

# PANDEMIC: COVID-19 AND THE PUBLIC HEALTH EMERGENCY

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## I. INTRODUCTION

The new coronavirus, which originated in Wuhan, in the Hubei Province of China, Novel Coronavirus (2019-nCoV),<sup>1</sup> has demonstrated the inherent dangers of living in a modern globalized world with significant international travel. The disease caused by this virus is officially called COVID-19.<sup>2</sup>

On December 31, 2019, China informed the World Health Organization (WHO) that there were patients showing symptoms of pneumonia due to an unknown etiology in the city of Wuhan.<sup>3</sup> From December 31, 2019, to January 3, 2020, a total of 44 patients expressed the symptoms. The Chinese authorities identified these cases as a new type of coronavirus and isolated the virus on January 7, 2020.<sup>4</sup> The Chinese government then implemented various measures to contain the crisis. Despite the implementation of these measures, however, the number of infected patients, as well as the death toll, rapidly increased. As of 3:47 p.m. Central European Time (CET) on November 24, 2020, there were 92,829 confirmed cases of COVID-19 with 4,749 deaths in China,<sup>5</sup> exceeding the world death toll of 774 for the SARS virus.<sup>6</sup> As will be discussed below, the confirmed patients, as well as death toll in the world, eventually skyrocketed and reached 58,712,326 confirmed cases with 1,388,528 deaths as of November 24, 2020.<sup>7</sup>

On January 15, 2020, the Ministry of Health, Labor and Welfare in Japan (MHLW) confirmed the first imported case of the 2019-novel coronavirus from

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<sup>1</sup> World Health Organization, *Coronavirus Disease (COVID-19) pandemic*, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>.

<sup>2</sup> World Health Organization, *WHO Director-General's remarks at the media briefing on 2019-nCoV on 11 February 2020* (Feb. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-remarks-at-the-media-briefing-on-2019-ncov-on-11-february-2020> [hereinafter *Director-General's Remarks*] (stating that the virus is now officially called severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2)); World Health Organization, *Naming the coronavirus disease (COVID-19) and the virus that causes it*, [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it) (commonly called the “new coronavirus”).

<sup>3</sup> World Health Organization, *Pneumonia of unknown cause – China* (Jan. 5, 2020), <https://www.who.int/csr/don/05-january-2020-pneumonia-of-unknown-cause-china/en/>.

<sup>4</sup> Sui-Lee Wee & Donald G. McNeil Jr., *From Jan. 2020: China Identifies New Virus Causing Pneumonia-like Illness*, N.Y. TIMES (Jan. 8, 2020), <https://www.nytimes.com/2020/01/08/health/china-pneumonia-outbreak-virus.html>.

<sup>5</sup> World Health Organization, *China Situation*, <https://covid19.who.int/region/wpro/country/cn> (last visited Nov. 24, 2020).

<sup>6</sup> *SARS Basics Fact Sheet*, CTNS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/sars/about/fs-sars.html> (last updated Dec. 6, 2017).

<sup>7</sup> World Health Organization, *WHO Coronavirus Disease (COVID-19) Dashboard*, <https://covid19.who.int> [hereinafter *WHO COVID-19 Dashboard*] (last visited Nov. 24, 2020).

Wuhan.<sup>8</sup> In response—and to prevent further spread of the virus in Japan—the government implemented various measures to prevent entry to patients and potential patients from China. However, the number of domestic infected patients continued to increase and by November 24, 2020, had reached a total of 133,929, with a death toll of 1,989.<sup>9</sup> In addition, there were at least 712 confirmed patients on the cruise ship docked at the Yokohama port with 13 deaths.<sup>10</sup>

What kind of measures has Japan adopted in response to this public health crisis? Are they effective in preventing patients and potential patients from entering Japan and in containing the spread of the virus? This article seeks to examine the Japanese response to this crisis. After outlining the development of COVID-19 in Part I, it critically examines Japan's basic infectious disease response system in Part II, the immigration control and quarantine system in Part III, the vaccination system in Part IV, and the treatment system to respond to acute and highly contagious diseases in Part V. This article will then analyze Japan's response to COVID-19 in Part VI. Despite the various measures adopted by the Chinese government as well as other foreign countries, it appears that the disease has not yet been contained. It is anticipated that the number of confirmed patients, as well as the number of deaths, will continue to increase worldwide. Certainly, the number of confirmed patients, as well as the death toll, will also increase in Japan. It is therefore an urgent necessity to re-examine the whole infectious disease prevention system and the government response to COVID-19. The Japanese experience will likely shed further light on the public health emergency law in other countries as well.

This crisis is not the first case of a contagious disease spreading around the world, and it certainly will not be the last. Upon examination of the Japanese system and the government response to the new coronavirus, this article concludes in Part VII that the unique Japanese approach to COVID-19 might be working, but that Japan needs to revise its systems to adequately respond to future challenges. It further argues that, in the context of public health emergencies, the basic constitutional and administrative law principle that rights and freedoms should be restricted to the minimum necessary may not be adequate. Rather, a principle that calls for maximum precautionary measures may be required. The development of this new principle may require a new jurisprudence of prevention. Such principle,

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<sup>8</sup> World Health Organization, *Novel Coronavirus (2019-nCoV) Situation Report – 1*, at 1 (2020), [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf?sfvrsn=20a99c10\\_4](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf?sfvrsn=20a99c10_4).

<sup>9</sup> Ministry of Health, Labour, and Welfare [MHLW], *Shingata coronavirus kansenshōnitsuite; Kokunai no hasseijokyō* [*New Coronavirus Infection: Current Infection Status*] (Nov. 24, 2020), <https://www.mhlw.go.jp/> [hereinafter MHLW, *Current Infection Status*] (including 15 confirmed patients among evacuees from Wuhan city); see *infra* note 67.

