

JAPANESE GOVERNMENT ACTIONS AGAINST COVID-19  
UNDER THE DIRECTIVES OF CONSTITUTIONAL AND  
ADMINISTRATIVE LAW

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ABSTRACT

*This paper presents law on the State of Emergency held jointly on June 16, 2020, by the Asian Law Center of Melbourne University and School of Law, and Vietnam National University, Hanoi.*

*This paper further elucidates the actions of the Japanese government against COVID-19 during the first five months of 2020. On May 25, 2020, the government lifted the emergency declaration passed under the amended Art. 49(2) of the amended Influenza Special Measures Act (ISMA).*

*This paper argues that the effects of the Japanese government action is not unique, but is instead similar to those of other countries. In 2012, the Japanese government had passed ISMA against severe acute respiratory syndrome (SARS), not COVID-19. The Government hesitated to use ISMA against COVID-19 for political reasons. The government opened advisory boards and chose a policy judgment. If a delay in governmental actions led to an increase in the number of serious patients, the governmental inaction was subjected to the State Redress Act and the people of Japan could, through the election process, change the government in the next election.*

*The emergence of COVID-19 has compelled Japanese scholars to question the validity of legal principles. Outside of Japan, the New York Times argues that the Japanese constitution should be amended to cope with such an emergency.<sup>1</sup>*

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*This paper is vigilant of the governmental interventions that are carried out in the name of emergency and keeps legal principle under the rule of law. An emergency does not allow us to ignore the law; nor does it put the administration above the law. If the emergency is predicted, we can prepare and prevent resulting distress with the use of law. If an emergency occurs, we can mitigate damages and recover by interpreting or amending the existing statutes.<sup>2</sup>*

*The lessons from the actions undertaken by the Japanese government should be shared with other countries that have democratic constitutions. When we start a constitutional and administrative law analysis, the legal and political responsibilities should be distinguished.*

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<sup>1</sup> Motoko Rich, Hisako Ueno, & Makiko Inoue, *Japan Declared a Coronavirus Emergency. Is It Too Late?*, N.Y. TIMES, <https://www.nytimes.com/2020/04/07/world/asia/japan-coronavirus-emergency.html> (last updated Apr. 16, 2020).

<sup>2</sup> Tom Ginsberg & Mila Versteeg, *Tom Ginsburg Compares Various Countries' COVID-19 Responses Under Their Constitutions*, U. CHI. L. SCH. (Apr. 17, 2020), <https://www.law.uchicago.edu/news/tom-ginsburg-compares-various-countries-covid-19-responses-under-their-constitutions>.

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## I. JAPAN’S CORONAVIRUS SPECIAL MEASURES ACT

On March 13, 2020, the National Parliament (Diet) passed the Coronavirus Special Measures Act (CSMA),<sup>3</sup> as a supplement and revision to the Influenza Special Measures Act (ISMA),<sup>4</sup> which was established in 2012. The ISMA aimed to prevent the rapid spread of influenza and reinforce the medical support system present in Japan. The general difference between ISMA and CSMA is the inclusion of the of a COVID-19 definition in CSMA. Furthermore, under the amended ISMA, the Prime Minister is authorized to establish a countermeasure headquarters and declare a state of emergency in response to the pandemic.<sup>5</sup> The local government may additionally prohibit the use of public facilities where many people would gather, i.e. schools, concert halls, etc., and subsequently request individuals to stay home.<sup>6</sup> However, no legal sanction action is currently provided if people do not follow the Act.<sup>7</sup> Furthermore, the amended ISMA is a temporary legislation, limiting its effect to a period of two years from its enforcement on March 14, 2020. Without any amendment to this law by the legislature, it will lose its effect after two years. It is therefore called the “sunset law.”<sup>8</sup>

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<sup>3</sup> Shingata influenza tō taisaku tokbetsu sochi hō [Coronavirus Special Measures Act], Law No. 31 (revised as Law No. 4 of 2020), [https://elaws.e-gov.go.jp/search/elawsSearch/elaws\\_search/lsg0500/detail?lawId=424AC0000000031](https://elaws.e-gov.go.jp/search/elawsSearch/elaws_search/lsg0500/detail?lawId=424AC0000000031) (Japan) [hereinafter CSMA or amended ISMA].

<sup>4</sup> Shingata influenza tō taisaku tokbetsu sochi hō [New Influenza Special Measures Law], Law No. 31 of 2012 (Mar. 13, 2013), [https://elaws.e-gov.go.jp/search/elawsSearch/elaws\\_search/lsg0500/detail?lawId=424AC0000000031](https://elaws.e-gov.go.jp/search/elawsSearch/elaws_search/lsg0500/detail?lawId=424AC0000000031).

<sup>5</sup> *Id.* at art. 15(1), art. 32(1).

<sup>6</sup> *Id.* at art. 45(1).

<sup>7</sup> See *In Japan, refusal to follow coronavirus requests could become a crime*, THE JAPAN TIMES (July, 3, 2020), <https://www.japantimes.co.jp/news/2020/07/03/national/coronavirus-japan-law-revisions/> (Such requests and orders are often ignored as the law stipulates no enforcement measures such as penalties).

<sup>8</sup> Amended ISMA, *supra* note 3, at art. 1-2(1).

What are the important aspects of the amended ISMA? First, the novel corona virus is regarded as the new influenza.<sup>9</sup> Before the amendment, there was no clarity on whether COVID-19 would even be covered by ISMA and the amendment constitutes the scope of application. Second, the central and local governments have already come to establish countermeasure action plans against COVID-19, affirming that the amended ISMA legally covers COVID-19.<sup>10</sup>

The amended ISMA provisions present three phases of analysis based on a linear timeframe: before spread, after spread, and beyond the limit of medical capacity.

In the first phase, the central and local governments are required to take necessary measures to store essential items, train essential workers, and disseminate knowledge in order to prepare for the prevention of the spread of the virus.<sup>11</sup> In this sense, the amended ISMA can use the existing action plans from the original ISMA to fight against COVID-19.<sup>12</sup> These specific plans instruct the government and private organizations on how to carry out actions against threatening diseases.<sup>13</sup> The application of an existing phase one action plan did not come without pushback, however. Initially, the government insisted that a plan under the original ISMA could not be applied to COVID-19 in the first phase.<sup>14</sup> Before the promulgation of the amended ISMA on March 13, 2020, the absence of a relevant law delayed governmental measures, increasing the number of critically ill patients.<sup>15</sup>

<sup>9</sup> *Id.*

<sup>10</sup> See Eric A. Feldman, *Did Japan's Lenient Lockdown Conquer the Coronavirus?*, THE REGULATORY REV. (June 20, 2020), <https://www.theregview.org/2020/06/10/feldman-japan-lenient-lockdown-conquer-coronavirus/>.

<sup>11</sup> Amended ISMA, *supra* note 3, art.13 (dissemination of knowledge), art. 27(public transportation), art. 55 (food supply).

<sup>12</sup> *Id.* art.1-2(3).

<sup>13</sup> Nat'l Action Plan for Pandemic Influenza and New Infectious Diseases, (June 7, 2013), <https://www.cas.go.jp/jp/seisaku/ful/keikaku/pdf/national%20action%20plan.pdf>.

<sup>14</sup> <https://mainichi.jp/articles/20200306/k00/00m/010/318000c> (Tokuso hō kai-sei de konkyo bureru shushō hatsugen) (Statement of prime minister changed in amendment of ISMA) (Prime Minister's remarks that the grounds are blurred by the revision of the Special Measures Law "Unknown virus" becomes "known infectious disease" four days later).

<sup>15</sup> *Japan losing patience with government over COVID-19 response*, DEUTSCHE WELLE, <https://www.dw.com/en/japan-losing-patience-with-government-over-covid-19-response/a-53133243> (last visited Aug. 25, 2020).

In the second phase, wherein a high probability of the spread of COVID-19 exists, the Ministry of Health, Labour and Welfare (MHLW), reports the situation to the prime minister.<sup>16</sup> The prime minister then establishes a countermeasures headquarter, in all cases except for when the disease is a temporary seasonal influenza.<sup>17</sup> When the central government determines that a countermeasures headquarter is necessary, prefectures are required to open such a headquarter.<sup>18</sup> A headquarter will then perform the task of proposing and implementing official statements of governmental policies.<sup>19</sup> The governors of prefectures may request cooperative actions from public and private organizations under Article 24(9) of the amended ISMA.<sup>20</sup> Article 24(9)<sup>21</sup> is applied as a request for voluntary restraint.

In the third phase, the prime minister as the chief of the countermeasures headquarter, may declare a state of emergency after submitting prior reports to the Diet.<sup>22</sup> A state of emergency can last up to two years, with a possible one year-extension.<sup>23</sup> Its objective is to prevent the collapse of the medical services system.<sup>24</sup> The action plan specifies the requirements for the declaration of emergency. Without the declaration of emergency during this phase, medical support would exceed its capacity and endanger the lives and health of the people, which could in turn lead to social disorder.

The Diamond Princess, a cruise ship marred with a number of COVID-19 cases, was anchored in the port of Yokohama in February 2020.<sup>25</sup> A number of infected persons were quarantined inside the

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<sup>16</sup> Amended ISMA, *supra* note 3, at art. 14; Amended ISMA, *supra* note 3, at art. 1-2(2).

<sup>17</sup> Amended ISMA, *supra* note 3, at art. 15.

<sup>18</sup> *Id.* at art. 22.

<sup>19</sup> *Pandemic Influenza Preparedness Action Plan of the Japanese Government*, MINISTRY OF HEALTH, LABOR AND WELFARE (Nov. 2005), <https://www.mhlw.go.jp/english/topics/influenza/pandemic01.html>.

<sup>20</sup> Amended ISMA, *supra* note 3, at art. 24(9).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at art. 32.

<sup>23</sup> *Id.* at art. 32(2).

<sup>24</sup> *Id.* at art. 32, para 2.

<sup>25</sup> Satoshi Sugiyama, *Japan finds 41 more virus infections on Diamond Princess; two more cruise ships turned away*, THE JAPAN TIMES (Feb. 7, 2020), <https://www.japantimes.co.jp/news/2020/02/07/national/coronavirus-diamond-princess-cruise-ship/>.

ship. The Quarantine Act,<sup>26</sup> authorized the government to request that a person with a high probability of contracting the disease, isolate themselves in hospitals and hotels for a certain period of time to conduct medical tests, prior to reentering society, in hopes of mitigating the spread of the virus.

