

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

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ABSTRACT

This paper 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 Influenza Special Measure Act (ISMA).

This paper argues that the experience of Japanese government action is not unique, but similar to those of other countries. In February 2020, 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 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 people will 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.

This paper is vigilant of the governmental interventions that are carried out in the name of emergency and keeps legal principle under 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 it with the use of law. If an emergency occurs, we can mitigate damages and recover quickly by interpreting or amending the existing statutes.¹

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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¹ Tom Ginsburg, *Compares Various Countries' COVID-19 Responses Under Their Constitutions States of Emergencies: Part I*. (17, April, 2020). Available at: <https://www.law.uchicago.edu/news/tom-ginsburg-compares-various-countries-covid-19-responses-under-their-constitutions>

I. JAPAN'S CORONAVIRUS SPECIAL MEASURES ACT

On March 13, 2020, the National Diet (Parliament) passed the Coronavirus Special Measures Act (CSMA)² as a supplement and revision to the Influenza Special Measures Act (ISMA),³ which was established in 2012. The ISMA aimed to prevent the rapid spread of influenza and reinforce the medical support system. The difference between ISMA and CSMA is the addition of the definition of COVID-19 in CSMA. Under the amended ISMA, the Prime Minister is authorized to establish countermeasure headquarters and declare a state of emergency. The local government may prohibit the use of facility(school, concert hall, etc) where many people may gather, and request individuals to stay home, but no legal sanction action is provided if people don't follow. 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 2 years. It is called the sunset law.

What are the important aspects of the amended ISMA? First, the novel corona virus is regarded as the new influenza.⁴ It constitutes the scope of application of the amended ISMA. Before the amendment, there was no clarity whether COVID-19 was covered by ISMA. Second, the central and local governments have already come to establish countermeasure action plans against COVID-19. The Amended ISMA legally covers COVID-19.

The amended ISMA provisions three steps on the basis of 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, and disseminate knowledge in order to prepare for the prevention of the spread of a virus.⁵ The amended ISMA can use the existing action plans from the original ISMA to fight against COVID-19.⁶ Action plans instruct the government and private organizations on how to carryout actions against diseases. However, the government persisted that an action under the original ISMA could not be applied to COVID-19 in the first phase. 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.

² Shingata influenza tō taisaku tokbetsu sochi hō [Coronavirus Special Measures Act]Act no. 31 of (revised as Act no. 4 of 2020). (Japan).(hereinafter CSMA, or amended ISMA).

³ *Id.* Shingata influenza tō taisaku tokbetsu sochi hō[Influenza Special Measures Act], Act no. 31 of 2012. (Japan).(hereinafter ISMA).

⁴ *Id.* Art.1-2(1) of supplement of amended ISMA.

⁵ *Id.* Art.6 to13 of amended ISMA.

⁶ *Id.*Art.1-2(3) of supplement of amended ISMA.

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.⁷ The Prime minister establishes a countermeasure headquarter in all cases, except when the disease is a temporary seasonal influenza.⁸ When a countermeasures headquarter is summoned by the central government, prefectures are required are also obliged to open headquarters.⁹ A headquarter performs the task of proposing official statements of governmental policies.¹⁰ The governors of prefectures may request cooperative actions from public and private organizations under Article 24(9) of the amended ISMA.¹¹ Article 24(9)¹² 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.¹³ A state of emergency can last up to two years, with a possible one year-extension. Its objective is to prevent the collapse of the medical services system.¹⁴ The action plan specifies the requirements for the declaration of emergency. Without the declaration of emergency during this phase, a medical support would exceed its capacity and endanger the lives and health of people, which may in turn lead to a 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. A number of infected persons were quarantined inside the ship. The Quarantine Act¹⁵ authorized government to request a person who has a high probability of the disease to stay in hospitals and hotels for a certain time to conduct medical tests.

Under the amended ISMA, the governors of prefecture can issue voluntary restraints to stay home, restrict the use of public facilities such as schools and entertainment facilities¹⁶, acquire land with the consent of landowners for temporary medical facilities¹⁷, and order emergency transportation of goods.¹⁸ Under the act, the headquarters of the central

⁷ Art.14 of the amended ISMA, and Article 1-2(2) of supplement of amended ISMA.□

⁸ Art.15 of the amended ISMA.

⁹ *Id.* Art.22.

¹⁰ Prime minister of Japan and his cabinet, new influenza headquarter. Available at: https://www.kantei.go.jp/jp/singi/novel_coronavirus/taisaku_honbu.html

¹¹ Art.24(9) of the amended ISMA.

¹² *Id.*

¹³ Art.32.

¹⁴ Art.

¹⁵ Ken eki hō[Quarantine Act], Act no. 201 of 1951, Art. 14(1)-2, 16(2) (Japan).

Translation is available at :

<http://www.japaneselawtranslation.go.jp/law/detail/?id=2783&vm=&re=>

¹⁶ Art.45(2) of amended ISMA.

¹⁷ *Id.* Art.49.