<sup>10</sup> MHLW, *Shingata coronavirus kansenshō no genzai no jokyō to Kouseiroudoushō no taiounitsuite* [*Current Situation of New Coronavirus Infection and MHLW's Responses*] (Nov. 22, 2020), [https://www.mhlw.go.jp/stf/newpage\\_15007.html](https://www.mhlw.go.jp/stf/newpage_15007.html) [hereinafter MHLW, *Current Situation*] (stating these persons are not classified as Japanese patients because they were found outside Japanese territory).

if developed, should also guide the public health emergency law in other countries as well.

## II. THE NEW CORONAVIRUS AND JAPAN

### A. The New Coronavirus and Its Outbreak

The first patient to show symptoms of pneumonia of unknown etiology was found in Wuhan, the Hubei Province of China, on December 1, 2019.<sup>11</sup> By mid-December, physicians began discussing the threat posed by this unknown disease.<sup>12</sup> In response, the Chinese government tried to down play the seriousness of the new disease and to control the spread of information; it arrested and sanctioned eight doctors for spreading unfounded “rumors” to disturb the public order.<sup>13</sup> This would have been the ideal moment to respond to and contain the spread of disease. The world is now paying the price for the Chinese government’s cover-up.<sup>14</sup> As a result of its attempted cover-up, the number of infected patients increased and the Chinese government was forced to report the emergence of the disease to the WHO on December 31, 2019.<sup>15</sup> China later found that a new coronavirus was the cause of the infections; China gave the new coronavirus its name—“2019-nCoV”—and provided the WHO with the virus’s genetic information.<sup>16</sup> The disease caused by this new virus was officially named “COVID-19” by the WHO.<sup>17</sup>

On January 23, 2020, China decided to lock down the city of Wuhan to stop the spread of the new coronavirus infection,<sup>18</sup> and further expanded the areas

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<sup>11</sup> Fernando Duarte, *Who is 'patient zero' in the coronavirus outbreak*, BBC (Feb. 23, 2020), <https://www.bbc.com/future/article/20200221-coronavirus-the-harmful-hunt-for-covid-19s-patient-zero>.

<sup>12</sup> Nicholas Kristof, *Coronavirus Spreads, and the World Pays for China's Dictatorship*, N.Y. TIMES (Jan. 29, 2020), <https://www.nytimes.com/2020/01/29/opinion/coronavirus-china-government.html>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Director-General's Remarks*, *supra* note 2.

<sup>16</sup> *WHO COVID-19 Dashboard*, *supra* note 7 (noting new coronavirus was identified on January 7, 2020, and the genetic information was shared with the WHO on January 12, 2020).

<sup>17</sup> *Director-General's Remarks*, *supra* note 2; Tedros Adhanom Ghebreyesus (@DrTedros), TWITTER (Feb. 11, 2020, 11:26 AM), <https://twitter.com/DrTedros/status/1227297754499764230>.

<sup>18</sup> Amy Qin, Steven Lee Myers & Elaine Yu, *China Tightens Wuhan Lockdown in 'Wartime' Battle With Coronavirus*, N.Y. TIMES (Feb. 6, 2020), <https://www.nytimes.com/2020/02/06/world/asia/coronavirus-china-wuhan-quarantine.html>.

for lockdown far beyond Wuhan.<sup>19</sup> The Chinese government was especially worried about the large number of people who would be travelling during the Lunar New Year holiday impacting the spread of the infectious disease.<sup>20</sup> The government urged people to stay at home and extended the Lunar New Year celebration period in an attempt to contain the virus.<sup>21</sup> The lockdown continued until it was finally lifted on April 8, 2020.<sup>22</sup> It caused a very serious blow to the Chinese economy as well as to international trade, thus threatening the world economy. Meanwhile, on January 30, 2020, the WHO declared the outbreak of the new coronavirus infection a “public health emergency of international concern.”<sup>23</sup> It raised its alert level to “very high” but stopped short of declaring the infection a pandemic.<sup>24</sup>

The exact nature of the virus and the methods of transmission are still not clear. So far, the main method of transmission is believed to be direct touching and droplet transmission.<sup>25</sup> It also came to be recognized that it could spread through aerosol transmission;<sup>26</sup> however, other researchers claimed that it was not spread

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<sup>19</sup> Isabel Togoh, *China Lockdown Spreads To 33 Million People as Coronavirus Death Toll Rises*, FORBES (Jan. 24, 2020), <https://www.forbes.com/sites/isabeltogoh/2020/01/24/china-lockdown-spreads-to-33-million-people-as-coronavirus-death-toll-rises/#4732a7664064>.

<sup>20</sup> Amy Qin & Vivian Wang, *Wuhan, Center of Coronavirus Outbreak, Is Being Cut Off by Chinese Authorities*, N. Y. TIMES (Jan. 22, 2020), <https://www.nytimes.com/2020/01/22/world/asia/china-coronavirus-travel.html>; Nathan Vanderklippe & Alexandra Li, *China's coronavirus lockdown unlike anything seen before; First cases appear in Europe*, THE GLOBE AND MAIL (Jan. 24, 2020), <https://www.theglobeandmail.com/world/article-as-china-locks-down-14-cities-fear-and-confusion-spread-along-with/>.

<sup>21</sup> *China extends Lunar New Year holiday to contain coronavirus as death toll rises*, FOX NEWS (Jan. 27, 2020), <https://www.foxnews.com/world/china-extends-holiday-contain-virus-death-toll-rises>.

<sup>22</sup> Nectar Gan, *China to lift lockdown on Wuhan, ground zero of coronavirus pandemic*, CNN (Mar. 24, 2020), <https://www.cnn.com/2020/03/24/asia/coronavirus-wuhan-lockdown-lifted-intl-hnk/index.html>.