To enforce this protocol, under the amended ISMA, the governors of prefectures can issue voluntary stay home restraints, restricting the use of public facilities such as schools and entertainment facilities,<sup>27</sup> as well as acquire land, with the consent of landowners, to establish temporary medical facilities,<sup>28</sup> and order emergency transportation of goods as is needed.<sup>29</sup> Under the act, the central government headquarters coordinate several measures and the headquarters' governors issue self-restraint requests.<sup>30</sup> Also under the act, a criminal sanction is provisioned only for the violation of the order on transportation of necessary goods,<sup>31</sup> not for the violation of voluntary restraint,<sup>32</sup> or the closure of facilities.<sup>33</sup>

The amended ISMA authorizes governors of prefectures to take actual actions and enables them to read the original ISMA action plan to that of amended ISMA for carrying out immediate actions.<sup>34</sup> In the meantime, the original ISMA enacted in 2012, was criticized for seriously restricting human rights.<sup>35</sup> The opposing party had argued that the supplement act should make provisions to ensure that the counter-measure actions take into consideration such rights and ensure that the restrictions on people's rights are necessarily minimum.<sup>36</sup>

<sup>26</sup> Ken eki hō [Quarantine Act], Law No. 201 of 1951, art. 14(1)-2, 16(2), translated in (Quarantine Act) [JAPANESE LAW TRANSLATION], <http://www.japaneselawtranslation.go.jp/law/detail/?id=2783&vm=&re=> (Japan).

<sup>27</sup> Amended ISMA, *supra* note 3, at art. 45(2).

<sup>28</sup> *Id.* art. 49.

<sup>29</sup> *Id.* art. 54.

<sup>30</sup> *Id.* at art. 3, 45(1). See SHINGATA INFURUENZA-TŌ TAISAKU SEIFU KŌDŌ KEIKAKU [GOVERNMENT ACTION PLAN FOR NEW INFLUENZA] of 2017, p. 6 [https://www.cas.go.jp/jp/seisaku/ful/keikaku/pdf/h29\\_koudou.pdf](https://www.cas.go.jp/jp/seisaku/ful/keikaku/pdf/h29_koudou.pdf).

<sup>31</sup> Amended ISMA, *supra* note 3, at arts. 76 -7.

<sup>32</sup> *Id.* art. 45(1).

<sup>33</sup> *Id.* art. 45(3).

<sup>34</sup> *Id.* at art. 2(3), art. 3(6).

<sup>35</sup> Kenji Utsunomiya, *Chairman's statement against the bill for special measures against new influenza*, JAPAN FEDERATION OF BAR ASSOCIATIONS (Mar. 22, 2012), <https://www.nichibenren.or.jp/document/statement/year/2012/120322.html>.

<sup>36</sup> Amended ISMA, *supra* note 3, at art. 5 ("Respect of human right and necessary action should be tailored to implement necessary purpose.").

### A. Tokyo Action Plan

The action plan of the Tokyo Metropolitan Government (TMG) is a model for other prefectures concerning the actions undertaken to address COVID-19. TMG established countermeasure headquarters for COVID 19 on January 31, 2020.<sup>37</sup> Once the disease was recognized, the Tokyo action plan divided the spread of the virus into two phases: early stage and infection stage.

In the early stage, the Tokyo Metropolitan Government located those diseased via an epidemiological survey and separated the diseased from others to carry out medical inspections.<sup>38</sup> Individuals with a high risk of contracting the disease, were advised to isolate themselves in a designated hospital for medical tests and progress observations under the Infectious Diseases Act (IDA).<sup>39</sup> This policy is outlined in Articles 19 and 20 of the IDA. The governor thereafter designates authority to a director of a public health center. According to the action plan, the infection stage is triggered only when TMG is no longer able to locate those infected by the disease. When this occurs, TMG takes a three-step approach and the government changes its purpose from “prevention” to the “treatment of those affected.”<sup>40</sup>

During the first phase of this stage the system lifts voluntary isolation. Further where Article 14<sup>41</sup> of the IDA mandates some hospitals to implement surveillance, other designated hospitals are exempt from such comprehensive surveillance, but must rather implement a partial surveillance, and subsequently report the number of COVID cases recorded to TMG.

Under the pandemic warning, if ten diseased patients are found in fixed points and recorded by the infectious disease surveillance, that particular hospital would be concluded to have had a rapid increase in

<sup>37</sup> *Tokyo Metropolitan New Influenza Measures Action Plan*, TOKYO METROPOLITAN ADMINISTRATION BUREAU DISASTER MANAGEMENT SECTION, <https://www.bousai.metro.tokyo.lg.jp/taisaku/torikumi/1000061/1000367.html> (last visited Oct. 13, 2020).

<sup>38</sup> [https://www.fukushihoken.metro.tokyo.lg.jp/iryo/kansen/ky\\_keikaku.files/kansensyoyouboukeikaku\\_Part1.pdf](https://www.fukushihoken.metro.tokyo.lg.jp/iryo/kansen/ky_keikaku.files/kansensyoyouboukeikaku_Part1.pdf) (Tokyo to kansen keikaku) (TMG action plan for infectious disease).

<sup>39</sup> Kansenshō no yobō oyobi kansenshō no kanja ni taisuru iryō ni kansru hō [Act on the Prevention of Infectious Diseases and Medical Care for Patients with Infectious Diseases], Law No.114 of 1998, art. 19. [hereinafter, Infectious Diseases Act].

<sup>40</sup> *Tokyo Metropolitan New Influenza Measures Action Plan*, *supra* note 37.

<sup>41</sup> Infectious Diseases Act, *supra* note 39, at art. 14-2.

the occurrence of the disease on premises.<sup>42</sup> That hospital would then no longer be available to treat the general public, and particularly would not be open to individuals with a high probability of contracting the disease. These individuals would not only be unable to visit the designated hospitals for the infectious disease, but would also be unable to visit general hospitals with similar records of cases.<sup>43</sup> In these situations, the TMG supports medical staff and requests that hospitals shorten the period afforded to the hospitalization of those affected by other diseases, often cancelling or postponing medical operations.<sup>44</sup>

If thirty diseased individuals are recorded and the number of people in a fixed point is expected to continue increasing, the hospital survey concludes a significant decline in the availability of hospital beds. The governor of the TMG will then declare a state of emergency and ask people to restrain voluntarily. Further, certain businesses with a high probability of spreading the infection, such as night bars and pachinko parlors, are ordered for closure with prior notice.<sup>45</sup>

This paper will discuss the amendment to the Japanese Constitution that authorizes the prime minister of Japan with emergency powers. The original ISMA provides a procedure for the action plan and supplements the amended ISMA to work as a guideline of concrete actions for the prefectures.

### *B. From Voluntary Restraint to Instruction*

The TMG asked the people of Tokyo to stay at home in May under Articles 24(9) and 45 of the amended ISMA. This stay at home order did not accompany any criminal liability; the fulfillment of the order depended on the people of Tokyo. Article 45(3) of the amended ISMA provisions a stronger “instruction” measure. A governor can directly instruct businesses to observe closure. While the article does

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<sup>42</sup> *Tokyo Metropolitan New Influenza Measures Action Plan*, *supra* note 37 (Countermeasures at each stage).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Amended ISMA, *supra* note 3, at art. 24(9); Amended ISMA, *supra* note 3, at art. 45 (2); Shusaku Kitajima & Stacey Steele, *COVID-19 Responses in Japan from an Administrative Law Perspective: Why won't Pachinko Parlours Close Down?*, THE UNIVERSITY OF MELBOURNE (May 26, 2020), <https://law.unimelb.edu.au/centres/alc/engagement/asian-legal-conversations-covid-19/government-governance/covid-19-responses-in-japan-from-an-administrative-law-perspective-why-wont-pachinko-parlours-close-down>.



restrict people legally, it does not involve any criminal liability.<sup>46</sup> A governor can also release the names of people who do not follow the instruction under Article 45(3) of the amended ISMA. For instance, when the Governor of Osaka prefecture announced a state of emergency and ordered closure of certain kinds of businesses in Osaka,<sup>47</sup> pachinko parlors<sup>48</sup> did not follow the voluntary closure order and kept the stores open. Pachinko is a famous Japanese mechanical game, known for its use for gambling. People who love pachinko continued to go to these gambling parlors, spending all day in front of the slot machines. As a result, the governors of Osaka and Chiba released the names of pachinko parlors that did not comply with the closure order.<sup>49</sup> However, governors' attempt to hold these businesses accountable for their failure to comply, failed.<sup>50</sup> Those who love pachinko learned where they could enjoy this activity through the official release of the names of non-compliant pachinko parlors.

Typically, under Japanese administrative law, announcements made by the government aims to provide information to citizens. As in this case, announcing noncompliant institutions to the public could have worked as a type of sanction. However, it would be deemed illegal under the Administrative Case Litigation Act if it were exercised in an arbitrary and capricious way.<sup>51</sup>

The request for a voluntary temporary closure is an administrative instruction that carries no sanctions, which means that a citizen could easily disobey the instruction.<sup>52</sup> Contrary to the intent of the

<sup>46</sup> See *In Japan, refusal to follow coronavirus requests could become a crime*, *supra* note 7.

<sup>47</sup> <https://www.nikkei.com/article/DGXMZO58374760S0A420C2AC8Z00/>

(Nikkei Shimbun, Osaka shunai nimo tenmei kōhyō, fu-chiji kyugyō ōjūin nara kansei kakudai hadome nerau) (Osaka release name of business that disobey self-restraint, Osaka governor aims to stop infection).

<sup>48</sup> Pachinko is Japanese gambling machine. It is a kind of slot machine.

<sup>49</sup> *Id.*; See also, <https://www.asahi.com/articles/DA3S14455289.html>

(Nyujiō chusen ken motome 200 nin ga retzu, kengai nambar no kuruma kyugyō siji matudo no pachinko ten) (Publication of store name, pachinko parlors that do not respond to requests for closure one after another) (200 people line up to go in pachinko in Matsudo, Chiba).

<sup>50</sup> *Id.*

<sup>51</sup> Gyōsei jiken soshou hō [Administrative Case Litigation Act], Law No. 139 of 1962, art. 30, translated in (Administrative Case Litigation Act) [JAPANESE LAW TRANSLATION], <http://www.japaneselawtranslation.go.jp/law/detail/?id=1922&vm=04&re=01> (Japan).

<sup>52</sup> SAKURAI & HASHIMOTO, *GYŌSEIHŌ* [Administrative law], p. 132; See also, <https://www.nikkei.com/article/DGKKZO58850880Y0A500C2KNTP00/>

governors, many people continued to congregate at the open pachinko parlors, which failed to follow government orders.<sup>53</sup> This practice was popular in many parts of Japan, while the governor of Tokyo did not disclose the names of businesses, the governors of Kanagawa, Gunma, and Ibaraki did.<sup>54</sup>

If not handled carefully, “public health” could act as a magic word granting the government uncontested leeway to restrict human rights. If citizens get together without any legal restriction, society prospers as a whole. The problem with the case of the pachinko parlors, was that if people relied on non-legal regulation such as custom or culture, where free-rider issues could arise.<sup>55</sup> It is therefore imperative to find a balance between government orders and preserving social freedom.

