attention of the U.N. human rights panels by the team of Japanese attorneys who represent the plaintiffs in the Tokyo litigation.³ Their U.N. submission includes a summary statement by the attorneys, samples of police documents showing details of the surveillance campaign and the text of the Tokyo Court decision. All of these documents were either prepared originally by the attorneys' team or translated by them from Japanese originals.⁴ This Asia-Pacific Journal report is based primarily on their English translation of the Tokyo court decision and other documents and references included in the UN submission.

II. The Police Surveillance Campaign Against Japan's Muslim Community

The case began with the October 2010 leak of more than one hundred documents from the Tokyo Metropolitan Police Department that detail comprehensive and highly intrusive police surveillance of Japan's Muslim community.⁵ This material provides a rare view into the inner workings of Japan's public security police, charged with protecting the state against subversive threats.

Seven months after leak of these documents, seventeen Muslim plaintiffs residing in Japan, including Japanese citizens and individuals from Tunisia, Algeria, Iran and Morocco, filed suit seeking a judgment holding that the police profiling revealed in these documents is unlawful. Their complaint asserted that the police action violated three separate provisions of Japan's Constitution: Article 13, which guarantees a right to privacy, Article 14, which prohibits discrimination based on "race, creed, sex, social status, or family origin," and Article 20, which guarantees freedom of religion.⁶ They also claimed the police action violated other laws and regulations that protect personal information.

In a judgment issued on January 15, 2014, the Tokyo court dismissed their claims, holding that the intrusive police surveillance was "necessary and inevitable" in order to protect Japan against the threat of international terrorism.

The court dismissed all constitutional claims. Although the court upheld the legality of the police surveillance, it also found that the police were negligent in protecting the information they collected, thereby allowing its leak into the public domain. The court ordered payment of a total of approximately 90 million yen in compensation for injury to the plaintiffs resulting from disclosure of their confidential information. Both sides appealed the court judgment. The case is now pending before the Tokyo High Court.

III. Details of the Surveillance Campaign

The Tokyo district court judgment establishes a firm factual record which shows a) thorough police surveillance of Muslims and systematic collection of personal information, and b) police selection of surveillance targets solely on the basis of their religion and ethnicity, without reference to any concrete evidence indicating any of the targeted individuals might be connected to potential terrorist acts or other criminal activity.



The Tokyo Mosque, Japan's largest

According to the court, the Tokyo Metropolitan Police launched their campaign with formation of a "mosque squad" composed of 43 agents in June 2008. The leaked documents showed that police stationed agents at mosques, followed individuals to their homes,

obtained their names and addresses from alien registration records, and compiled databases profiling more than 70,000 individuals. The documents also showed that the police obtained bank account information, including balances, income and expenses and other personal information and stationed agents at Islam-related non-profit organizations, halal shops and restaurants, and other places that might be frequented by members of Tokyo's Muslim community. In some cases, the police actually installed surveillance cameras at mosques and other venues.

Despite this conclusive record of highly intrusive surveillance, the court nonetheless absolved the police of any wrongdoing. The court's judgment was based solely on its concern over the hypothetical risk that the targeted individuals present a threat of a violent terrorist attack. In the Court's words, police surveillance was "necessary and inevitable" in order to protect Japan against the threat of international terrorism.

The Court reached this conclusion even though government lawyers failed to present any concrete evidence of a) a present risk of a terrorist incident, or b) that any of the subjects of government surveillance were connected to such a risk.

IV. Evidence Relied on by the Tokyo Court to Find Police Surveillance Lawful

As justification for the police surveillance campaign, the Court cited three types of evidence: 1) occurrence of violent terrorist attacks in foreign countries, 2) general statements by al-Qaeda leaders listing Japan among US allies that should be punished, and 3) evidence that an al-Qaeda officer had once lived in Japan. The court's list of terrorist attacks commenced with the 9/11 incident and included terrorist bombings in Bali, Madrid, London and elsewhere. There was no mention of such an attack in Japan. General statements cited by the court included 2004 statements by al-Qaeda leaders Osama bin Laden and Zawahiri listing Japan among other US allies that should be punished and a 2007 statement made by Khalid Sheikh Mohammed while in U.S. custody indicating that he had been involved in a plot to destroy the U.S. Embassy in Tokyo.

The court made only one reference to individuals who appeared in Japan that it identified as members of an international terrorist organization. The court described a French national named Lionel Dumont who had resided in Niigata in 2003 as an al-Qaeda officer. The court judgment also states that another unnamed individual stayed with Dumont and opened an account "under a false name at the Japan Post (and) had received a few dozen transfers of several thousand to one million yen, and he is suspected to have been raising finances for terrorism and procuring supporters during his time in Japan."

The court attached special significance to Japan's status as an ally of the United States and its policies in the Middle East: "Japan has been identified by multiple leaders of radical Islamic organizations as a target that is a US ally, participant in the occupation of Iraq etc., and supporter of the existence of the Israeli state."

After describing this evidence of a threat to Japan, the court summarized as follows:

"Thus, given the real risks of international terrorist attacks taking place in Japan, the seriousness of the damage once such an act of international terrorism happens, and the complications in early detection and prevention due to its covert nature, assessing the current circumstances of mosque attendees through the Mosque Monitoring Activities and other Information

Gathering Activities should be regarded as necessary activities for the police, whose duty is to maintain public safety and order, including the deterrence of crime, to prevent the occurrence of international terrorism.”

V. The United Nations Study on Protection of Human Rights While Countering Terrorism

The question of how to balance police investigations of potential terrorists against protection of individual rights confronts governments all over the world. To provide guidance, in 2005 the UN Human Rights Council appointed an expert to serve as “Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.”