<sup>23</sup> World Health Organization, *Novel Coronavirus (2019-nCoV) Situation Report – 11* (Jan. 31, 2020), [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200131-sitrep-11-ncov.pdf?sfvrsn=de7c0f7\\_4](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200131-sitrep-11-ncov.pdf?sfvrsn=de7c0f7_4).

<sup>24</sup> Thomas Mulier, *WHO Raises Global Risk for Coronavirus to Very High*, BLOOMBERG (Feb. 28, 2020), <https://www.bloomberg.com/news/articles/2020-02-28/who-raises-global-risk-for-coronavirus-to-very-high-from-high>.

<sup>25</sup> *How COVID-19 Spreads*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 28, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

<sup>26</sup> *Id.* (“It is possible that COVID-19 may spread through the droplets and airborne particles that are formed when a person who has COVID-19 coughs, sneezes, sings, talks, or breathes. There is growing evidence that droplets and airborne particles can remain suspended in the air and be breathed in by others, and travel distances beyond six feet . . . . In general, indoor environments without good ventilation increase this risk.”).

through airborne transmission.<sup>27</sup> The incubation period is generally believed to be between two to fourteen days, long enough to cause trouble for the governments taking urgent actions: the symptoms appear a fairly lengthy time after infection and the patients can live normal lives without realizing they are infected (especially if they could transmit their infection before expressing symptoms).<sup>28</sup> Some researchers claim that some patients did not show any symptoms until twenty-four days after infection.<sup>29</sup> Some patients never show symptoms, and most patients only show mild symptoms such as fever, cough, or shortness of breath.<sup>30</sup> Nevertheless, a small number of individuals came to show serious symptoms of pneumonia and required hospitalization, eventually potentially leading to death for some.<sup>31</sup> There are also some reports of asymptomatic transmission: the infection spreading even

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<sup>27</sup> Katherine Arden, *There's no evidence COVID-19 virus spreads through the air but it's still possible*, AUSTRALIA'S SCIENCE CHANNEL (Feb. 14, 2020), <https://australiascience.tv/theres-no-evidence-covid-19-virus-spreads-through-the-air-but-its-still-possible/> (noting there is a dispute on whether the COVID-19 could be spread by airborne transmission). The CDC now admit the possibility of airborne transmission, but it is not clear whether it is aerosol transmission or airborne transmission. *Scientific Brief: SARS-CoV-2 and Potential Airborne Transmission*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 5, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html>. In general, airborne transmission is used to describe infections capable of being transmitted through exposure to infectious, pathogen-containing, small droplets and particles suspended in the air over long distances and that persist in the air for long times, which requires special engineering controls to prevent spread (e.g., negative-pressure airborne infection isolation rooms and high efficiency respirators), and it looks like COVID-19 is still different from this kind of infectious disease capable of spread through airborne transmission. In any case, the CDC argue that the airborne transmission is unlikely except for special circumstances. *Id.*

<sup>28</sup> *Symptoms of Coronavirus*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/about/symptoms.html>.

<sup>29</sup> Aylin Woodward, *2 studies of coronavirus patients suggest the disease's incubation period could be longer than the standard quarantine period of 14 days*, BUSINESS INSIDER (Feb. 21, 2020, 5:27 PM), <https://www.businessinsider.com/wuhan-coronavirus-symptoms-24-days-after-infection-2020-2>.

<sup>30</sup> *Symptoms of Coronavirus*, *supra* note 28.

<sup>31</sup> *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html> (updated Feb. 16, 2021) (Noting 81% of the patients show mild to moderate symptoms, 14% of the patients show severe symptoms, 5% of the patients show critical symptoms, and 2.3% of the patients die). The mortality rate of the new coronavirus infection is believed to be somewhat 3.4%. *See infra* note 387. But it is evident that the senior people with underlying health conditions are facing the most risk. *Weekly Updates by Select Demographic and Geographic Characteristics*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://www.cdc.gov/nchs/nvss/vsr/covid\\_weekly/index.htm#Race\\_Hispanic](https://www.cdc.gov/nchs/nvss/vsr/covid_weekly/index.htm#Race_Hispanic) (updated Feb. 17, 2020) (noting that more than 80% of the patients who die are people over the age of 65).

before the patients began showing symptoms.<sup>32</sup> Although many are skeptical, some experts believe that this type of transmission is possible.<sup>33</sup> In short, the new coronavirus appears to be highly contagious.<sup>34</sup>

The international community responded to the outbreak and spread of the new coronavirus in China by restricting the entry of travelers from China into their countries. For instance, the United States government decided starting February 2, 2020, to suspend the entry of foreign nationals who had been in China within fourteen days of the attempted entry.<sup>35</sup> United States citizens, residents, and their immediate family members who had been in the Hubei Province and other parts of mainland China were still allowed to enter the United States, but they were subject to health monitoring and possible quarantine for up to fourteen days.<sup>36</sup> The Australian government also instituted temporary entry restrictions on February 1, 2020.<sup>37</sup> All travelers arriving from any part of mainland China, regardless of nationality, are subject to enhanced border control measures to ensure the health, safety, and well-being of the Australian community. Australia also denied entry to anyone who had traveled from or through mainland China within the fourteen days of the attempted entry, with certain exceptions. Australian residents, citizens, and permanent residents who were allowed to enter Australia were required to self-quarantine for fourteen days.<sup>38</sup>

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<sup>32</sup> Roni Caryn Rabin, *Even Without Symptoms, Wuhan Coronavirus May Spread, Experts Fear*, N.Y. TIMES (Feb. 4, 2020), <https://www.nytimes.com/2020/02/04/health/coronavirus-symptoms-germany.html>.