## II. WHY ARE CENTRAL AND LOCAL GOVERNMENTAL ACTIONS DELAYED? INTERPRETATION OF TEXT IN A STATUTE AND POLITICAL RESPONSIBILITY

The central and local governmental actions were delayed in Japan. These actions against COVID-19 involved both legal and political responsibility. Therefore, it is important that we distinguish a legal responsibility from a political one. If the government takes a certain interpretation of the provision of ISMA and does not take any action, resulting in the delay of necessary measures and cause for serious loss of health and lives, people may seek legal damage under the State

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(Pachinko ten ga eigyō jishuku sinai) (The pachinko parlors won't restrain themselves from operating).

<sup>53</sup> Interview with Shusaku Kitajima, Professor, Tohoku University (May 26, 2020); <https://www.asahi.com/articles/DA3S14455289.html> (Tenmei kohyō jichitai aitsugu kyugyō yōsei ōjūnu pachinko ten) (Local governments release names of pachinko);

<https://www.asahi.com/articles/DA3S14455289.html> (Nyuujō chusen ken motome 200 nin ga retzu, kengai nambar no kuruma kyugyō siji matudo no pachinko ten) (200 people line up to go in pachinko in Matsudo, Chiba).

<sup>54</sup> <https://www.asahi.com/articles/DA3S14459923.html> (pachinko simet-suke kyōka to-chiji eigyo zero jitsuh ha ato 4 ten) (binding pachinko, TMG governor said zero but four stores are open).

<sup>55</sup> THE JAPAN TIMES, *supra* note 6 (In early May, governments of prefectures including Hyogo, Kanagawa, Niigata, Chiba and Fukuoka issued business suspension orders to pachinko parlors which in turn ignored repeated requests to shut down to prevent further spread of coronavirus and continued to operate even after their names were disclosed . . . Some pachinko parlors, however, continued operation, and even those that followed the orders resumed operation after business closure requests for other commercial facilities were relaxed).

Redress Act for the government's illegality.<sup>56</sup> If a certain interpretation of the text of the statute is beyond the text and is equivalent to the rewriting of a statute, it is the mission of the legislature to amend it.<sup>57</sup>

Under a parliamentary system, the head of the ruling party is the prime minister in the administrative branch.<sup>58</sup> The serious conflict between the cabinet and ruling party in the parliament does not occur because the cabinet and the majority of the parliament works together.

If a certain implementation is beyond interpretation, the prime minister would be required to submit a bill to amend the existing statute.<sup>59</sup> In Japan, the government persisted on only a certain interpretation of the statute, delaying the execution of necessary prevention measures.

### A. Definition of Text and Interpretation of IDA

Japan's IDA lays out several types of diseases with several treatments. If the definitions provided in IDA were appropriately interpreted, the government could have responded more quickly.

First, the IDA calls for a compulsory action of hospitalizing a person with high probability of contracting diseases that are designated in the class range<sup>60</sup> of 1-3 in the Article 6(1-3) of IDA.

The Infectious diseases are designated within a range of Class 1 to Class 3 in Article 6(1-3) of the IDA.<sup>61</sup>

Class 1 of designated diseases includes seven classes of diseases: Ebola hemorrhagic fever, Crimean-Congo hemorrhagic fever, pest, and variola.

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<sup>56</sup> See Kokka baishou hō [State Redress Act], Law No. 22 of 1947, art. 1 (Japan).

<sup>57</sup> Nihon-Koku Kenpō [CONSTITUTION], art. 41, translated in (The Constitution of Japan) [JAPANESE LAW TRANSLATION], <http://www.japaneselawtranslation.go.jp/law/detail/?id=174&vm=04&re=01&new=1> (Japan).

<sup>58</sup> *Id.* at arts. 66, 67.

<sup>59</sup> *Id.* art. 72.

<sup>60</sup> Kansen-shō no yobō oyobi kansen-shō no kanja ni taisuru iriyō ni kansuru hōritsu [Act on the Prevention of Infectious Diseases and Medical Care for Patients with Infectious Diseases], Act No. 114 of 1998, art. 6, translated in (Act on the Prevention of Infectious Diseases and Medical Care for Patients with Infectious Diseases) [JAPANESE LAW TRANSLATION] <http://www.japaneselawtranslation.go.jp/law/detail/?id=2830&vm=04&re=02> (Japan).

<sup>61</sup> *Id.* at art. 6(1)-(3).

Class 2 includes diseases such as poliomyelitis, tuberculosis, diphtheria, severe acute respiratory syndrome (SARS), and Middle East respiratory syndrome (MERS).

Class 3 includes diseases such as cholera, shigellosis, intestinal hemorrhagic *Escherichia coli*, and typhoid.

The hospitalization fee would be covered by the government. Under the IDA, the designation enables government to restrict a person with an infectious disease from going to work for a certain duration.<sup>62</sup> The public health center can figure out the number of designated diseases to formulate a quick response of isolation measures.

The cabinet had thought that COVID-19 was a recognized disease, not simply a “new infection” under Article 6(7) of IDA. Article 6(8)<sup>63</sup> of IDA provides the definition of “new infection” as follows:

The term “New Infectious Disease” as used in this act means a disease which is deemed to be transmittable from person to person, which involves pathological conditions or therapeutic outcomes apparently different from those of any already known infectious disease, and which could cause a serious condition if developing the disease, and which is deemed to be likely to seriously affect the lives and health of the public in the event of the spread of the disease.

As in the case of designated infectious diseases, hospitalization is compulsory for the new infectious diseases because it could escalate to a serious health condition, and may be transmittable from one person to another.<sup>64</sup>

The Quarantine Act has another definition for people who come from abroad. The definition of “Quarantine Infectious Disease”<sup>65</sup> authorizes a government to ask the person who is susceptible to diseases to undergo an inspection and a medical treatment. The act is aimed at preventing foreigners from bringing novel diseases into Japan.

<sup>62</sup> *Id.* at art. 15.

<sup>63</sup> *Id.* at art. 6(8).

<sup>64</sup> *Id.* at art. 6 (1), (2), (8) (Class 1 and 2 are compulsory hospitalization. Designated infectious disease is defined by cabinet order); *Id.* at art. 7. *See also*, Shingata korona uirusu kansenshō wo sitei kansenshō tosite sadameru tō no seirei [Cabinet Order designating new coronavirus infection as a designated infectious disease], no. 11 of cabinet order, art.1 (Japan).

<sup>65</sup> Ken eki hō [Quarantine Act], Law No. 201 of 1951, art. 2(3) (Japan).

B. COVID-19: Unknown or Known?

In February 2020, COVID-19 was assigned as a “Designated Infectious Disease” in Article 6(8) of the Infectious Diseases Act.<sup>66</sup> In March 2020, the government originally argued that the IDA is not applicable to COVID-19, for it is a “recognized” virus, and thus, called the need for an amendment to cover COVID-19.<sup>67</sup> While the opposing party first argued that the original ISMA was applicable, it however succumbed to the ruling party’s call for the revision of ISMA on March 13, 2020.<sup>68</sup>

ISMA originally borrowed the definition of IDA for designated diseases that are different from known (recognized) diseases.<sup>69</sup> On March 5, 2020, the Coordination Office of Measures on Emerging Infectious Diseases under the Cabinet Secretariat declared on Twitter that ISMA, could not be applied to an unknown disease such as COVID-19.<sup>70</sup> On March 6, 2020, in a day, the cabinet changed the interpretation of “unknown” to “known.”<sup>71</sup>

Why did the Shinzo Abe’s cabinet change the interpretation of the text? ISMA was originally established in 2012 under the leadership of the Democratic Party, when the current ruling party, the Liberal Democratic Party (LDP) was the opposing party. The 2012 ISMA categorized several types of diseases, such as new influenza, re-emerging

<sup>66</sup> <https://mainichi.jp/english/articles/20200304/p2g/00m/0na/039000c>, THE MAINICHI, Abe seeks opposition help for emergency virus bill as cases top 1,000 (March 4, 2020); <https://style.nikkei.com/article/DGXMZO65267330R21C20A0000000?channel=DF130120166018> (Nikkei Asia, Japan classifies Wuhan coronavirus as ‘designated infectious disease’) (January 28, 2020); <http://www.asahi.com/ajw/articles/AJ202001270041.html> (Asahi Shimbun, Japan will label coronavirus as infectious disease to fight spread) (January 27, 2020).

<sup>67</sup> <https://mainichi.jp/articles/20200306/k00/00m/010/318000c> (Tokuso hō kai-sei de konkyo bureru shushō hatsugen) (Statement of prime minister changed in amendment of ISMA) (Prime Minister’s remarks that the grounds are blurred by the revision of the Special Measures Law “Unknown virus” becomes “known infectious disease” four days later).

<sup>68</sup> *What is Japan’s coronavirus special measures law?*, THE MAINICHI (Mar. 11, 2020), <https://mainichi.jp/english/articles/20200311/p2a/00m/0na/008000c>.

<sup>69</sup> Amended ISMA, *supra* note 3, art. 2(1). *See also*, IDA, art. 6(7).

<sup>70</sup> <https://www.asahi.com/articles/ASN366JPZN36UTFK017.html> (Naikaku kanbō twitter terebi bangumi ronpyō ni hanron shingata corona) (Cabinet office twitter objected to commentary on television program).