¹⁸ *Id.* Art.54.

government coordinate several measures and the governors of headquarters issue self-restraint requests.¹⁹

Under the act, a criminal sanction is provisioned only for the violation of the order on transportation of necessary goods²⁰, not for the violation of voluntary restraint²¹ and closure of facilities.²²

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. In the meantime, the original ISMA had drawn criticism that the human rights were seriously restricted in 2012.²³ The opposing party had argued that the supplement act should make provisions to ensure that the countermeasure actions take into consideration human rights, and ensure that the restrictions on people's rights are necessarily minimum.²⁴

A. Tokyo Action Plan

The action plan of Tokyo Metropolitan Government (TMG) is a model for other prefectures concerning the actions undertaken against COVID-19. TMG established a countermeasure headquarter for COVID 19 on January 31, 2020.²⁵ Once the disease was recognized, the Tokyo action plan divided the spread of virus into two phases: early stage and infection stage.

In the early stage, the Tokyo Metropolitan Government located the diseased via epidemiological survey, and separated the diseased from others to carry out medical inspections.²⁶ A person with high probability of contracting the disease was advised to isolate oneself in the designated hospital for medical tests and progress observations under the

¹⁹ *Id.* Art.45(1). Ministry of Health, Labor and Welfare, Governmental action plan for new influenza etc. (2015, revised in 2017). pp.6. Available at: https://www.cas.go.jp/jp/seisaku/ful/keikaku/pdf/h29_koudou.pdf

²⁰ Art. 76 and 77 of amended ISMA.

²¹ *Id.* Art.45(1).

²² *Id.* Art.45(3).

²³ Japan Bar Association, Statement of President of JBA against bill of ISMA. (22, March, 2012). Available at:

<https://www.nichibenren.or.jp/document/statement/year/2012/120322.html>

²⁴ Art. 5 of amended ISMA. (respect of human right and necessary action should be tailored to implement necessary purpose).

²⁵ Tokyo Metropolitan Government, Disaster Prevention Information, TMG action plan for influenza etc. Available at:

<https://www.bousai.metro.tokyo.lg.jp/taisaku/torikumi/1000061/1000367.html>

²⁶ Tokyo to kansen keikaku [TMG action plan for infectious disease] (March, 2018).

Available at

https://www.fukushihoken.metro.tokyo.lg.jp/iryo/kansen/ky_keikaku.files/kansensyoyoboukeikaku_Part1.pdf

Infectious Diseases Act (IDA).²⁷ This advice is provided in articles 19 and 20 of the IDA. The governor designates ones power to a director of a public health center.

According to the action plan, the infection stage arrives only when TMG is no longer able to locate the diseased. During this stage, TMG takes three steps. The government changes its purpose from “prevention” to “relief to the affected people.”

During the first phase of this stage, the system placed for the advice of voluntary isolation is lifted. Under the pandemic warning that 10 diseased are recorded in fixed point, the hospital survey concludes a rapid increase in the occurrence of the disease. A person with a high probability of contracting the diseases would not only be able to visit the designated hospitals for the infectious disease, but would also be able to visit general hospitals.

In the second phase, there are under warning 30 diseased are recorded in a fixed point, the numbers of people in a fixed point is expected to be still increasing, and the hospital survey concludes significant decline in the availability of hospital beds. The governor of TMG declares a state of emergency and asks 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.²⁸

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 does not accompany any criminal liability; the fulfillment of the order depends on the people of Tokyo. Article 45(3) of the amended ISMA provisions a stronger “instruction” measure. A Governor can instruct businesses to observe closure. While the article does restricts people legally, however, it does not involve any criminal liability. 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 the closure of certain kinds of

²⁷ 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], Act no.114 of 1998 (Japan).[hereinafter, Infectious Diseases Act].

²⁸ Art 24(8) of amended ISMA and Article 24(8) of supplement of supplement of amended ISMA.

businesses in Osaka,²⁹ some Pachinko parlor³⁰ did not follow the voluntary closure order and kept the stores open. Osaka and Chiba governors officially released the name of pachinko that didn't follow instruction. Those who love pachinko learned where they can enjoy it by the release of the name of Pachinko parlors. The governors challenge failed.

Usually, under the administrative law in Japan, announcements made by the government aim to provide information to the citizens. As in this case, an announcement of the name would work as a "sanction." However, it would be deemed illegal if it were exercised in an arbitrary and capricious way under the Administrative Case Litigation Act.³¹ The request for a voluntary temporary closure is an administrative instruction with no sanction. A Citizen may disobey the instruction. Contrary to the intent of the governor, many people got together at Pachinko parlors that did not follow the instruction.³² To bring into light some other instances, while the governor of Tokyo did not disclose the name of businesses, the governors of Kanagawa, Gunma, and Ibaraki released the names of businesses.³³

II. WHY DELAYED ? INTERPRETATION OF TEXT IN A STATUTE AND POLITICAL RESPONSIBILITY

The central and local governmental actions are delayed in Japan. These actions involve both, legal and political responsibility. It is important that we distinguish a legal responsibility from a political one. If the government takes one 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 Redress Act for the

²⁹ Nikkei Shimbun, *Osaka shunai nimo tenmei kōhyō, fu-chiji kyugyō ōjūnu nara kansei kakudai hadome nerau* [Osaka release name of business that disobey self-restraint, Osaka governor aims to stop infection](23, April, 2020). Available at:

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

³⁰ Pachinko is Japanese gambling machine. It is a kind of slot machine.