<sup>33</sup> Jacqueline Howard, *Novel coronavirus can be spread by people who aren't exhibiting symptoms, CDC director says*, CNN (Feb. 13, 2020, 9:43 PM), [https://www.cnn.com/asia/live-news/coronavirus-outbreak-02-13-20-intl-hnk/h\\_8d935a8b6df385aba0cbfdb30cd3aeac](https://www.cnn.com/asia/live-news/coronavirus-outbreak-02-13-20-intl-hnk/h_8d935a8b6df385aba0cbfdb30cd3aeac); *How COVID-19 Spreads*, *supra* note 25 (stating that “[p]eople who are infected but do not show symptoms can also spread the virus to others.”).

<sup>34</sup> Berkeley Lovelace Jr., *Researchers say the coronavirus may be more contagious than current data shows*, CNBC (Feb. 4, 2020, 3:06 PM), <https://www.cnbc.com/2020/02/04/researchers-say-the-coronavirus-may-be-more-contagious-than-current-data-shows.html> (“The so-called R naught of the disease, a mathematical equation that shows how many people will get sick from each infected person, is around 2.2”).

<sup>35</sup> Proclamation No. 9984,85 Fed. Reg. 6798 (Jan. 31, 2020).

<sup>36</sup> *Id.* The United States government later further intensified the entry ban on foreign travelers. *Travelers Prohibited from Entry to the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/travelers/from-other-countries.html> (last updated Feb. 19, 2021).

<sup>37</sup> Prime Minister of Australia, *Updated Travel Advice to Protect Australians from the Novel Coronavirus* (Feb. 1, 2020), <https://www.pm.gov.au/media/updated-travel-advice-protect-australians-novel-coronavirus>; Prime Minister of Australia, *Extension of Travel Ban to Protect Australians from the Coronavirus* (Feb. 13, 2020), <https://www.pm.gov.au/media/extension-travel-ban-protect-australians-coronavirus>.

<sup>38</sup> Eventually, the Australian government further intensified the entry restrictions for foreigners. Australian Government Department of Home Affairs, *Travel Restrictions and Exemptions*, <https://covid19.homeaffairs.gov.au/travel-restrictions> (last visited Feb. 22, 2021).

The WHO opposed such measures<sup>39</sup> and the Chinese government strongly protested against them.<sup>40</sup> Many health law experts in the world also supported these oppositions.<sup>41</sup>

## **B. COVID-19 and Japan**

On January 15, 2020, Japan confirmed its first case of the new coronavirus.<sup>42</sup> By that time, the virus had already spread throughout China. Japan's first patient was a resident of the Kanagawa Prefecture who had recently visited the city of Wuhan.<sup>43</sup> The second, third, fourth, fifth, and seventh patients were Wuhan residents who were visiting Japan.<sup>44</sup> The bus driver who transported the tourists from Wuhan and the tour guide who accompanied the group were also later confirmed to be infected.<sup>45</sup> Gradually, the number of infected patients increased;

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<sup>39</sup> Antonio Regalado, *WHO calls China coronavirus an international emergency, but opposes travel bans*, MIT TECH. REV. (Jan. 30, 2020), <https://www.technologyreview.com/2020/01/30/275959/the-china-coronavirus-is-officially-an-international-emergency/>.

<sup>40</sup> Christy Somos, *China praises Canada, slams U.S. over coronavirus response*, CTV NEWS (Feb. 3, 2020, 12:31 PM), <https://www.ctvnews.ca/world/china-praises-canada-slams-u-s-over-coronavirus-response-1.4795270>.

<sup>41</sup> See *infra* note 187.

<sup>42</sup> MHLW, *Shingata coronavirus nikanrenshitahaien no kanja no hasseinitsuite [The First Confirmed Patient Infected with New Coronavirus]* (Jan. 16, 2020), [https://www.mhlw.go.jp/stf/newpage\\_08906.html](https://www.mhlw.go.jp/stf/newpage_08906.html); *Japan confirms the first case of new China coronavirus strain*, GUARDIAN (Jan. 16, 2020), <https://www.theguardian.com/world/2020/jan/16/japan-confirms-first-case-of-new-china-coronavirus-strain>.

<sup>43</sup> *Shingata corona, kokunai de hatsukakunin [New Coronavirus Infection, The First Domestic Patient Was Found]*, YOMIURI SHIMBUN (Jan. 16, 2020, 1:45 PM), <https://www.yomiuri.co.jp/medical/20200116-OYT1T50151/>.

<sup>44</sup> MHLW, *Shingata coronavirus nikanrenshitahaien no kanja no hasseinitsuite [The Second Confirmed Patient Infected with New Coronavirus]* (Jan. 24, 2020), [https://www.mhlw.go.jp/stf/newpage\\_09079.html](https://www.mhlw.go.jp/stf/newpage_09079.html); MHLW, *Shingata coronavirus nikanrenshitahaien no kanja no hasseinitsuite [The Third Confirmed Patient Infected with New Coronavirus]* (Jan. 25, 2020), [https://www.mhlw.go.jp/stf/newpage\\_09099.html](https://www.mhlw.go.jp/stf/newpage_09099.html); MHLW, *Shingata coronavirus nikanrenshitahaien no kanja no hasseinitsuite [The Fourth Confirmed Patient Infected with New Coronavirus]* (Jan. 26, 2020), [https://www.mhlw.go.jp/stf/newpage\\_09100.html](https://www.mhlw.go.jp/stf/newpage_09100.html); MHLW, *Shingata coronavirus nikanrenshitahaien no kanja no hasseinitsuite [The Fifth Confirmed Patient Infected with New Coronavirus]* (Jan. 28, 2020), [https://www.mhlw.go.jp/stf/newpage\\_09154.html](https://www.mhlw.go.jp/stf/newpage_09154.html); MHLW, *Shingata coronavirus nikanrenshitahaien no kanja no hasseinitsuite [The Seventh Confirmed Patient Infected with New Coronavirus]* (Jan. 28, 2020), [https://www.mhlw.go.jp/stf/newpage\\_09158.html](https://www.mhlw.go.jp/stf/newpage_09158.html).