<sup>71</sup> <https://mainichi.jp/articles/20200306/k00/00m/010/318000c> (Tokuso hō kai-sei de konkyo bureru shushō hatsugen) (Statement of prime minister changed in amendment of ISMA).

infectious diseases of common concern (ERIDCC), and other new diseases.<sup>72</sup>

On February 29, 2020, Shinzo Abe announced that everyone could take the test for COVID-19. However, in a matter of just four days, he explained that he did not state that this could be carried out immediately.<sup>73</sup>

It seems as though the Liberal Democratic Party did not want to use ISMA, which was passed when LDP was the opposing party in 2012.<sup>74</sup> In 1998, when the IDA was established, it was doubtful to see whether its definition was clear or not. At that time, SARS was first recognized as a "New Infectious Disease" in Article 6(9), then, "Designated Infectious Disease" in Article 6(8) of IDA.<sup>75</sup> The term "New Infectious Disease" differs from existing infections, and is regarded as a class 1 infection of designated diseases, such as Ebola. An administrative agency may compel hospital admittance for any person with a high probability of a new infectious disease, or a class 1 infection of an already designated disease.<sup>76</sup> If SARS was considered a new infectious disease in the IDA, the question then arises whether COVID-19 should also be considered the same. Although it is unclear what occurred between February 29, 2020 to March 6, 2020, which caused the government to suddenly change the official interpretation and its policies, the political decision of the prime minister is left to the judgment of the voters.<sup>77</sup>

<sup>72</sup> <https://mainichi.jp/articles/20200306/k00/00m/010/318000c> (Tokuso hō kaisei de konkyo bureru shushō hatsugen) (Statement of prime minister changed in amendment of ISMA) (Prime Minister's remarks that the grounds are blurred by the revision of the Special Measures Law "Unknown virus" becomes "known infectious disease" four days later) ("With the introduction of the new influenza and other measures in 2012, the former government (Democratic party) defined the new influenza as 1) new type of influenza, 2) re-emerging influenza, and 3) new infectious diseases.").

<sup>73</sup> <https://mainichi.jp/articles/20200303/k00/00m/010/337000c> (Zen kanja ukerareru demo imasugu to ha ittenai, shusho henten mo gokai shojinu) (Prime minister said that all the patients can take test, but not said immediately. Statement of PM changed, but PM said that it doesn't lead misunderstanding); <https://mainichi.jp/articles/20200302/k00/00m/010/302000c> (Shingata corona PCR kensa konkyo tobosei seiji handan) (New corona virus test, groundless political judgement).

<sup>74</sup> <https://www.asahi.com/articles/ASN347DNGN34UTFK014.html> (Ima no hōritsu de dekiru tokuso hō kaisei yatō kara chumon zokuzoku).

<sup>75</sup> Infectious Disease Act, *supra* note 38, at art. 6(9).

<sup>76</sup> *Id.* at arts. 19, 20.

<sup>77</sup> <https://www.nhk.or.jp/politics/articles/feature/38490.html>. (NHK, Nihon moderu jissai donano [Evaluation of Japanese model]) (What is the public's

*C. Definition of Disease in Article 6(8) and Article 9:  
Hospitalization*

The government could have applied new infectious diseases into Article 9 of the IDA and the cabinet could have changed the application by cabinet order or cabinet decision if they subsequently found a mistake in the exiting application of Designated Infectious Disease in Article 6(8) of IDA. Overall, many citizens rely on the government's official interpretation; therefore, the government should not change its application of a law so easily. Legal stability is a key factor in the rule of law.<sup>78</sup>

The opposing party has criticized that the application of designated diseases in Article 6(8) of IDA was wrong, asserting that the government should change the application immediately in order to take appropriate governmental actions.<sup>79</sup> The ruling party and the Abe administration have argued that Article 9 was available only for unknown diseases.<sup>80</sup> The government successfully amended IDA to include COVID-19 and evaded the political responsibility on March 13, 2020.<sup>81</sup>

A significant difference between Article 6(8) and Article 9 of ISMA, is that Article 9 enables ISMA to be applied to the category of new infectious disease. The governors of prefectures may take actions before a designation based on the advice of MHLW. After the cabinet order designated COVID-19 as a new infectious disease, the

assessment of the government's response?) (Cabinet approval ratings have fallen. In May, an NHK poll showed that for the first time since June 2018, about two years ago, "I don't support the government" was up from "I support the government" Above.)

<sup>78</sup> Tomoya Yamazaki, *Constitutional Interpretation and Legal Stability*, KANAZAWA L. REV. 59 (2), 245, 245 (2017). See also Moto, *KENPŌKŌGI*, at 117 (citing NIHONKOKU KENPO [KENPO] [CONSTITUTION], art. 9 (Japan) (discussing how one of the most significant developments of official interpretation concerned Article 9 of the Japanese Constitution which renounces war and prohibits Japan from maintaining war potential)).

<sup>79</sup> <https://www.asahi.com/articles/ASN347DNGN34UTFK014.html> (Ima no hōritsu de dekiru tokuso hō kaisei yatō kara chumon zokuzoku).

<sup>80</sup> <https://mainichi.jp/articles/20200306/k00/00m/010/318000c> (Tokuso hō kaisei de konkyo bureru shushō hatsugen) (Statement of prime minister changed in amendment of ISMA) (Prime Minister's remarks that the grounds are blurred by the revision of the Special Measures Law "Unknown virus" becomes "known infectious disease" four days later).

<sup>81</sup> <https://www.nhk.or.jp/politics/articles/feature/38490.html> (NHK, Nihon moderu jissai dōnano [Evaluation of Japanese model]).

government could carry out actions against COVID-19 as a class 1 infection of designated diseases.

#### D. When ISMA was Activated

When the amended ISMA is in effect, the government may exercise emergency actions to order restrictions, bans, or closure of schools, social service facilities, and places where many people visit and use.<sup>82</sup> The government may offer emergency loans, and restrict the purchase of goods.<sup>83</sup> The amended ISMA allows quarantine station chiefs to inspect hotels and hospitals for those infected without requiring the owner's consent.<sup>84</sup> They may additionally take lands to erect temporary medical facilities,<sup>85</sup> order expropriation and savings of necessary items,<sup>86</sup> order medical workers to provide medical services,<sup>87</sup> and order public transportation for general coordination,<sup>88</sup> and distribution of necessary items.<sup>89</sup>

This power of the amended ISMA was arguably a critical curtailment of human rights. The Japan Bar Association (JBA) already denounced ISMA publicly in 2012.<sup>90</sup> JBA criticized that ISMA allowed the government to comprehensively restrict human rights via compulsory sanctions placed through cabinet orders.

The other difference between Article 6(8) and Article 9 of IDA is public insurance. Article 37 of IDA covers the medical services of hospitalization for people who follow the advice of the public health center. Class 1 and Class 2 designated infectious diseases are covered at public expenses. The extent of public expense depends on the kind of disease. New infectious diseases are covered for medical service only if they are recognized.<sup>91</sup>

<sup>82</sup> Amended ISMA, *supra* note 3, art. 45(3).

<sup>83</sup> *Id.* at art. 60. *Id.* at art. 55.

<sup>84</sup> *Id.* at art. 29(5).

<sup>85</sup> *Id.* at art. 49(2).

<sup>86</sup> *Id.* at art. 55, para. 2, 3.

<sup>87</sup> Amended ISMA, *supra* note 3, at art. 31(3).

<sup>88</sup> *Id.* at art. 53(1).

<sup>89</sup> *Id.* at art. 54(3).

<sup>90</sup> <https://www.nichibenren.or.jp/document/statement/year/2012/120322.html> (JFBA, Shingata infuruenza to taisaku tokubetsu soti hōan ni hantai suru kaichō seimei) (Statement of JBA president against new influenza measurement act).

<sup>91</sup> Infectious Disease Act, *supra* note 38, art. 19 (Hospitalization), art. 22 (Discharge from hospital), art. 37 (Medical Services for Inpatients) (“The cost of testing to determine if the patient has been sickened by the new infection.”).



Abe's administration changed its attitude to revise ISMA to cover COVID-19 in order to try to expand the availability of inspection when the government could not figure out the precise number of the diseased.<sup>92</sup> As the number of diseased are increasing beyond capacity of public medical capacity, medical workers argue that private medical inspection facilities can support inspection as well as public ones.<sup>93</sup> By announcing the number of patients, hospitals can figure out the total number of cases and the cases of rejection of emergency transportation to patients would get smaller.

Although the prime minister allegedly announced that tests were available for everyone, in reality, the Japanese government abandoned attempts to screen all people and instead inspected only those who exhibited serious health conditions.<sup>94</sup>

The local governments took actions against COVID-19 as well. If the problem was seriously getting beyond their capacities, the central government would coordinate the measures undertaken by prefectures, give helpful information, and announce basic consistent policies.<sup>95</sup> These delayed actions of the central government encouraged local governments to carry out their own measures. Actions of the local governments have been consistent with Chapter 8<sup>96</sup> of the Japanese constitution on the autonomy of local governments. The power and authority of local governments in Japan are much weaker than the central government. COVID-19 has afforded local governments with ample opportunities to respond proactively when central government decision making appears paralyzed or beleaguered. When the virus spread, cities and municipalities coped with the effects of the disease by being on the front lines. Prefectures such as Wakayama carried out

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<sup>92</sup> <https://mainichi.jp/articles/20200306/k00/00m/010/318000c> (Tokuso hō kai-sei de konkyo bureru shushō hatsugen) (Statement of prime minister changed in amendment of ISMA) (Prime Minister's remarks that the grounds are blurred by the revision of the Special Measures Law "Unknown virus" becomes "known infectious disease" four days later).

<sup>93</sup> <https://www.nikkei.com/article/DGXMZO60069980V00C20A6EA3000> (Shingata korona, seisaku wo kiku) (policies on corona).

<sup>94</sup> Hisahiko Yano, *Coronavirus: Why Japan tested so few people*, NIKKEI ASIA (Mar. 12, 2020), <https://asia.nikkei.com/Spotlight/Coronavirus/Coronavirus-Why-Japan-tested-so-few-people>.

<sup>95</sup> Amended ISMA, *supra* note 3, at art. 20(1).

<sup>96</sup> NIHONKOKU KENPŌ [KENPŌ] [JAPAN], ch. 8 (Japan).

inspections without taking into consideration the degree of the disease.<sup>97</sup>

*E. Free Speech and Shiori Yamao's Objection when ISMA was Revised in March 2020*

The Japanese constitution restricts prior restraint and prohibits censorship.<sup>98</sup> However, the government has been quick at suppressing the criticism levied against it with regard to the definition of what constitutes recognized or unknown.<sup>99</sup> While it is valid to prohibit rumors that cause confusion among citizens, it is also important that television, print media, and the internet—which have been the tools for free expression—remain free.

When ISMA was revised in March, other problems arose. Shiori Yamao of the Constitutional Democratic Party (CDP) of Japan (Rikken Minshu) strongly argued that it was absolutely wrong to get along with LDP to revise ISMA together.<sup>100</sup> As we have seen, CDP, the largest party among the opposing parties, argued that it was not at all necessary to amend ISMA.<sup>101</sup>

Yamao argues that in the amended ISMA, a prior approval of the Diet should have been required for emergency declarations made under Article 32 of ISMA.<sup>102</sup> Under the amended ISMA, the government is obligated to report *after* the emergency declaration and the emergency may extend to a maximum 2 years.<sup>103</sup> Yamao finds that the government can ask people to stay at home under Article 45(1), and pointed out that by using Article 45(2) and (3), the government can restrict the use of schools and nursing homes, and ban people from

<sup>97</sup> Satoshi Sugiyama, *From Tokyo to Wakayama to Okinawa, Japan on edge as COVID-19 spreads*, THE JAPAN TIMES (Feb. 14, 2020), <https://www.japan-times.co.jp/news/2020/02/14/national/wakayama-positive-coronavirus/>.