³¹ Gyōsei jiken soshou hō [Administrative Case Litigation Act], Act no. 139 of 1962, Art. 30 (Japan). Translation is available at:

<http://www.japaneselawtranslation.go.jp/law/detail/?id=1922&vm=04&re=01>

³² Asahi Shimbun, *Tenmei kohyō jichitai aitsugu kyugyō yōsei ōjūnu pachinko ten* [Local governments release names of Pachinko](24, April, 2020). Available at:

<https://www.asahi.com/articles/DA3S14455289.html>

Asahi Shimbun, *Nyujō 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](4, May, 2020). Available at:

³³ Asahi Shimbun, *Pachinko simetsuke kyōka to-chiji eigyo zero jitsuh ha ato 4 ten* [Binding Pachinko, TMG governor said zero but four stores are open]

(29, April, 2020). Available at: <https://www.asahi.com/articles/DA3S14459923.html>

government's illegality.³⁴ If an interpretation is beyond the text and is equivalent to the rewriting of a statute, it is the mission of the legislature to amend it.³⁵ Under a parliamentary system, the head of the ruling party takes the prime minister in the administrative branch.³⁶ The administrative agency takes charge of existing major issues and the prime minister would be required to submit a bill to amend the existing statute.³⁷ The political responsibility is left to the judgment of voters. In Japan, the government persisted on only one interpretation of the statute, delaying the execution of necessary prevention measures.

A. Definition of Text and Interpretation of IDA

Japan's Infectious Disease Act (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 of 1-3 in the Article 6(1-3) of IDA.³⁸ 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. The public health center can grasp the number of designated diseases to formulate a quick response of isolation measures.

The Infectious diseases are designated within a range of Class 1 to Class 3 in Article 6(1-3) of the IDA:³⁹

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

Article 6(7)⁴⁰ 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

³⁴ Kokka baishou hō [State Redress Act], Act no. 22 of 1947, Art.1(Japan).

³⁵ Nihon-Koku Kenpō [Constitution of Japan] May 3, 1947, Art. 41 (Japan).

³⁶ *Id.* Art. 66 and 67.

³⁷ *Id.* Art. 72.

³⁸ Art. 6 of IDA. Translation is available at:

<http://www.japaneselawtranslation.go.jp/law/detail/?vm=04&re=01&id=2830>

³⁹ Art. 6(1) to 6(3) of IDA.

⁴⁰ *Id.* Art. 6(7).

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 disease because it could escalate to a serious health condition and may be transmittable from one person to another.

The Quarantine Act has another definition for people who come from abroad. The definition of “Quarantine infectious disease”⁴¹ 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 diseases that do not exist in Japan, and attempts to prevent passengers from bringing diseases into Japan.

B. COVID 19 is the Same as Pest or Ebola -- Unknown or Known

In March 2020, COVID-19 was assigned as a “Designated Infectious Disease” in article 6(8) of the Infectious Diseases Act. 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. 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.

ISMA originally borrowed the definition of IDA for designated diseases that are different from known (recognized) diseases. 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-19.⁴² On March 6, 2020, in a day, the cabinet changed the interpretation of “unknown” to “known.”⁴³

Why did the Abe 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 was the opposing party. The 2012 ISMA categorized several types of diseases, such as new influenza, re-emerging infectious diseases of common concern (ERIDCC), and other new diseases.

⁴¹ Ken eki hō[Quarantine Act], Act no. 201 of 1951, Art2(3) (Japan).

⁴² Asahi Shimbun, *Naikaku kanbō twitter terebi bangumi ronpyō ni hanron shingata corona* [Cabinet office twitter objected to commentary on television program](6, March, 2020). Available at: <https://www.asahi.com/articles/ASN366JPZN36UTFK017.html>

⁴³ Mainichi Shimbun, *Tokuso hō kaisei de konkyo bureru shushō hatsugen* [Statement of prime minister changed in amendment of ISMA](6, March, 2020). Available at: <https://mainichi.jp/articles/20200306/k00/00m/010/318000c>

On February 29, 2020, Shinzo Abe announced that everyone could take the test for COVID-19. However, just in a matter of 4 days, he explained that he did not state that he could carry it out immediately.⁴⁴

It seems as though the Liberal Democratic Party did not want to use ISMA, which was passed when LDP was the opposing party in 2012.⁴⁵ In 1998, when IDA was established, it was doubtful to see whether its definition was clear or not. At that time, SARS was recognized as "New Infectious Disease" in Article 9 of IDA.⁴⁶ New infectious disease is different from existing infections, and is regarded as class 1 infection of designated diseases, such as Ebola. In new infectious disease as well as in Class 1 infection of designated diseases, administrative agency may compel a person with a high probability of contracting the infection to admit in a hospital, without imposing the duty beforehand. If SARS was new infectious disease in IDA, a question arises whether COVID-19 is also the same. Although it is not clear as to what happened between February 29, 2020 and March 6, 2020 for the government to change the official interpretation and change the policies all of sudden, the political decision on the prime minister is left to the judgement of the voters.