<sup>45</sup> MHLW, *Shingata coronavirus nikanrenshitahaien no kanja no hasseinitsuite [The Sixth Confirmed Patient Infected with New Coronavirus]* (Jan. 28, 2020), [https://www.mhlw.go.jp/stf/newpage\\_09153.html](https://www.mhlw.go.jp/stf/newpage_09153.html); MHLW, *Shingata coronavirus nikanrenshitahaien no kanja no hasseinitsuite [The Eighth Confirmed Patient Infected with*

most were visitors from Wuhan, local residents who had recently visited Wuhan, or persons who had close contact with the infected patients.

On January 28, 2020, the Japanese government enacted a new abinet order under the *Infectious Disease Prevention Act*,<sup>46</sup> classifying the new coronavirus as a “designated infectious disease,”<sup>47</sup> and amended the *Quarantine Act Enforcement Order* to add new coronavirus as an infectious disease subject to quarantine.<sup>48</sup> The MHLW also revised its regulation to apply various provisions of the *Infectious Disease Prevention Act* to the new coronavirus infection.<sup>49</sup> The government established the New Coronavirus Infection Response Headquarters (hereinafter “Headquarters”) in accordance to the *Infectious Disease Prevention Act* on January 30, 2020—headed by the prime minister and all of the state ministers—and held its first meeting that same day.<sup>50</sup> Also on that day, the Ministry of Foreign Affairs advised those with contact to China to avoid all travel unless they had a compelling reason.<sup>51</sup> The government also placed restrictions on foreign travelers from Hubei Province and on travelers who had passports issued by Hubei Province.<sup>52</sup> Unlike other countries in the world, however, Japan did not introduce any further restrictions on the entry of Chinese travelers.<sup>53</sup>

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*New Coronavirus*] (Jan. 29, 2020), [https://www.mhlw.go.jp/stf/newpage\\_09201.html](https://www.mhlw.go.jp/stf/newpage_09201.html).

<sup>46</sup> Kansenshō no yōbōyobikansenshō no kanjanitaisuruiyounikansuruhōritsu [Act on Prevention of Infectious Disease and Treatment of the Infectious Disease Patients], Law No. 114 of 1998 (Japan) [hereinafter *Infectious Disease Prevention Act*].

<sup>47</sup> Shingataconoraviruskansenshō wo shiteikansenshōtoshitesadamerutō no seirei [Cabinet Order to Designate New Coronavirus Infection as Designated Infectious Disease], Cabinet Order No. 11 of 2020, <https://www.mhlw.go.jp/content/10900000/000589748.pdf> (Japan).

<sup>48</sup> Ken-ekihosekourei no ichibu wo kaiseisuruseirei [Cabinet Order to Amend Parts of the Quarantine Act Enforcement Order], Cabinet Order No. 12 of 2020, <https://kanpou.npb.go.jp/old/20200128/20200128t00004/20200128t000040006f.html> (Japan).

<sup>49</sup> MHLW, Kenkōkyokuchō [Health division chief], *Shingata coronavirus kansenshō wo shiteikansenshōtoshitesadamerutō no seireito no sekounitsuite* [Enforcement of The Cabinet Order to Designated New Coronavirus Infection as Designated Infectious Disease] (Jan. 28, 2020), <https://www.mhlw.go.jp/content/10900000/000589747.pdf>.

<sup>50</sup> *Shingata coronavirus kansenshōtaisakuhonbu* [New Coronavirus Infection Response Headquarters], PRIME MINISTER OF JAPAN AND HIS CABINET (Jan. 30, 2020), [https://www.kantei.go.jp/jp/singi/novel\\_coronavirus/th\\_siryou/sidai\\_r020130.pdf](https://www.kantei.go.jp/jp/singi/novel_coronavirus/th_siryou/sidai_r020130.pdf) [hereinafter *Headquarters*].

<sup>51</sup> Ministry of Foreign Affairs, *Chuugokuniokerushingata coronavirus no hasseinitsuite (tokō level no hikiage)* [Outbreak of the New Coronavirus in China (Raising the Danger Level for Travel)] (Jan. 21, 2020), <https://www.jpi.or.jp/pdf/200203.pdf>. The Ministry of Foreign Affairs already strongly advised to stop all travel to Hubei Province on January 24. Press Release, MotegiToshimitsu, Foreign Minister, Ministry of Foreign Affairs, *Response to the Novel Coronavirus* (Jan. 24, 2020), [https://www.mofa.go.jp/press/kaiken/kaiken4e\\_000742.html](https://www.mofa.go.jp/press/kaiken/kaiken4e_000742.html).

<sup>52</sup> Ministry of Foreign Affairs, *Shingata coronavirus kansenshōkanren* [Response to New Coronavirus] (Feb. 4, 2020), <https://www.anzen.mofa.go.jp/od/ryojiMailDetail.html>.

<sup>53</sup> Eventually, however, the government was forced to introduce more extensive entry

The Headquarters also decided to adopt comprehensive countermeasures against the outbreak and spread of new coronavirus on February 13, 2020.<sup>54</sup> The Headquarters placed its focus on preventing the entry of the infectious disease into Japan and intensifying the capacity to face the domestic spread. However, it did not include any restrictions on the rights and freedoms of Japanese people living in Japan.<sup>55</sup>

Despite these measures restricting the entry of potential COVID-positive patients, the number of confirmed cases in Japan continued to rise.<sup>56</sup> It is difficult to determine when and where some of these COVID-positive patients became infected because some of the patients did not have any contact with Wuhan residents or persons who had travelled to Wuhan, nor with any of the known infected patients. This means that the increasing number of patients were infected domestically.