<sup>98</sup> NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 21, para.1, 2 (Japan).

<sup>99</sup> <https://www.asahi.com/articles/ASN366JPZN36UTFK017.html> (Naikaku kanbō twitter terebi bangumi ronpyō ni hanron shingata corona) (Cabinet office twitter objected to commentary on television program).

<sup>100</sup> CONSTITUTIONAL DEMOCRATIC PARTY OF JAPAN, <https://cdp-japan.jp/english> (Yamao was disappointed that she left her party on March 18<sup>th</sup>).

<sup>101</sup> Satoshi Sugiyama, *Japan's Diet unites, on surface at least, to pass coronavirus emergency bill*, THE JAPAN TIMES (Mar. 13, 2020), <https://www.japan-times.co.jp/news/2020/03/13/national/politics-diplomacy/japans-diet-unites-surface-least-pass-coronavirus-emergency-bill/>.

<sup>102</sup> Amended ISMA, *supra* note 3, at art. 32.

<sup>103</sup> *Id.* at art. 1-2(1).

gathering. Article 45(2) and (3) effectively enables the government to suppress the freedom of expression.<sup>104</sup>

Yamao suspects the exercise of Article 2-6 that allowed the government to instruct necessary general coordination of designated public institutions such as NHK and “other” public interest entities. She strongly argues that if the other public interest entities in Article 2-6 include private television broadcasting companies, the government may order private television companies for a general coordination<sup>105</sup> and may issue necessary instructions<sup>106</sup> of order to the transportation and postal services.<sup>107</sup> She argues that it would be unconstitutional for a government to intervene in the operations of private broadcasting companies.<sup>108</sup>

In response to Yamao’s proposition that the definition of “necessary” in Article 53(2) is unclear, Ichiro Miyashita, deputy minister in the cabinet office responded on March 11, 2020, that the government may replace the contents of broadcast, if the government finds it to be inappropriate. Miyashita, however, changed this statement in front of the Committee on Judicial Affairs of the House of Representatives on March 13, 2020.<sup>109</sup>

Yamao then argued that the supplementary resolution was not enough to protect human rights because, since the time that ISMA was established as a supplementary resolution, and added in the House of Councilors, it has not functioned well.<sup>110</sup> The amended ISMA does not require *prior* report, only the supplementary resolution requires the government to submit a prior report to Diet when issuing an emergency declaration, effectively enabling the government to restrict human rights.<sup>111</sup>

<sup>104</sup> *Id.* at art. 45(2), (3).

<sup>105</sup> *Id.* at art. 20.

<sup>106</sup> *Id.* at art. 33.

<sup>107</sup> *Id.* art. 53(2).

<sup>108</sup> *Id.*; <https://www.asahi.com/articles/ASN4N6TGLN4BUTFK00Z.html> (Watashi ga hantai shita riyu) (Reasons I objected to "legislative closure" that moved Representative Yamao).

<sup>109</sup> <https://www.nhk.or.jp/politics/articles/statement/31782.html> (*Kinkyu jitai sengen hosō naiyō sasikae ariuru tōben tekkai*) (Change of official statement that government may replace contents of broadcasting).

<sup>110</sup> <https://www.asahi.com/articles/ASN4N6TGLN4BUTFK00Z.html> (Watashi ga hantai shita riyu) (Reasons I objected to "legislative closure" that moved Representative Yamao).

<sup>111</sup> [http://www.shugiin.go.jp/internet/itdb\\_rchome.nsf/html/rchome/Futai/nai-kakuECB0F1A58E87DC0C49258529003CB3D6.htm](http://www.shugiin.go.jp/internet/itdb_rchome.nsf/html/rchome/Futai/nai-kakuECB0F1A58E87DC0C49258529003CB3D6.htm) (Shingata influenza tō tai-saku tokbetsu sochi hō no ichibu wo kaisei suru hōritsu an ni taisu futai ketsugi);

In Japan, while Diet does have exclusive law-making power and enjoys supplementary resolution requests, it does not hold legally binding power.<sup>112</sup> The government does not take the legal responsibility even if it does not follow the supplementary resolution.<sup>113</sup>

Constitutionality of emergency declaration should first be reviewed if it has legal basis in ISMA. Second, it would need a prior consent of the parliament before the cabinet declares an emergency. The constitution would require control of the legislature over the government. There is no provision in the amended ISMA that was passed in March of 2020 aside from the supplementary resolution. As the supplementary resolution does not bind the cabinet, the ISMA may allow for a huge increase in power of the government if the cabinet renews the declaration.<sup>114</sup> Legitimacy of the emergency declaration might be questioned if prior consent of the parliament should be included as text in ISMA, when the parliament revised ISMA in March 2020.

### III. EMERGENCY POWER AND THE AMENDMENT OF JAPANESE CONSTITUTION

This chapter explains the emergency powers in the hands of the state when a pandemic occurs in Japan. Some people argue that it is now time to amend the current constitution to empower the prime minister to exercise stronger leadership.<sup>115</sup> Professor Laurence Repeta

<https://www.nikkei.com/article/DGXMZO56622530Q0A310C2PP8000/>; Kinkyu jitai ha kokkai jizen hōkoku, yoyatō futai ketsugi de gōi) (Emergency declaration is required to report to the Diet beforehand, ruling and opposing party agreed).

<sup>112</sup> House of Councilors, Sangiin no aramashi [Summary of the House of Councilors], [https://www.sangiin.go.jp/japanese/aramashi/keyword/katudo01.html#:~:text.](https://www.sangiin.go.jp/japanese/aramashi/keyword/katudo01.html#:~:text=)

<sup>113</sup> <https://r.nikkei.com/article/DGXMZO36587710X11C18A0PP8000?s=6> (Futai ketsugi yaku 6 warino houritsuni jikkousei takaku) (Facilities that do not accept holidays, will be announced within the week Osaka Prefecture policy) (Supplementary resolution 69 % highly effective. This is because parliamentary answers bind the government in carrying out its policies without being written into law. Resolutions and answers in parliament are not only politically significant, but also highly effective. Supplementary resolution is used for negotiation between ruling and opposing parties).

<sup>114</sup> Satoshi Sugiyama, *Steps limited for Japan's government even if it declares coronavirus emergency*, THE JAPAN TIMES (Mar. 29, 2020), <https://www.japan-times.co.jp/news/2020/03/29/national/politics-diplomacy/japanese-government-state-of-emergency-coronavirus/>.

<sup>115</sup> Motoko Rich et al., *Japan Declared a Coronavirus Emergency. Is It Too Late?*, N.Y. TIMES (Apr. 7, 2020), <https://www.ny-times.com/2020/04/07/world/asia-japan-coronavirus-emergency.html>.

however, strongly argues that there is no necessity to amend the Japanese constitution.<sup>116</sup>

If an emergency is declared, there are two options available in the Japanese constitution. One is to amend the constitution to announce an emergency, empowering the government to restrict human rights and concentrate the national power to the administration.<sup>117</sup> The other is to announce a state of emergency under the existing statutes. There are comprehensive statutes that cover natural disasters, nuclear disasters, or issues of national defense. The reason for this is that the imperial constitution of Japan<sup>118</sup> has been abused by governments to exercise emergency powers.<sup>119</sup>

In the case of a nuclear power plant accident, the Act on Special Measures Concerning Nuclear Emergency Preparedness enables the government to declare an emergency.<sup>120</sup> In the case of a natural disaster, the Basic Act on Disaster Management (BADM) provisions for a state of emergency.<sup>121</sup> In the case of national defense, the Measures for Protection of the People in Armed Attack Situations Act is available.<sup>122</sup> Accordingly, the Japanese government has prepared statutes for things that are beyond imagination without amending the constitution.

#### A. Expansion of Administrative Power

The large expansion of administrative power is a classic lesson for a constitutional and administrative law class in Japan.<sup>123</sup> In the United States, on 1960s, scholars have warned about large

<sup>116</sup> Laurence Repeta, *The coronavirus and Japan's Constitution*, THE JAPAN TIMES (April 14, 2020), <https://www.japantimes.co.jp/opinion/2020/04/14/commentary/japan-commentary/coronavirus-japans-constitution/#.XpYPEINKgdU>.

<sup>117</sup> Yuichiro Tsuji, *Godzilla and the Japanese Constitution: A Comparison Between Italy and Japan*, 3 ITALIAN LAW JOURNAL 451 (2017).

<sup>118</sup> DAI NIHON TEIKOKU KENPŌ [MEIJI KENPŌ] [CONSTITUTION], arts. 8, 14, 31, 70 translated in [JAPANESE LAW TRANSLATION], <https://www.ndl.go.jp/constitution/e/etc/c02.html> (Japan).

<sup>119</sup> Koju Nagai, *Shingata korona uirusu to kinkyū jitai jokō* [New corona virus and emergency power provision], SEKAI, May 2020, at 58 (Japan).

<sup>120</sup> Genshiryoku saigai taisaku tokubetsu sochi hō [Act on Special Measures Concerning Nuclear Emergency Preparedness], Law No. 223 of 1961, art. 15 (Japan).

<sup>121</sup> Saigai taisaku kihon hō [Basic Act on Disaster Management], Law No. 223 of 1961, art. 105 (Japan).

<sup>122</sup> Buryoku kōgeki jitai tō ni okeru kokumin no hogo no tame no sochi ni kansuru hōritsu [Act concerning the Measures for Protection of the People in Armed Attack Situations, etc.], Law No. 112 of 2004 (Japan).

<sup>123</sup> HIDEKI MOTO, *KENPŌKŌGI* 205, 208 (2d edition); NOBUYOSHI ASHIBE, *KENPŌ* 299, 309 (7th edition).

administrative power.<sup>124</sup> It reminds us of those controversies. Even though we are in a state of emergency, the government is still under the rule of law and there is separation of power. The other two branches shall regulate the administrative power. If an emergency is predictable, we can prepare by establishing a new or interpreting an existing statute. If an emergency is unpredictable and beyond statute, we may need to amend the constitution. As aforementioned, legal professionals have two propositions: amend the constitution, or interpret the current statute without amending the constitution. These propositions depend on the definition of “unpredictable emergency.”<sup>125</sup>

In emergencies, temporary measures such as cabinet orders do not have eternal effect. The rule making power is originated from the law-making organ, the Diet.<sup>126</sup> The Diet exercises law-making power exclusively. When the Diet delegates law-making power to administrative branches,<sup>127</sup> it should clearly specify the scope and standard of power that the agencies will enjoy. A comprehensive delegation is prohibited by the constitution.<sup>128</sup>

The reason that comprehensive delegation is banned is because of the untrustworthiness of the government. The power of administrative agency originates from democratic legitimacy. If we predict when an emergency occurs, we can prepare for it by passing a statute.<sup>129</sup> It may offer legal predictability and ensure that the human rights are safe. As Japan is fragile to natural disasters such as typhoons, earthquakes, and floods, the Japanese parliament passed several statutes

<sup>124</sup> Pierce, *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 Am. U. L. Rev. 391, 402-407(1987).