C. Definition of disease in Article 6(8) and Article 9 -- Hospitalization

In emergency situations, legal professionals may make a mistake in the understanding and application of laws. The government might have applied new infectious disease in Article 9 of IDA. The cabinet could have changed the application, if it had found a mistake in the exiting application of Designated Infectious Disease in Article 6(8) of IDA by the cabinet order or cabinet decision.

The frequent change in interpretation is not the best for legal stability. Many citizens rely on the official interpretation of the government; thus, the government should not change its legal interpretation of a law. Legal stability is key factor in the rule of law.⁴⁷

Opposing party has criticized that the application of designated disease in Article 6(8)

⁴⁴ Mainichi Shimbun, *Shingata corona PCR kensa konkyo tobosi seiji handan* [New corona virus test, groundless political judgement](2, March, 2020).

Available at: <https://mainichi.jp/articles/20200302/k00/00m/010/302000c>

⁴⁵ Asahi Shimbun, *Ima no hōritsu de dekiru tokuso hō kaisei yatō kara chumon zokuzoku*[Request from opposing party, current ISMA is available to cover COVID-19](5, March, 2020). Available at: <https://www.asahi.com/articles/ASN347DNGN34UTFK014.html>

⁴⁶ Art.9 of IDA.

⁴⁷ Tomoya Yamazaki, *Constitutional Interpretation and Legal Stability*, Kanazawa Law Review, Vol.59(2), at 245 (2017).

One of the most important changes of official interpretation is one for Article 9 of Constitution. Moto, *KENPŌKŌGI*, at 117.

of IDA was wrong, and asserted that the government should change the application immediately in order to take governmental actions.⁴⁸ The ruling party and Abe administration have argued that Article 9 was available only for unknown diseases. The government successfully amended IDA to include COVID-19 and evaded the political responsibility on March 13, 2020.

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 new infectious disease, the government may 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 school, social service facilities, and places where many people visit and use.⁴⁹ The Government may implement emergency loans⁵⁰ and restrict the purchase of goods. It may expropriate hotels and hospitals for the inspection of a disease⁵¹, take lands for temporary medical facilities⁵², order expropriation and savings of necessary items⁵³, order medical workers to provide medical services,⁵⁴ and order public transportation for general coordination⁵⁵ and distribution of necessary items.⁵⁶

This power of the amended ISMA was arguably a critical curtailment of human rights. Japan Bar Association has already denounced ISMA publicly in 2012. 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.

⁴⁸ Asahi Shimbun, *Ima no hōritsu de dekiru tokuso hō kaisei yato kara chumon zokuzoku*[Request from opposing party, current ISMA is available to cover COVID-19](5, March, 2020). Available at: <https://www.asahi.com/articles/ASN347DNGN34UTFK014.html>

⁴⁹ Art.45(3) of amended ISMA.

⁵⁰ *Id.* Art.60

⁵¹ Art.29(5).

⁵² Art. 49(2) of amended ISMA.

⁵³ *Id.* Art.55(2) and (3).

⁵⁴ *Id.* Art. 31(3).

⁵⁵ *Id.* Art.33(1).

⁵⁶ *Id.* Art.54(3).

Abe administration moved to revise ISMA to cover COVID-19 in order to try expanding the availability of inspection when the government can't figure out precise number of the diseased. As the number of diseased are increasing, and medical workers argue that private medical inspection facilities can support inspection as well as public ones.⁵⁷ By announcing the number of patients, hospitals can grasp a sense of the total number of cases and the cases of rejection of emergency transportation to patients would get smaller.

Although prime minister allegedly announced that all the people could take the test, however, in reality, the Japanese government gave up the screening of all people, and inspected only those who had serious health conditions.⁵⁸

The Central government would coordinate the measures undertaken by prefectures, give helpful information, and announce basic consistent policies.⁵⁹ These paralyzed actions encouraged local governments to carry out their own measures. Japanese constitution provisions one chapter on the autonomy of local governments. The power and authority of local governments in Japan have been much weaker than the central government. COVID-19 has come to offer local governments the opportunities to take action when the central government decision making is paralyzed. When the virus spread, cities and municipalities coped with the effects of the disease by being on the front line. Prefectures such as Wakayama carried out inspections without taking into consideration the degree of the disease.⁶⁰

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

Japanese constitution restricts prior restraint and prohibits censorship.⁶¹ However, the government has been quick at suppressing the criticism levied against it with regard to the definition of what constitutes recognized or unknown.⁶² While it is valid to prohibit rumors

⁵⁷ Nikkei Shimbun, *Shingata korona, seiaku wo kiku*[policies on corona](6, June, 2020).

Available at: <https://www.nikkei.com/article/DGXMZO60069980V00C20A6EA3000/>

⁵⁸ Mainichi, *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]](3, March, 2020). Available at: <https://mainichi.jp/articles/20200303/k00/00m/010/337000c>

⁵⁹ Art.20(1) of amended ISMA.