Martin Scheinin, a Finnish professor of public international law, served in this position for two three-year terms, from 2005 through 2011.⁷ In a report issued in January 2007, Scheinin assessed the compliance of terrorist-profiling practices with human rights standards and set out permissible forms of terrorist profiling and possible alternatives to the reliance on terrorist profiles.⁸

Professor Scheinin wrote that he believes profiling is a permissible means of law enforcement activity. According to his report, “Detailed profiles based on factors that are statistically proven to correlate with certain criminal conduct may be effective tools better to target limited law-enforcement resources.” (Paragraph 33)

When law-enforcement agents use broad profiles that are not focused on such factors, but reflect unexamined generalizations, however, he wrote that they may violate fundamental human rights.

Regarding the right to non-discrimination, protected by both the International Covenant on Civil and Political Rights and the Convention on the Elimination of Racial Discrimination, Scheinin concluded:

“In particular, profiling based on stereotypical assumptions that persons of a certain “race”, national or ethnic origin or religion are particularly likely to commit crime may lead to practices that are incompatible with the principle of non-discrimination.” (Paragraph 34, emphasis added)

Regarding the right to privacy, he wrote that “data-mining initiatives based on broad terrorist profiles that include group characteristics such as religion and national origin may constitute a disproportionate and thus arbitrary interference with the right to privacy, guaranteed by article 17 of the International Covenant on Civil and Political Rights (ICCPR).” (Paragraph 38)

The Scheinin report includes descriptions of profiling programs used by authorities in various countries. In particular, it describes a program “initiated by the German authorities in the wake of 11 September 2001 to identify terrorist ‘sleepers’. The German police forces collected personal records of several million persons from public and private databases. The criteria for the search included: being male; age 18-40; current or former student; Muslim denomination; link through birth or nationality to one of several specified countries with a predominantly Muslim population. Approximately 32,000 persons were identified as potential terrorist sleepers and more closely examined.”⁹ (Paragraph 35)

Applying article 17 of the ICCPR, the German Constitutional Court ruled that the program violates the right to privacy. The Court held that the preventive use of this profiling method would be lawful only “if it were shown that there was a ‘concrete danger’ to national security or human life, rather than a general threat situation as it existed since 11 September 2001.” (Paragraph 38)

The factual record provided by Tokyo District Court shows a general threat at best, with no evidence whatever of the “concrete danger” required by the German Constitutional Court to support legality of such surveillance. The Scheinin report and citations such as the German decision clearly support the UN Committee on the Elimination of Discrimination recommendation that Japan “ensure that its law enforcement officials do not rely on ethnic or ethno-religious profiling of Muslims.”

Final Comments

As Japan prepares to host the 2020 Olympics and otherwise present itself as a respected member of the international community, the country must demonstrate that it is an honorable host to visitors and residents from abroad where anyone can expect and receive fair treatment from government authority. The kind of behavior detailed in the Tokyo court’s judgment presents the picture of a police establishment that is insensitive to foreign residents and religious minorities and out of step with fundamental principles of international law. The court’s apparent eagerness to condone discriminatory exercise of police power poses a fundamental question about the role of the courts as guardians of fundamental rights. It remains to be seen how Japan’s appellate courts will handle these issues.

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Notes

¹ [“Concluding Observations”](#) of the United Nations Committee on the Elimination of Discrimination (CERD Committee), August 29, 2014 (Advance Unedited Version). The CERD Committee was created pursuant to the United Nations Convention on the Elimination of Discrimination.

In a completely separate proceeding conducted by the UN Human Rights Committee, it issued concluding observations that included the following statement: “The Committee is concerned about reports on widespread surveillance of Muslims by law enforcement officials (arts. 2, 17 and 26)”, and the recommendation that the Japanese government should “(a) train law enforcement personnel on cultural awareness and the inadmissibility of racial profiling, including the widespread surveillance of Muslims by law enforcement officials, and (b) Ensure that affected persons have access to effective remedies in cases of abuse.” United Nations Human Rights Committee, [“Concluding observations on](#)

[the sixth periodic report of Japan](#)” (Advance Unedited Version). The United Nations Human Rights Committee was created pursuant to the International Convention on Civil and Political Rights.

² Tokyo District Court Decision, January 15, 2014. In this article, all English expressions are derived from the translation in the UN submission by the attorneys’ team.

³ The website of the “Attorney Team for Victims of Illegal Investigation Against Muslims” is located at <http://k-bengodan.jugem.jp>

⁴ The full submission is available on the website of the [UN Committee on the Elimination of Racial Discrimination](#), and also check [Extensive and Systematic Surveillance and Profiling of Muslims: Japan’s Violation of the International Convention on the Elimination of All Forms of Racial Discrimination](#)

⁵ For a 2010 report on the leak, see David McNeill, “[Muslims in shock over police ‘terror’ leak — Japan residents named in documents want explanation — and apology — from Tokyo police force,](#)” The Japan Times, November 9, 2010.

⁶ An English translation of [Japan’s Constitution is available](#). Article 13 does not expressly mention a “right to privacy,” but many of Japan’s constitutional scholars interpret the broad language of Article 13 to encompass such a right.

⁷ “[Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism \(Mr. Martin Scheinin\).](#)”

⁸ See A/HRC/4/26, “[Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism \(Mr. Martin Scheinin\).](#)”

⁹ The Scheinin report notes that the German profiling program (the so-called “Rasterfahndung programme”), failed to identify any significant suspects.

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