<sup>125</sup> Yuichiro Tsuji, *Godzilla and the Japanese Constitution*, *supra* note 109, at 474 (Our statutes and our constitution are human-made documents and are too incomplete to address every potential, unpredictable emergency. However, earthquakes occur in Japan often, and appropriate preventive and resilient responses could be planned).

<sup>126</sup> Nihon-Koku Kenpō [CONSTITUTION] art. 41 (Japan).

<sup>127</sup> *Id.* art. 73(6). *See also*, MOTO, *KENPOKŌGI*, *supra* note 124, at 212-214. ASHIBE, *KENPŌ*, *supra* note 124, at 307; Saiko Saibansho [Sup. Ct.] Nov. 6, 1974, Shōwa 44 (a) no. 1501, 28, 9 SAIKŌ SAIBANSHO KEIJINJI HANREISHŪ [KEISHŪ] 393 (Japan) (the “Sarufutsu” case); *see also* Yuichiro Tsuji, *Stand for the National Flag and Sing the National Anthem*, 2 CARDOZO PUB. L., POL’Y & ETHICS J. (2019). Yuichiro Tsuji, *Forgotten People: A Judicial Apology for Leprosy Patients in Japan*, 19 OR.. REV. INT’L. L. 223, 237–38 (2018).

<sup>128</sup> MOTO, *KENPŌKŌGI*, *supra* note 124, at 213.

<sup>129</sup> Yuichiro Tsuji, *Godzilla and the Japanese Constitution*, *surpa* note 118, at 465, 467.

after deliberation.<sup>130</sup> These statutes primarily aim to prevent natural disasters.<sup>131</sup> However, they are also available for COVID-19. If these statutes may be misused to restrict human rights, the Diet may limit the term of their validity to a certain period,<sup>132</sup> such as two years in the case of the sunset law. Therefore, COVID-19 shall not be evaluated to justify the reinforcement of administrative power.<sup>133</sup> While we witnessed the signs of a pandemic with SARS, the states as well as the public have been ignorant.

COVID-19 has been a trigger to make us review our legal principles. This paper argues that the Japanese constitution does not have to be amended for COVID-19. The existing statutes dealing with natural disasters and nuclear power plants are available to cope with COVID-19.

Compared to the ISMA for COVID-19, the Basic Act on Disaster Management has stronger power to restrict human rights. Article 63 of BADM<sup>134</sup> has delegated government the power to designate evacuations and restrictions. Article 116<sup>135</sup> of BADM provisions a fine and imprisonment for the violation of Article 63. Usually, an administrative action requires a statute to impose an obligation or restrict human rights.<sup>136</sup>

<sup>130</sup> *Id.* at 474.

<sup>131</sup> *Id.* at 452.

<sup>132</sup> *Id.* at 468 (The time period for an emergency tends to be easily extended. Even though an emergent situation may pass, the suspension of human rights might continue forever).

<sup>133</sup> *Id.* at 463 (Japanese constitutional scholars may think that the unpredictable can always happen and that free discretionary power should be justified and given to the executive branch).

<sup>134</sup> Basic Act in Disaster Management (BADM), art. 63 (When a disaster has occurred or is just about to occur and the mayor of a municipality finds it particularly necessary in order to prevent danger to human life or bodily health, the mayor of the municipality may establish a warning area and restrict or prohibit the entry of persons other than those engaged in emergency disaster response measures to said area, or order them to leave said area); *See also*, <https://mainichi.jp/articles/20200527/dde/041/040/020000c> (Shingata korona Saigai hosei korona ni uyou wo) (Application of natural disaster law into COVID-19).

<sup>135</sup> Basic Act in Disaster Management (BADM), art. 116 (Sanction in violation of art. 63) (Article 116 Any person who falls under any of the following items shall be punished by a fine of not more than one hundred thousand yen or detention: (i) any person who has employed signals related to disaster prevention provided for by the Cabinet Office Ordinance based on the provisions of paragraph (1) of Article 52 or using similar signals without good reason(ii) A person who fails to comply with a prohibition or restriction or an order to leave from the mayor of a municipality pursuant to the provision . . .).

<sup>136</sup> SAKURAI & HASHIMOTO, *GYŌSEIHŌ* [Administrative law], at 15-17.

When the prime minister issued a request for the closure of public schools on February 28, 2020, before ISMA was established, it had no such power to ask for schools to close, since the public elementary and junior high schools fall under the jurisdiction of the boards of education in the municipalities, not the prime minister.<sup>137</sup>

In face of COVID-19, it was found out that the public health centers in municipalities and prefectures dealt with patients as in natural disasters. The power of central government in Japan works only when the magnitude of COVID-19 is beyond the capacity of a local government.<sup>138</sup> The role of central government is to provide expertise on diseases with the help of expert opinion, coordinate the differences between local governments, and provide information to the citizens.<sup>139</sup> The central government listens to the advisory committee to take action. However, the opinion of the advisory board has no legal binding power. The advisory board influences the policy making of political branches.

### B. Advisory Board and Legal and Political Responsibility

The government has the discretion to choose a certain policy along with the advisory board. While the advisory board makes the scientific judgment, it is the government who takes the political responsibility.<sup>140</sup>

The IDA provides one important lesson to the cabinet and legislature: interpretation or amendment to provisions in the existing statute. The legislature amends the statute or the government changes the interpretation of the statute by the cabinet decision.<sup>141</sup> In an

<sup>137</sup> Satoshi Sugiyama, *Abe's bold school closure move appears spurred by criticism of virus response*, THE JAPAN TIMES (Feb. 28, 2020), <https://www.japan-times.co.jp/news/2020/02/28/national/abe-closes-school-coronavirus/> (The instruction is not legally binding).

<sup>138</sup> Yuichiro Tsuji, *Godzilla and the Japanese Constitution*, *supra* note 118, at 456 (The first quick response is by the local government, and strengthening the governor does not infringe upon individual rights of the local people. Central government works to support local governments).

<sup>139</sup> See Yuichiro Tsuji, *Local Autonomy and Japanese Constitution - David and Goliath*, 8 KJLL 43 (2018) (At branches of government, and to help identify the kinds of failures in democratic process warranting heightened judicial scrutiny).

<sup>140</sup> SAKURAI & HASHIMOTO, *GYŌSEIHŌ* [Administrative law], at 39. (Opinion of advisory board doesn't bind decision of the government).

<sup>141</sup> [https://www.nikkei.com/article/DGXMZO54920700Y0A120C2CE0000/?n\\_cid=DSREA001](https://www.nikkei.com/article/DGXMZO54920700Y0A120C2CE0000/?n_cid=DSREA001) (Shingata haien sitei kansenshō ni kakugi kettei) (Cabinet decision on new pneumonia and



emergency, we may move to stop the law-making power to provide sweeping power to the administrative branch. If we refer to a wide discretion to pass a law in legislature, we can avoid the discussion on amending the constitution.<sup>142</sup>

In the meantime, we should not emphasize the power of legislature, for history teaches us about how the hysterical actions of people may have resulted in legislatures making mistakes. A legislature can function even in an emergency.<sup>143</sup>

The governmental accountability is subjected to a proportionality test. If the emergency is serious, the government needs to explain it to the citizens. The communication between the government and voters is important for a healthy democracy.<sup>144</sup>

In the central government advisory board was set up for COVID-19 was set up at the headquarter of the cabinet and provisioned in Article 18(4)<sup>145</sup> of the amended ISMA.

The advisory board would propose that COVID-19 is a recognized or unknown disease under IDA. The government would take political responsibility if it made the wrong judgement. If the inaction of the government would lead to the loss of the lives of the diseased, the State Redress Act would provide grounds for legal responsibility.<sup>146</sup>

designated infectious diseases) (COVID-19 was classified into a designated infectious disease by cabinet decision).

<sup>142</sup> *Security legislation takes effect*, THE JAPAN TIMES (March 29, 2016), <https://www.japantimes.co.jp/opinion/2016/03/29/editorials/security-legislation-takes-effect/> (The legislation expands the scope of Japan's military actions outside its territory in a broad range of areas, but the conditions that trigger such actions are only broadly defined — leaving much to the discretion of the government in power); See also, Yuichiro Tsuji, *Godzilla and the Japanese Constitution*, *supra* note 139, at 469 (democracy must be maintained to protect human rights and measures dependent on the discretion of the government should be avoided).

<sup>143</sup> Keita Furuta, Satoru Kuroda & Yoshio Onishi, *The Reception of Carl Schmitt in the Japanese Constitutional Theory*, 33 OIU J. OF INT'L STUDIES 85 (2020).

<sup>144</sup> Vicki Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2014) (Jackson argues that "proportionality review is not the answer to all constitutional rights questions" but, "include its potential to bring constitutional law closer to constitutional justice, to provide a common discourse about rights for all branches of government, and to help identify the kinds of failures in democratic process warranting heightened judicial scrutiny.").

<sup>145</sup> Amended ISMA, *supra* note 3, art. 18(4).

<sup>146</sup> Saiko Saibansho [Sup. Ct.] Oct. 15, 2004, Hei 13 (e) no. 1194, 58 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1802, [https://www.courts.go.jp/app/hanrei\\_jp/detail2?id=52320](https://www.courts.go.jp/app/hanrei_jp/detail2?id=52320) (Japan) (holding that liability under the State Redress Act for inaction of the government led to serious damage to Minamata diseases).