⁶⁰ Nikkei Shimbun, *Wakayama ken eigyo jishuku yosei wo zenmen kaijo 1 nichi kara*[Wakayama prefecture lifts self restraint from 1, May](29, May, 2020). Available at: <https://www.nikkei.com/article/DGXMZO59777370Z20C20A5LKA000/>

⁶¹ Nihon-Koku Kenpō [Constitution of Japan] May 3, 1947, Art. 21 (Japan).

⁶² Asahi Shimbun, *Naikaku kanbo twitter terebi bangumi ronpyo ni hanron shingata corona*[Cabinet office twitter objected to commentary on television program](6, March, 2020). Available at: <https://www.asahi.com/articles/ASN366JPZN36UTFK017.html>

that cause confusion among citizens, it is also important that televisions, printing media and internet, which have been the tools for free expression remain free.

When ISMA was revised in March, other problems arose. Siori Yamao of the Constitutional Democratic Party of Japan (Rikken Minshu) strongly argued that it was absolutely wrong to get along with LDP to revise ISMA together.⁶³ As we have seen, CDP, the largest party among the opposing parties, argued that it was not at all necessary to amend ISMA.

Yamao argued that in the amended ISMA, a prior approval of the Diet should have been required for emergency declarations made under article 32 of ISMA.⁶⁴ Under the amended ISMA, the government is obligated to report *after* the emergency declaration and the emergency may extend to a maximum 2 years.⁶⁵ She found 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 home, and ban people from gathering. Article 45(2) and (3) enables the government to suppress the freedom of expression.

Yamao suspected the exercise of article 2-6 that allowed the government to instruct necessary general coordination of designated public institutes such as NHK and “other” public interest entities. She strongly argued 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 coordination⁶⁶ and may issue necessary instructions⁶⁷ of order to the transportation and postal services.⁶⁸ She argued that it would be unconstitutional for a government to intervene in the operations of private broadcasting companies.

In response to her question that the definition of “necessary” in Article 53(2) was unclear, Ichiro Miyashita, deputy minister in the cabinet office answered on March 11, 2020 that the government may replace the contents of broadcast, if the government finds it to be inappropriate. He however, changed this statement in front of the Committee on Judicial Affairs of the House of Representatives on March 13, 2020.⁶⁹

⁶³ Constitutional Democratic Party of Japan (Rikken Minshu).

Available at: <https://cdp-japan.jp/english>

Yamao was so disappointed and left party on 18, March.

⁶⁴ Art. 32 of the amended ISMA.

⁶⁵ Art.1-2(1) of the supplement of amended ISMA.

⁶⁶ Art.20 of amended ISMA.

⁶⁷ *Id.* Art.33.

⁶⁸ *Id.* Art.53(2).

⁶⁹ The NHK, *Kinkyu jitai sengen hosō naiyō sasikae ariuru tōben tekkaï* [Change of official statement that government may replace contents of broadcasting](13, March, 2020).

Available at: <https://www.nhk.or.jp/politics/articles/statement/31782.html>

Yamao argued that the supplementary resolution was not enough to protect the human rights because since the time ISMA was established as a supplementary resolution and added in the House of Councilors, it has not functioned well. The amended ISMA doesn't require *prior* report, only supplementary resolution requires the government to submit a prior report to Diet when issuing an emergency declaration, enabling the government to restrict human rights.⁷⁰

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

III. EMERGENCY POWER AND AMENDMENT OF JAPANESE CONSTITUTION

This chapter explains the emergency powers in the hands of 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.⁷¹ Professor Laurence Repeta however, strongly argues that there is no necessity to amend the Japanese constitution.⁷²

If an emergency is declared, there are two options available in the Japanese constitution. One is to amend the constitution to announce emergency, empowering government to restrict human rights and concentrate the national power to the administration.⁷³ The other is to announce a state of emergency under the existing statutes. There is no comprehensive statute that covers natural disasters, nuclear disasters, or issues of national defense. The reason for this is that the imperial constitution of Japan⁷⁴ has been abused by governments to exercise

⁷⁰ The House of the Representatives, Shingata influenza tō taisaku tokbetsu sochi hō no ichibu wo kaisei suru hōritsu an ni taisu futai ketsugi [Supplementary resolution]. Available at:

http://www.shugiin.go.jp/internet/itdb_rchome.nsf/html/rchome/Futai/naikakuECB0F1A58E87DC0C49258529003CB3D6.htm

Nikkei Shimbun, *Kinkyū 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] (10, March, 2020). Available at:

<https://www.nikkei.com/article/DGXMZO56622530Q0A310C2PP8000/>

⁷¹ New York Times, *Japan Declared a Coronavirus Emergency. Is It Too Late?* (7, April, 2020). Available at: <https://www.nytimes.com/2020/04/07/world/asia/japan-coronavirus-emergency.html>

⁷² Laurence Repeta, *The coronavirus and Japan's Constitution* (14, April, 2020). Available at: <https://www.japantimes.co.jp/opinion/2020/04/14/commentary/japan-commentary/coronavirus-japans-constitution/#.XpYPEINKgdU>