Moreover, the Japanese government decided to allow all Japanese citizens living in the city of Wuhan to return to Japan if they wished.<sup>57</sup> The government arranged for five airplanes to transport 829 of these Japanese citizens and their families back to Japan, using airplanes provided by All Nippon Airways (ANA), one of Japan's major commercial airlines.<sup>58</sup> The passengers returning to Japan were requested to be tested and were asked to remain in designated hotel rooms for fourteen days.<sup>59</sup> Two of the passengers refused to be tested, but were nonetheless

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restrictions. *See infra* notes 296–97.

<sup>54</sup> *Shingata coronavirus kansenshōnikansurukinkyūtaiousaku [Emergency Countermeasures against the New Coronavirus Infection]*, PRIME MINISTER OF JAPAN AND HIS CABINET (Feb. 13, 2020), [https://www.kantei.go.jp/jp/singi/novel\\_coronavirus/th\\_siryō/kinkyūtaiou\\_corona.pdf](https://www.kantei.go.jp/jp/singi/novel_coronavirus/th_siryō/kinkyūtaiou_corona.pdf) [hereinafter *Emergency Countermeasures*].

<sup>55</sup> *Id.* However, it also urged the country to strengthen its infectious disease response system, for example, by improving their testing capability, their medical facilities and their response ability, facilitating the production and distribution of testing kits, developing treatment methods and vaccinations, and establishing an efficient supply of masks and medications. *Id.*

<sup>56</sup> MHLW, *Shingata coronavirus kansenshō no kokunaihasseidouko [Trend of Domestic New Coronavirus Infection Patients]* (Nov. 2, 2020), <https://www.mhlw.go.jp/content/10906000/000695249.pdf>.

<sup>57</sup> *Tsunawataridatabukanhoujin mission no zentūtaura [Real Story of Rescue Mission of Citizens from Wuhan: Walking on the Tightrope]*, FNN (Mar. 3, 2020, 7:00 AM), <https://www.fnn.jp/articles/-/25897> [hereinafter *Real Story of Rescue Mission*].

<sup>58</sup> *Id.* The first chartered airplane left China on January 29, 2020. The reason why the Japanese government asked the ANA to evacuate the Japanese citizens from Wuhan rather than using its government airplanes may be logistical. The ANA already had a regular flight between Narita and Wuhan. Moreover, the Chinese government has a concern with using the government airplanes because they are affiliated with the Japanese Self Defense Forces. The Self Defense Forces are the Japanese de facto armed forces although the Japanese government never officially calls it as such. China has been very sensitive to its existence, expansion and dispatch into foreign countries, especially to China, because of the memory of the extreme hardship suffered by the Japanese military forces during World War II.

<sup>59</sup> *See* Nat'l Inst. of Infectious Diseases, *Chugoku Wuhan sikara charter bin de*

permitted to return home, which triggered huge condemnation from the public.<sup>60</sup> The two passengers later voluntarily came forward for testing and tested negative for the virus.<sup>61</sup> In total, fifteen evacuees were eventually found to be infected with the new coronavirus.<sup>62</sup>

The government was later notified that one of the passengers traveling aboard the *Diamond Princess*—a luxury cruise ship that left the Yokohama port and was destined to return to the same port after two weeks' travel—who had disembarked in Hong Kong, tested positive for coronavirus infection on February 1.<sup>63</sup> Upon arrival at the Yokohama Port on February 3, 2020, the government tested passengers who had come in close contact with the infected patient before allowing them to disembark, and initially found that ten other passengers had been infected with the new coronavirus on February 5.<sup>64</sup> Those patients were transferred to hospitals but the government ordered a fourteen day quarantine for all remaining passengers and crew members on board.<sup>65</sup> There were 3,711 passengers and crew members on board.<sup>66</sup> Apparently, this was the first case of cluster or community

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*kikokushanitsuite [People Returned from Wuhan by the Chartered Airplanes]*, (Apr. 7, 2020), <https://www.niid.go.jp/niid/ja/diseases/ka/corona-virus/2019-ncov/2488-idsc/ias-news/9525-483p01.html> [hereinafter Nat'l Inst. of Infectious Diseases, *People Returned from Wuhan*] (discussing the coronavirus test results of a flight returning from Wuhan City on January 29, 2020). “Out of 206 people who arrived in Japan, 5 didn’t feel well and transported to the hospital (one of them tested positive later).” *Id.* Among the remaining 201, two refused to be tested and returned home (but later came forward for testing and tested negative). *Id.* One hundred ninety-nine people gave consent for testing, and all but one remained in the hotel (the one person left initially tested negative but was later discovered to be infected). *Id.*

<sup>60</sup> *Shingatahaien, kikokuhoujinhutarigakensakyohi [New Coronavirus Infection: Two Japanese Evacuees Refused to Be Tested]*, FUKUI NEWS (Jan. 30, 2020, 6:30 AM), <https://www.fukuishimbun.co.jp/articles/-/1019326>.

<sup>61</sup> *Kensakyohishitakikokushahutari, kensauketai to moushide [Two Returnees Who Refused to Be Tested Came Forward for Testing]*, ASAHI SHIMBUN (Jan. 30, 2020, 7:48 PM), <https://www.asahi.com/articles/ASN1Z6HWJN1ZULBJ017.html>; *Kensakyohishitahoujinhutari, shingata coronavirus kansen nashi [Two Evacuees Who Refused to Be Tested Found Not Infected]* NIHON TV 24 (Feb. 1, 2020, 1:04 AM), <https://www.news24.jp/articles/2020/02/01/07588014.html>.

<sup>62</sup> MHLW, *Current Infection Status*, *supra* note 9.