In June, the government disbanded this advisory board and established a subcommittee under the Cabinet secretariat,<sup>147</sup> whose members are appointed by the prime minister. Scientific objectivity and political neutrality might be separated if appointment of members should be nominated by the prime minister and approved by the Diet. The Japanese government failed in the nuclear power plant cases resulting from the Great East Japan Earthquake of 2011.<sup>148</sup>

### C. Delegated Power

Article 73(6)<sup>149</sup> of the Japanese constitution allows the government to pass ministerial ordinances to the provisions of the constitution and statutes. The government may not pass a sanction except for the delegation of a statute. The text of Article 73(6) allows the government to pass ministerial ordinances with sanctions, when the Diet delegates its power to the government.<sup>150</sup>

Article 41<sup>151</sup> of the Japanese constitution announces that the law-making power exclusively belongs to the Diet, the highest legislative organ. While a comprehensive delegation is not allowed, a delegation must clarify the purpose, meaning, scope, and standards of the delegated power. If it satisfies the due process of law, a sanction is also delegated. The more severe a sanction is, the more clarified the standard should be.<sup>152</sup>

When disaster or disease seriously occurs, the government is obligated to explain what kind of concrete action the government should take to relieve damage and provide helpful information to reduce confusion over disaster or pandemic. The people are more likely to take irrational action<sup>153</sup> when the government's explanation is not

<sup>147</sup> Eric Johnston, *Japan's new coronavirus panel aims for more clarity and balance*, THE JAPAN TIMES (July 16, 2020), <https://www.japan-times.co.jp/news/2020/07/16/national/japan-covid-19-panel-balance/>.

<sup>148</sup> YUICHIRO TSUJI, NUCLEAR POWER PLANTS AND VOLCANO IN JAPAN (forthcoming in Taiwan).

<sup>149</sup> NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 73, para. 6 (Japan).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at art. 41.

<sup>152</sup> MOTO, KENPŌKŌGI, *supra* note 124, at 212 (2nd ed. 2018) (Rulemaking by administrative agency that has no basis in law is unconstitutional. Where the Japanese Constitution has been interpreted as permitting delegation, blanket delegation that does not specify the purpose or scope of the delegation by law is considered impermissible).

<sup>153</sup> Nishikawa Mitsuko, *Coronavirus fuels toilet paper panic buying*, NHK (Mar. 3, 2020), <https://www3.nhk.or.jp/nhkworld/en/news/backstories/905/>.

complete. The responsibility of the government is to reinforce a check on political powers. If the government fails, by changing the public statement, people will seek political accountability.<sup>154</sup>

In Japan, under the amended ISMA, a cabinet may issue an emergency cabinet order to allow the postponement of payment when the House of Representatives is dissolved.<sup>155</sup> The cabinet is required to convene an extraordinary Diet session for the approval of Diet. If the Diet does not approve, the cabinet order will lose its effect.<sup>156</sup>

#### D. Corruption and Rule of Law

In event of COVID-19, the rule of law and legal stability have come to be challenged in first six months of 2020. The change of interpretation of the law by the cabinet may influence the lives of citizens; the government is required to adhere to an original interpretation of the statute in general. If the government finds it necessary to change several interpretations, legitimacy of its change should prioritize human rights. On January 31, 2020, the Abe administration changed the retiring age of the Director of Public Prosecutions of Ministry of Justice by a cabinet decision.<sup>157</sup> The Abe administration submitted a bill to amend the Public Prosecutor's Office Act in March.<sup>158</sup>

Newspapers severely criticized the Abe administration; stating that the Abe cabinet wanted to favor people who protect the administration and prevents the Ministry of Justice from investigating the political corruptions of the prime minister.<sup>159</sup> For example, the prime minister was alleged of using taxes for his personal use, which was in violation of the Public Office Election Act<sup>160</sup> (prohibition of

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<sup>154</sup> Lawrence Repeta, *The coronavirus and Japan's Constitution*, THE JAPAN TIMES (Apr. 14, 2020), <https://www.japantimes.co.jp/opinion/2020/04/14/commentary/japan-commentary/coronavirus-japans-constitution/>.

<sup>155</sup> Amended ISMA, *supra* note 3, at art. 59.

<sup>156</sup> *Id.*

<sup>157</sup> <https://www.tokyo-np.co.jp/article/167979> (Kensatsu chō kaisei an moto kenji sōchō ra hantai ikensho no zenbun Louis 14 no chin ha kokka sōki) (Ex-Public Prosecutor General's official statement against bill to revise Public Prosecutor's Office Act, reminiscent of Louis XIV).

<sup>158</sup> Kensatsu cho hō [Public Prosecutor's Office Act], Law No. 61 of 1947, Art.22 (Japan).

<sup>159</sup> <https://www.nhk.or.jp/politics/articles/feature/37768.html> (Kensatuchō hōan miokuri no tenmatsu) (Seeing bill of revision of Public Prosecutor's Office Act off).

<sup>160</sup> Kōshoku senkyo hō [Public Office Election Act], Law No. 100 of 1950 (Japan).

contribution) and Political Funds Control Act<sup>161</sup> (failure to enter necessary items).

By changing the official interpretation to extend the retiring age of the director of public prosecutions, the Abe administration wanted to ensure his political and legal safety.<sup>162</sup> The Abe cabinet dramatically changed the official interpretation of the respective statute. This change in legal interpretation should be left for the voters to decide.<sup>163</sup>

If the government persists on a certain official interpretation and retains inaction, it may cause a serious loss or injury to the citizens. The government may be liable under the State Redress Act.

#### IV. ADMINISTRATIVE GUIDANCE AND COMPENSATION IN JAPAN

Many people plead on Twitter that if the population were to stay at home and keep their own businesses closed, then the government should compensate them. The phrase “self-restraint and compensation come together” once appeared in the ranking for the most commented posts on Twitter.<sup>164</sup>

##### A. *Self-restraint and Compensation Come Together: Administrative Guidance*

In Article 45<sup>165</sup> of the amended ISMA, prefectures requested that the stores remain closed as part of administrative guidance, one of the unique administrative actions in Japanese administrative law. Administrative actions disposition does carry the legal binding power to

<sup>161</sup> Seiji shikin kiseo hō [Political Funds Control Act], Law No. 194 of 1948 (Japan).

<sup>162</sup> Kōshoku senkyo hō [Public Office Election Act], *supra* note 159.

<sup>163</sup> James C. Fisher, *COVID-19, Collective Action, and Japan's Constitution*, TOKYO REVIEW (May 13, 2020), <https://www.tokyoreview.net/2020/05/covid-19-collective-action-and-japans-constitution/>; For a change of Constitutional interpretation by cabinet decision, *see also*, Yuichiro Tsuji, *Amendment of the Japanese Constitution — A Comparative Law Approach*, 37 NANZAN REV. OF AMERICAN STUDIES 51-70 (2015).

<sup>164</sup> Lully Miura, *It's time to face the real risks posed by COVID-19*, THE JAPAN TIMES (Mar. 24, 2020), <https://www.japantimes.co.jp/opinion/2020/05/24/commentary/japan-commentary/time-face-real-risks-posed-covid-19/>; *See also*, *Decision to hold martial arts event in Japan amid virus fears draws fire on SNS*, THE MAINICHI (Mar. 23, 2020), <https://mainichi.jp/english/articles/20200323/p2a/00m/0na/024000c>.

<sup>165</sup> Amended ISMA, *supra* note 3, at art. 45.

change the right or duty of citizens.<sup>166</sup> Under administrative guidance, a government may ask citizens to perform voluntary actions. Administrative guidance is not administrative disposition. There should not be any sanction if the citizens do not follow administrative guidance.<sup>167</sup>

In Japanese society, the relationship between a citizen and the government does not occur only one time. It is a continuous relationship. Even if a person chooses not to follow the administrative guidance, they may fear that such an act of disobedience may result in the government carrying out discriminatory actions against them in every other opportunity.<sup>168</sup>

Based on Article 45(1) of the amended ISMA,<sup>169</sup> a governor of prefecture can issue self-restraint to citizens within a designated area and period. However, there is no sanction against disobedience and no provision for compensation, when a governor is asking for voluntary self-restraint. In July, governors were requesting that ISMA should be amended to provide compensation.<sup>170</sup>

Article 62<sup>171</sup> of ISMA, provides provisions for compensation in Articles 29(5), 49, and 55(2).<sup>172</sup> Article 29(5)<sup>173</sup> allows a director of quarantine to use designated hospitals or medical facilities for quarantine. He/she may request a compensation for the medical service without the consent of medical hospitals. Article 49(1)<sup>174</sup> allows governors of prefectures to acquire lands for temporary medical facilities with the consent of landowners. Article 49(2)<sup>175</sup> allows governors to use lands if the ownership of the respective lands is unknown. Article

<sup>166</sup> SAKURAI & HASHIMOTO, *GYŌSEIHŌ* [Administrative law], at 132.

<sup>167</sup> Lawrence Repeta, *The coronavirus and Japan's Constitution*, THE JAPAN TIMES (Apr. 14, 2020), <https://www.japantimes.co.jp/opinion/2020/04/14/commentary/japan-commentary/coronavirus-japans-constitution/> (The law does not mandate penalties for violation. That's right. Under this law, governors like Tokyo Gov. Yuriko Koike can strongly request that people stay home but they cannot order them to do so).

<sup>168</sup> SAKURAI & HASHIMOTO, *GYŌSEIHŌ* [Administrative law], at 133.

<sup>169</sup> Amended ISMA, *supra* note 3, at art. 45(1).

<sup>170</sup> <https://www.tokyo-np.co.jp/article/48623> (Tokyo Shimbun, Korona tokuso hō ni bassoku, hoshō mo chiji ra sōki kaisei motomeru) (Sanction and compensation should be provided in ISMA, governor's request).

<sup>171</sup> Amended ISMA, *supra* note 3, at art. 62.

<sup>172</sup> *Id.* at arts. 29(5), 49, 55.

<sup>173</sup> *See id.* at art. 29(5).

<sup>174</sup> *See id.* at art. 49(1).

<sup>175</sup> *See id.* at art. 49(2).

55(2)<sup>176</sup> allows governors to request producers, sellers, distributors, keepers, and transporters to sell necessary items to prefectures for implementing emergency measures. Article 55(2)<sup>177</sup> allows a governor to take necessary items for the special measurement of emergency action, if the person does not follow the request of Article 55(1). Article 63<sup>178</sup> of the amended ISMA provides compensation to those who work for the medical services and are injured or who passed away from COVID-19.

Citizens have the option to follow or not follow self-restraint in Article 45. However, most Japanese follow administrative guidance and are affected by peer pressure.<sup>179</sup> There is no provision for self-restraint in Article 45<sup>180</sup> for compensation.

In Japanese constitutional and administrative law, compensation is limited only for specific people and special damages. Article 29(3)<sup>181</sup> of the constitution does not cover for damages that are generally shared in common. It was a wise strategy for the government to avoid financial burden because political administrative action is in fact, not a legal administrative action.