⁷³ Yuichiro Tsuij, *Godzilla and the Japanese Constitution: A Comparison Between Italy and Japan* (2017). 3 Italian Law Journal, No. 2 (2017), 451-477. Available at SSRN: <https://ssrn.com/abstract=2987655>

⁷⁴ Dai Nihon Teikoku Kenpō (Meiji Kenpō) [Meiji Constitution] Nov., 29 of 1890, Art. 8, 14, 31, 70 (Japan).

emergency powers.⁷⁵

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.⁷⁶ In the case of a natural disaster, the Basic Act on Disaster Management provisions for a state of emergency.⁷⁷ In the case of national defense, act concerning the Measures for Protection of the People in Armed Attack Situations, etc., is available.⁷⁸ Japanese have 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.⁷⁹ In the United States, on 1960s, scholars have warned large administrative power.⁸⁰ 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 emergency is predictable, we can prepare by establishing a new or interpreting existing statute. If emergency is unpredictable beyond statute, we may need to amend the constitution. When we call COVID-19 as an “emergency,” legal professionals have two propositions: amend the constitution, or interpret current statute without amending constitution. These propositions depend on definition of “unpredictable emergency”.⁸¹

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.⁸² The Diet exercises law-making power exclusively. When the Diet delegates law-making power to

⁷⁵ Koju Nagai, *Shingata korona uirusu to kinkyu jitai jokō* [New corona virus and emergency power provision], Sekai(2020, May), at 58.

⁷⁶ Genshiryoku saigai taisaku tokubetsu sochi hō[Act on Special Measures Concerning Nuclear Emergency Preparedness], Act no. , Art.15(Japan).

⁷⁷ Saigai taisaku kihon hō [Basic Act on Disaster Management], Art.105 (Japan).

⁷⁸ Buryoku kōgeki jitai tō ni okeru kokumin no hogo notame no sochi ni kansuru hō[Act concerning the Measures for Protection of the People in Armed Attack Situations, etc], Act no. 112 of 2004 (Japan).

⁷⁹ HIDEKI MOTO, *KENPŌKŌGI* (2nd edition), at 205, 208.
NOBUYOSHI ASHIBE, *KENPŌ*(7th edition), at 299, 309.

⁸⁰ Pierce, *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 Am. U. L. Rev. 391, 402-407(1987).

⁸¹ Tsuji, *Godzilla and the Japanese Constitution*, 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.)

⁸² Nihon-Koku Kenpō [Constitution of Japan] May 3, 1947, Art. 41 (Japan).

administrative branches,⁸³ it should clearly specify the scope and standard of power that the agencies will enjoy. A comprehensive delegation is prohibited by the constitution.⁸⁴

The reason that comprehensive delegation is banned 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. It may offer legal predictability and ensure that the human rights are safe. As Japan is fragile to natural disasters such as typhoon, earthquake, and floods, the Japanese parliament passed several statutes after deliberation. These statutes primarily aim to prevent natural disasters. 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, such as 2 years in the case of the sunset law. Therefore, COVID-19 shall not be evaluated to justify the reinforcement of administrative power. While we witnessed the signs of pandemic since SARS, the states as well as the public have been ignorant.

COVID-19 has just been a trigger to make us review our legal principles. This paper argues that Japanese constitution doesn't have to be amended for COVID-19. The existing statutes on natural disaster and nuclear power plants are available to cope with COVID-19.

Compared to the CSMA for COVID-19, the Basic Act on Disaster Management has stronger power to restrict human rights. Article 63 of BADM⁸⁵ has delegated government the power to designate evacuations and restrictions. Article 116 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.

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

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

⁸³ *Id.* Art. 73(6). See also, MOTO, *KENPOKŌGI* at 212-214. ASHIBE, *KENPŌ*, 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*. *Cardozo Public Law, Policy and Ethics Journal*, Vol. 2, No. 3, 2019. Available at SSRN: <https://ssrn.com/abstract=3384513>

Yuichiro Tsuji, *Forgotten People: A Judicial Apology for Leprosy Patients in Japan*, 19 *OR. REV. INT'L. L.* 223, 237–38 (2018).

⁸⁴ MOTO, *KENPŌKŌGI*, at 213.

⁸⁵ Art.63 of BDAM.

government. 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. 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 advisory board makes the scientific judgment, it is the government who takes the political responsibility.

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

In the meantime, we should not emphasize the power of legislature, for history teaches as to how hysterical actions of people may have also resulted in legislatures making mistakes. A legislature can function even in an emergency.⁸⁶

The governmental accountability is subjected to 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.

In 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)⁸⁷ of the amended ISMA.

Advisory board would propose that COVID-19 is recognized or unknown disease under IDA. The government would take political responsibility if it made wrong judgement. If inaction of government would lead loss of the lives of diseased, the State Redress Act would be ground of legal responsibility.⁸⁸

⁸⁶ Keita Furuta, *The Reception of Carl Schmitt in the Japanese Constitutional Theory*, (1) Satoru Kuroda and Yoshio Onishi, 33(2) OIU journal of international studies 85(2020).

⁸⁷ Art.18(4) of amended ISMA.