<sup>63</sup> Nat'l Inst. of Infectious Diseases, *Genbakaranogaikyō: Diamond Princess go niokeru COVID-19 [Summary of the COVID-19 Infection among Passengers on the Diamond Princess]* (Feb. 19, 2020), <https://www.niid.go.jp/niid/ja/diseases/ka/corona-virus/2019-ncov/2484-idsc/9410-covid-dp-01.html> [hereinafter Nat'l Inst. of Infectious Diseases, *COVID-19 Infection among Passengers on the Diamond Princess*].

<sup>64</sup> MHLW, *Yokohamakōnikikoushita cruise sen-nai de kakuninsaretashingata coronavirus kansenshōnitsuite [New Coronavirus Infection in Cruise Ship Docked at the Yokohama Port]* (Feb. 5, 2020), [https://www.mhlw.go.jp/stf/newpage\\_09276.html](https://www.mhlw.go.jp/stf/newpage_09276.html).

<sup>65</sup> Nat'l Inst. of Infectious Diseases, *COVID-19 Infection among Passengers on the Diamond Princess*, *supra* note 63.

<sup>66</sup> *Id.*

infection. Eventually, the total number of confirmed patients reached 712 with 13 deaths.<sup>67</sup>

The government later decided to refuse entry to all foreign nationals aboard another cruise ship—the *Westerdam*, which departed from Hong Kong and was planning to arrive in Okinawa—due to the potential of community infection.<sup>68</sup> The government denied the ship's entry into the port and ordered its return to Hong Kong, while urging all Japanese passengers onboard to take a flight back to Japan.<sup>69</sup>

It remains to be examined to what extent these measures contributed to the prevention of entry of the new coronavirus into Japan. Eventually, Japan was destined to be swept away by the pandemic. But at least it could be said that these attempts had slowed down the pace that COVID-19 could penetrate into Japan and gave more time for the government to prepare for it.

This is not the first time a serious new contagious disease hit Japan. In recent years alone, Japan has been faced with the threat of SARS,<sup>70</sup> MERS,<sup>71</sup> Ebola<sup>72</sup> and the Zika virus.<sup>73</sup> Although no one in Japan ever became infected with any of these viruses,<sup>74</sup> the fear of further outbreak and spread of these diseases prompted the Japanese people to develop and implement precautionary measures. The H1N1 influenza, also called swine flu, hit Japan and hospitalized 17,646 people by March 30, 2010, killing 171 patients.<sup>75</sup> H1N1 was the first outbreak of a new contagious disease in modern Japan.

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<sup>67</sup> See MHLW, *Current Situation*, *supra* note 10.

<sup>68</sup> Satoshi Sugiyama, *Japan decides to refuse entry of all noncitizen cruise ship passengers on board bound for Okinawa due to virus concern*, JAPAN TIMES (Feb. 6, 2020), <https://www.japantimes.co.jp/news/2020/02/06/national/science-health/japan-10-more-coronavirus-cases-quarantined-cruise-ship/#.Xj99QSIU1gg>.

<sup>69</sup> Several other ports refused entry, but the passengers were eventually allowed to disembark in Cambodia under the assumption that no one onboard was infected. This assumption proved false as one of the passengers was later discovered to be infected and the Cambodian government was faced with the challenge of tracing all the other possibly infected passengers. *U.S. woman previously on Westerdam cruise ship tests positive for new coronavirus*, GLOBAL NEWS (Feb. 15, 2020), <https://globalnews.ca/news/6555892/westerdam-cambodia-coronavirus-passenger/>.

<sup>70</sup> World Health Organization, *Severe Acute Respiratory Syndrome (SARS)*, <https://www.who.int/csr/sars/en/> (last visited Feb. 20, 2021).

<sup>71</sup> World Health Organization, *Middle East respiratory syndrome coronavirus (MERS-CoV)*, <https://www.who.int/emergencies/mers-cov/en/> (last visited Feb. 20, 2021).

<sup>72</sup> World Health Organization, *Ebola virus disease*, [https://www.who.int/health-topics/ebola/#tab=tab\\_1](https://www.who.int/health-topics/ebola/#tab=tab_1) (last visited Feb. 20, 2021).

<sup>73</sup> World Health Organization, *Zika virus disease*, <https://www.who.int/emergencies/diseases/zika/en/> (last visited Feb. 20, 2021).

<sup>74</sup> Nat'l Inst. of Infectious Diseases, *Hasseidoukocohanenjihoukokusuichiran [Outbreak and Spread of Infectious Disease; List of Number of Infected Patients]* (Mar. 11, 2012), <https://www.niid.go.jp/niid/ja/ydata/9007-report-ja2018-10.html>.

<sup>75</sup> MHLW, *Nihon niokeru influenza A (H1N1) no shingata influenza niyorunyuinakanjasu no gaikyo [Summary of Number of Patients Hospitalized because of the*

Furthermore, due to global warming, the average temperatures in Japan are rising<sup>76</sup> and the country's climate has become much more akin to that found in warmer tropical regions. As a result, Japan is now facing the arrival and spread of tropical contagious diseases, such as yellow fever, malaria, and dengue fever.<sup>77</sup> Previously, outbreaks of these diseases were rare in Japan; it was mostly tourists returning from these tropical regions that reported symptoms of these infections. In 2014, however, more than 100 cases of dengue fever were found in Tokyo's Yoyogi Park.<sup>78</sup> Since then, Japan has been forced to prepare for the possible outbreak of tropical infectious diseases.<sup>79</sup>