If some businesses do not follow administrative guidance, prefectures follow the next step, “instruction” in Article 45(3).<sup>182</sup> Administrative instruction is an administrative action. Some businesses under “instruction” may request the government by arguing that the government should stop administrative guidance.<sup>183</sup> The government shall inspect and review whether such guidance is necessary or not.<sup>184</sup>

### B. Compensation or Not?

The self-restraint order is an act of administrative guidance. Governors of Tokyo, Osaka, and Chiba issued self-restraint with a list of

<sup>176</sup> *See id.* at art. 55(2).

<sup>177</sup> Amended ISMA, *supra* note 3, at art. 55(2).

<sup>178</sup> *Id.* at art. 63.

<sup>179</sup> Administrative law isn't applied to local government. Some prefectures provide administrative procedure ordinance. Gyōsei tetudukki hō [Administrative procedure Act] Law No. 88 of 1993, art.3(3)(Japan); *see also* <https://mainichi.jp/english/articles/20200408/p2g/00m/0na/010000c> (Emergency declaration in Japan tests conformity as virus strains health care).

<sup>180</sup> Amended ISMA, *supra* note 3, at art.45.

<sup>181</sup> Nihon-Koku Kenpō [CONSTITUTION], art. 29(3) (Japan).

<sup>182</sup> Amended ISMA, *supra* note 3, at art. 45(3).

<sup>183</sup> Gyōsei tetsuduki hō [Administrative Procedure Act], Law No. 88 of 1993, art. 36-2 (Japan).

<sup>184</sup> *Id.*

certain business such as gyms, pachinko parlors, bars, hotels, etc. The listed business is illustrative. Governors do not have to pay compensation because a listed business may disobey guidance.<sup>185</sup> However, it does not mean that the government takes any financial burden.

There is no provision for administrative instruction in Article 45<sup>186</sup> of the amended ISMA. However, a person may bring Article 29(3)<sup>187</sup> of the Constitution directly for compensation, if the administrative action leads specific people to a particular damage. Compensation under Article 29(3)<sup>188</sup> of the Constitution of Japan requires specific damages. People who live together in a society, share its burden within tolerable limit, and carry a shared burden generally do not activate Article 29(3).<sup>189</sup>

Self-restraint may restrict the constitutional right of freedom of businesses, placed in Article 22<sup>190</sup> of the Constitution, if it involves the legal effect. The issue is whether a temporary self-restraint is the equivalent of the total acquisition of property or freedom of businesses. If people may ask general citizens for financial payment, they need to change ISMA. It is wrong to ask for legal compensation under Article 29(3)<sup>191</sup> of the Constitution for damages that are widely spread and generally shared in common. Citizens would make claims against local governments for compensation because administrative guidance is issued by prefectures, not the central government.

The government could use this legal gap to avoid financial burden, while it continues to use administrative guidance.<sup>192</sup> However, the Ministry of Economy, Trade, and Industry mentioned that Article 45<sup>193</sup> of the amended ISMA should be amended to impose a legal

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<sup>185</sup> Satoshi Sugiyama, *Abe administration faces flak over hesitancy to compensate virus-hit businesses*, THE JAPAN TIMES (Apr. 15, 2020), <https://www.japan-times.co.jp/news/2020/04/15/national/politics-diplomacy/shinzo-abe-coronavirus-business-compensation/> (If the government is using its authority to make such a request of the private sector, we should offer compensation as a package).

<sup>186</sup> Amended ISMA, *supra* note 3, at art. 45.

<sup>187</sup> Nihon-Koku Kenpō [CONSTITUTION], art. 29 (Japan).

<sup>188</sup> *Id.* at art. 29(3).

<sup>189</sup> See Yuichiro Tsuji, *Reflection of Public Interest in the Japanese Constitution: Constitutional Amendment*, 46 DENV. J. INT'L L. & POL'Y 159 (2018).

<sup>190</sup> Nihon-Koku Kenpō [CONSTITUTION], art. 22 (Japan).

<sup>191</sup> *Id.* at art. 29(3).

<sup>192</sup> Satoshi Sugiyama, *supra* note 177. (While the administration has set out a series of other financial measures within its economic plan, they say those measures are complicated and time-consuming).

<sup>193</sup> Infectious Disease Act, *supra* note 39, at art. 45.

responsibility on those who disobey guidance.<sup>194</sup> Local governments accordingly issue self-restraint orders. If the parliament amends to impose legal responsibility toward guidance, the local government is obligated to pay compensation to specific people for particular damages.

While Japanese citizens are questioned for their political evaluation of the government, they may request for the government to use Article 25<sup>195</sup> of the constitution for social rights: the minimum standards of wholesome and cultured living. The term of minimum standard in Article 25 is so abstract that usually the legislature needs to clarify the intent and scope by passing statutes such as the Labor Standard Act.<sup>196</sup>

Article 26<sup>197</sup> of Labor Standard Act provides compensation to businesses, wherein the grounds for damages are not attributable to the businesses.

In the case of COVID-19, the self-restraint request is issued by governors and the cabinet. Government discloses the names of those who do not follow the self-restraint effect. Self-restraint is an administrative guidance that does not possess legal binding power.<sup>198</sup> If a disclosure functions as an administrative action that forcibly changes the rights or duties of citizens, it would be an administrative action.

<sup>194</sup> <https://www.nikkei.com/article/DGXMZO58769900T00C20A5MM8000/> (Kyugyō yōsei ni bassoku shushō ho kaisei ni sinchō) (Sanction to self-restraint, PM hesitate to amend).

<sup>195</sup> Nihon-Koku Kenpō [CONSTITUTION] art. 25 (Japan).

<sup>196</sup> For the widely varying interpretations of art. 25, see, e.g., Saiko Saibansho [Sup. Ct.] May 24, 1967, Shōwa 39 (gyo tsu) no. 14, 21(5) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1043 (Japan). The Supreme Court of Japan dismissed the case because plaintiff passed away. The S.Ct. left a note for legal nature of Article 25 of the constitution. *See also* NOBUYOSHI ASHIBE, *KENPŌ* 278 (7th edition), (In Japanese constitutional studies, the social right in Article 25 is usually understood as an abstract right, which requires the legislature to pass statutes to provide for concrete governmental social securities). Alternatively, Professor Noriho Urabe argues that Article 25 works to limit legislative discretion. He strongly argues that it is wrong to understand that the rights protected under Article 25 are only that people cannot live below the minimum standards of a wholesome and cultured living. The government has a duty to ensure that people will not fall below the minimum standard, and so Urabe argued that unemployment insurance, medical insurance, and pension system are at the center of Article 25. NORIHO URABE, *KENPŌ GAKU KYŌSHITSU* [Constitutional Law, 3d ed.] 246-48 (Nihon hyoronsha 2016).

<sup>197</sup> Rōdō Kijun hō [Labor Standards Act], Law No. 49 of 1947, art.26 (Japan).

<sup>198</sup> James C. Fisher, *supra* note 164. (explaining that the requests are therefore not legally binding, and non-compliance carries no penalty).



## V. CONCLUSION

The Japanese government and people struggle to change their lifestyle and prevent the occurrence of another pandemic. COVID-19 has raised critical legal issues in Japanese law. Legal analysis starts when the question arises whether people abolish the existing legal principles and establish new legal principles by amending the constitution, or they review the existing legal principles and modify them to retain the separation of powers under the Japanese constitution. This paper takes the latter approach.

Japan has experienced many natural disasters and has prepared for specific action via specific statutes. For example, in 2012, ISMA was promulgated to take actions against SARS. In March 2020, the Diet amended ISMA to cover COVID-19; however, it has remained unsure if the act requires an amendment.<sup>199</sup> The inaction of the legislature may either lead to legal liabilities under the State Redress Act or result in political judgments from voters in the next election.

Finally, in March 2020, the legislature amended the definition provided by the amended ISMA to cover COVID-19.<sup>200</sup> The ruling and opposing parties would face the judgment of voters. Japanese legal professionals are faced with two options: interpret the definition of the disease to cover COVID-19 or to agree with amending it in the legislature. The amended ISMA however, could not predict the serious financial burden caused by self-restraint on the general public. Self-restraint is an act of administrative guidance that has legal grounds in Article 45 of the amended ISMA.<sup>201</sup> It however, does not possess a legal binding to change any right or duty of citizens. Japanese people have the complete freedom to disobey. Some pachinko businesses did not follow the administrative guidance, arguing that it is their constitutional right to do business as laid out by Article 22 of the constitution.<sup>202</sup> This resulted in a few governors disclosing their names.<sup>203</sup>

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<sup>199</sup> *Abe reluctant to heed calls for coronavirus law revisions*, THE JAPAN TIMES (Aug. 3, 2020), <https://www.japantimes.co.jp/news/2020/08/03/national/politics-diplomacy/japan-shinzo-abe-coronavirus-law/>.

<sup>200</sup> Eric A. Feldman, *Did Japan's Lenient Lockdown Conquer the Coronavirus?*, THE REGULATORY REV. (June 20, 2020), <https://www.theregview.org/2020/06/10/feldman-japan-lenient-lockdown-conquer-coronavirus/>.

<sup>201</sup> Amended ISMA, *supra* note 3, at art. 45; James C. Fisher, *supra* note 164.

<sup>202</sup> Nihon-Koku Kenpō [CONSTITUTION], art. 22, translated in (The Constitution of Japan) [JAPANESE LAW TRANSLATION] <http://www.japaneselawtranslation.go.jp/law/detail/?id=174&vm=04&re=01&new=1> (Japan).

<sup>203</sup> <https://www.nikkei.com/article/DGXMZO58374760S0A420C2AC8Z00/> (Osaka shunai nimo tenmei kōhyō, fu-chiji kyugyō ōujinu nara kansei kakudai

Unfortunately, such a disclosure informed people as to where they could enjoy pachinkos, resulting in the pachinko parlors attracting more people.

The damages generally shared in common do not constitute the compensation mentioned in Article 29(3). COVID-19 questioned the compensation requirement under Article 29(3). If the restriction is within the tolerance limit, which is to say that the people live together, no compensation is paid. Generally, a shared burden also does not lead to compensation. The legislature could have provided financial payments to stimulate the economy when it amended the ISMA to cover COVID-19 in March 2020. However, the judgment should ultimately be left to the people of Japan.

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hadome nerau) (Facilities that do not accept holidays, will be announced within the week Osaka Prefecture policy) (Osaka release name of business that disobey self-restraint, Osaka governor aims to stop infection) (Pachinko is Japanese gambling machine. It is a kind of slot machine); *see also* <https://www.asahi.com/articles/DA3S14455289.html> (Nyujo chusen ken motome 200 nin ga retzu, kengai nambar no kuruma kyugyo siji matudo no pachinko ten) (Publication of store name" pachinko parlors that do not respond to requests for closure one after another) (200 people line up to go in pachinko in Matsudo, Chiba).