⁸⁸ Saiko Saibansho [Sup. Ct.] Oct.,15, 2004, Heisei 13 (o) no. 1194, 58(7) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1802 (Japan). Available at: https://www.courts.go.jp/app/hanrei_jp/detail2?id=52320

In this case, the Supreme Court held liability under the State Redress Act for inaction of the

C. Delegated Power

Article 73(6)⁸⁹ of the Japanese constitution allows the government to pass ministerial ordinances to the provisions of constitution and statutes. The government may not pass a sanction except the delegation of a statute. The text of article 73(6) allows the government to pass ministerial ordinance with sanctions, when the Diet delegates its power the government.⁹⁰

Article 41⁹¹ of 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, more clarified should the standard be.

When disaster or disease is seriously occurred, the government is obligated to explain what kind of concrete action government should take such as relieve damage, provide helpful information to reduce confusion over disaster or pandemic. The people are more likely to take irrational action when government's explanation isn't complete, which allows runaway of legislature or the cabinet. The accountability of the government is to reinforce a check on the government. If the government fails accountability by changing the public statement, people will seek political responsibility.

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.⁹² 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.⁹³

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 6 months of 2020. The change of legal interpretation may influence the lives of citizens; the government is required to adhere to an original interpretation of statute in general. If the government finds it necessary to change several interpretations, it may give priority to the one

government led serious damage to Minamata diseases.

⁸⁹ Nihon-Koku Kenpō [Constitution of Japan] May 3, 1947, Art. 73(6) (Japan).

⁹⁰ *Id.*

⁹¹ *Id.* Art.41.

⁹² Art.59 of amended ISMA.

⁹³ *Id.*

that involves human rights. On January 31, 2020, the Abe run administration changed the retiring age of the Director of Public Prosecutions of Ministry of Justice by a cabinet decision.⁹⁴ The Abe run administration submitted a bill to amend the Public Prosecutor's Office Act in March.⁹⁵

Newspapers severely criticized Abe's administration; stating that the Abe cabinet wanted to keep people who favor the administration and do not investigate the political corruptions of the prime minister.⁹⁶ Prime minister was alleged of using tax for his personal use, which was in violation of the Public Office Election Act⁹⁷ (prohibition of contribution) and Political Funds Control Act⁹⁸(failure to enter necessary items).

By changing the official interpretation to extend the retiring age of the director of public prosecutions, Abe administration wants to ensure his political and legal safety.⁹⁹ It was a dramatic change in the official interpretation of the respective statute. This change in legal interpretation is left for the voters to decide.

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 on Twitter plead that if we stay at home and are keeping our businesses closed, then the government should compensate. The phrase "self-restraint and compensation are set" once appeared in the ranking for the most commented posts on twitter.

1. Self-restraint and Compensation come Together -- Administrative Guidance

In Article 45¹⁰⁰ 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

⁹⁴ Tokyo Shimbun, *Kensatsu chō kaisei an moto kenji sōchō ra hantai ikensho no zenbun Louis 14 no chin ha kokka sōki*[Ex Public Prosecutor Generals official statement against bill to revise Public Prosecutor's Office Act, reminding of Louis XIV](16, May, 2020). Available at: <https://www.tokyo-np.co.jp/article/16797>

⁹⁵ Kensatsu chō hō[Public Prosecutor's Office Act], Act No. 61 of 1947, Art.22 (Japan).

⁹⁶ NHK, *Kensatuchō hōan miokuri no tenmatsu*[Seeing bill of revision of Public Prosecutor's Office Act off] (27, May, 2020). Available at: <https://www.nhk.or.jp/politics/articles/feature/37768.html>

⁹⁷ Kōshoku senkyo hō [Public Office Election Act], Act No. 100 of 1950(Japan).

⁹⁸ Seiji shikin kiseo hō[Political Funds Control Act], Act No. 194 of 1948(Japan).

⁹⁹ *Id.*

¹⁰⁰ Art.45 of ISMA.

change the right or duty of citizens.¹⁰¹ Under administrative guidance, a government may ask citizens to perform voluntary actions. Administrative guidance isn't administrative disposition. There should not be any sanction if the citizens do not follow administrative guidance.

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, he/she may however fear that such an act of disobedience may result in the government carrying out discriminatory actions against them in every other opportunity.¹⁰²

Based on article 45(1) of the amended ISMA¹⁰³, 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, for a governor is asking for voluntary self-restraint.

Article 62¹⁰⁴ of ISMA provisions for compensation in articles 29(5), 49, and 55(2).¹⁰⁵ Article 29(5)¹⁰⁶ 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)¹⁰⁷ allows governors of prefectures to acquire lands for temporary medical facilities with the consent of landowners. Article 49(2)¹⁰⁸ allows governors to use lands if there is no one who knows the ownership of the respective lands. Article 55(2)¹⁰⁹ allows governors to request producers, sellers, distributors, keepers, and transporters to sell necessary items to prefectures for implementing emergency measures. Article 55(2)¹¹⁰ allows 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 63¹¹¹ 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 to follow self-restraint in Article 45. However, most Japanese follow administrative guidance and are affected by peer pressure.¹¹² There is

¹⁰¹ SAKURAI & HASHIMOTO, *GYŌSEIHŌ* [Administrative law] at 132.

¹⁰² *Id.* at 133.

¹⁰³ Art.45(1) of ISMA.

¹⁰⁴ *Id.* Art.62.

¹⁰⁵ *Id.* Art.29(5), 49, 55.

¹⁰⁶ *Id.* Art. 29(5).

¹⁰⁷ *Id.* Art. 49(1).

¹⁰⁸ *Id.* Art.49(2).

¹⁰⁹ *Id.* Art.55(2).

¹¹⁰ *Id.*

¹¹¹ *Id.* Art.63.

¹¹² Administrative law isn't applied to local government. Some prefectures provide administrative procedure ordinance. Gyosei tetudukki hō [Administrative procedure Act] Act No. 88 of 1993, Art.3(3).(Japan).

no provision for self-restraint in Article 45¹¹³ for compensation.

In Japanese constitutional and administrative law, compensation is limited only for specific people and special damages. Article 29(3)¹¹⁴ of 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 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).¹¹⁵ Administrative instruction is an administrative action. Some businesses under “instruction” may request the government by arguing that the government should stop administrative guidance.¹¹⁶ The Government shall inspect and review if such a guidance is necessary or not.¹¹⁷

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

There is no provision for administrative instruction in article 45¹¹⁸ of the amended ISMA. However, a person may bring Article 29(3)¹¹⁹ of constitution directly for compensation, if the administrative action leads specific people to a particular damage. Compensation under article 29(3)¹²⁰ 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).¹²¹

Mainichi Shimbun, *Emergency declaration in Japan tests conformity as virus strains health care* (8, April, 2020). Available at:

<https://mainichi.jp/english/articles/20200408/p2g/00m/0na/010000c>

¹¹³ *Id.* Art.45.

¹¹⁴ Nihon-Koku Kenpō [Constitution of Japan] May 3, 1947, Art. 29(3) (Japan).

¹¹⁵ Art.45(3) of amended ISMA.

¹¹⁶ Gyōsei tetsuduki hō[Administrative Procedure Act], Act No. 88 of 1993, Art.36-2 (Japan).

¹¹⁷ *Id.*

¹¹⁸ Art.45 of amended ISMA.

¹¹⁹ Nihon-Koku Kenpō [Constitution of Japan] May 3, 1947, Art. 29 (Japan).

¹²⁰ *Id.* Art.29(3).

¹²¹ Yuichiro Tsuji, *Reflection of Public Interest in the Japanese Constitution: Constitutional Amendment*, 46 Denv. J. Int'l L. & Pol'y 159 (2018). Available at SSRN:

<https://ssrn.com/abstract=3191012>

Self-restraint may restrict the constitutional right of freedom of businesses, placed in Article 22¹²² of constitution, if it involves the legal effect. The issue is whether a temporary self-restraint is equivalent of 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 legal compensation under Article 29(3)¹²³ of the constitution for damages that are widely spread and generally shared in common. Citizen would claim against local government for compensation because administrative guidance is issued by prefectures, not central government.

The government could have used this legal gap to avoid financial burden, while it continues to use administrative guidance. However, the Ministry of Economy, Trade, and Industry mentioned that Article 45¹²⁴ of the amended ISMA should be amended to impose a legal responsibility on those who disobey guidance.¹²⁵ Local government issues self-restraint order. 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 government to use Article 25¹²⁶ 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 legislature need to embody by passing statues such as Labor Standard Act.¹²⁷

¹²² Art. 22 of Kenpō.

¹²³ *Id.* Art. 29(3).

¹²⁴ Art. 45 of IDA.

¹²⁵ Nikkei Shimbun, *Kyugyō yōsei ni bassoku shushō ho kaisei ni sinchō*[Sanction to self-restraint, PM hesitate to amend](5M, May, 2020).

Available at; <https://www.nikkei.com/article/DGXMZO58769900T00C20A5MM8000/>

¹²⁶ Art. 25 of Kenpō.

¹²⁷ 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. ASHIBE, *KENPŌ*, at 279. MOTO, *KENPŌKŌGI*, at 474. (In Japanese constitutional studies, usually social right in Article 25 is abstract right, that requires legislature to pass statute for concrete governmental social securities).

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* [Class of Constitution, 3rd ed]246-248(Nihon hyoronsha 2016).

Article 26¹²⁸ 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. If a disclosure functions as an administrative action that forcibly changes the rights or duties of citizens, it would be an administrative action.

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 the Japanese law. Japanese face the issue of whether they abolish the existing legal principles and establish new legal principles by amending the constitution, or they examine the 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 did require an amendment. 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 ISA to cover COVID-19. 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 amend 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. 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. This resulted in a few governors losing their minds and disclosing their names. Unfortunately, such a disclosure informed people as to where they could enjoy pachinkos, resulting in the pachinko parlors attracting more people.

¹²⁸ Rōdō Kijun hō[Labor Standards Act], Act No. 49 of 1947, Art.26 (Japan).

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 stipulate the economy when it amended the ISMA to cover COVID-19 in March 2020. However, I leave its judgment to the people of Japan.