### III. CONTAGIOUS DISEASE PREVENTION SYSTEM

#### A. Infectious Disease Prevention Act

The *Infectious Disease Prevention Act (Act)* is the main statute enacted in Japan in 1998 to prevent the outbreak and spread of contagious diseases and to promote the public health.<sup>80</sup> The *Act* divides "infectious diseases" into eight categories based on the seriousness and infectious capability of the disease.<sup>81</sup> Category 1 includes infectious diseases such as Ebola fever, pest, small pox, Marburg disease, and Lassa fever, perhaps the most vicious infectious disease; Category 2 includes tuberculosis, diphtheria, SARS, MERS and avian flu; Category 3 includes cholera, dysentery, enterohemorrhagic *E. coli*, and typhoid; Category 4 includes hepatitis E, hepatitis A, yellow fever, rabies, anthrax, and malaria; and, Category 5 includes influenza (excluding avian flu and new influenza), syphilis, and measles.<sup>82</sup> New influenza, or H1N1, was later added as a sixth category,<sup>83</sup>

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*New Influenza, Influenza A (H1N1)*] (Oct. 6, 2009), <https://www.mhlw.go.jp/bunya/kenkou/kekkaku-kansenshou04/rireki/091009-02.html>.

<sup>76</sup> According to the Ministry of Environment, the average temperature of Japan rose 1.19°C over a century, a much faster pace than the world average of 0.72°C over the same time span. MINISTRY OF ENVIRONMENT (MOE) ET AL., *NIHON NO KIKOHENDŌ TO SONOEIKYŌ [JAPAN'S CLIMATE CHANGE AND ITS IMPACT]* 2 (2018), [https://www.env.go.jp/earth/tekiou/pamph2018\\_full.pdf](https://www.env.go.jp/earth/tekiou/pamph2018_full.pdf). As a result, the number of days with a maximum temperature above 35°C is also increasing by 0.2 days per decade. *Id.*

<sup>77</sup> MOE, *CHIKYUONDANKA TO KANSENSHŌ [GLOBAL WARMING AND INFECTIOUS DISEASES]* 2, [https://www.env.go.jp/earth/ondanka/pamph\\_infection/full.pdf](https://www.env.go.jp/earth/ondanka/pamph_infection/full.pdf) [hereinafter MOE, *GLOBAL WARMING*] (discussing the possible link between the global warming and increased risk of infection of tropical infectious diseases).

<sup>78</sup> MHLW, *Dengunetsu no kokunaikansenjirei no hasseijoukyounitsuite [Emergence of Deng Fever Infection in Japan]*, [https://www.mhlw.go.jp/bunya/kenkou/kekkaku-kansenshou19/dengue\\_fever\\_jirei.html](https://www.mhlw.go.jp/bunya/kenkou/kekkaku-kansenshou19/dengue_fever_jirei.html) (last updated Oct. 31, 2014).

<sup>79</sup> MOE, *GLOBAL WARMING*, *supra* note 77 (need for preparation).

<sup>80</sup> *Infectious Disease Prevention Act*, *supra* note 46, art. 1.

<sup>81</sup> *Id.* art. 6(1).

<sup>82</sup> *Id.* art. 6(2)–(6).

<sup>83</sup> *Id.* art. 6(7).

“designated infectious disease” was added as a seventh;<sup>84</sup> and “new infectious disease” was added as an eighth.<sup>85</sup> A “designated infectious disease” refers to an already known infectious disease that newly becomes a threat to public health and would likely spread without the application of some of the provisions of the *Act*.<sup>86</sup> For these types of diseases, the government may issue an order that makes certain measures under the *Act* (as specified in the cabinet order) available for the newly designated disease for up to one year.<sup>87</sup> A “new infectious disease,” on the other hand, is a disease whose symptoms and treatment are clearly different from those of known infectious diseases and which may threaten the lives or seriously affect the health of the people.<sup>88</sup>

Under the *Act*, some people were treated as patients even though they were not confirmed infectious. The people who are regarded as “patients” of these diseases include: persons who have symptoms similar to those of a category 1 infectious disease or certain category 2 infectious diseases;<sup>89</sup> persons who have symptoms similar to those of new influenza and who are reasonably suspected of having contracted the infectious disease;<sup>90</sup> and persons who are pathogen-carriers of a category 1 infectious disease or new influenza who show no symptoms.<sup>91</sup> Apparently, this treatment is not granted to all infectious diseases.

The *Act* mandates all physicians who treated certain patients of infectious diseases, asymptomatic pathogen carriers, and persons who are suspected of infection to report immediately these persons to the local governors,<sup>92</sup> who must then forward these reports to the Health, Labor and Welfare Minister (HLW Minister).<sup>93</sup> This reporting process ensures that the HLW Minister collects necessary information promptly and as thoroughly as possible.<sup>94</sup> The *Act* also requires the HLW Minister to analyze the information collected and to make positive efforts to publicize the information it holds on causes of infections, disease trends, and the prevention and treatment of infections.<sup>95</sup> It authorizes the HLW Minister to request the cooperation of physicians and other medical professionals in implementing measures designed to prevent the outbreak and spread of infectious diseases.<sup>96</sup>

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<sup>84</sup> *Id.* art. 6(8).

<sup>85</sup> *Infectious Disease Prevention Act, supra* note 46, art. 6(9).

<sup>86</sup> *Id.* art. 6(78).

<sup>87</sup> *Id.* art. 7(1).

<sup>88</sup> *Id.* art. 6(9).

<sup>89</sup> *Id.* art. 8(1).

<sup>90</sup> *Infectious Disease Prevention Act, supra* note 46, art. 8(2).

<sup>91</sup> *Id.* art. 8(3).

<sup>92</sup> *Id.* art. 12(1).

<sup>93</sup> *Id.* art. 12(2).

<sup>94</sup> *Id.* art. 14–16.

<sup>95</sup> *Infectious Disease Prevention Act, supra* note 46, art. 16(1).

<sup>96</sup> *Id.* art. 16-2.

The *Act* also allows local governors to restrict the rights and freedoms of patients, persons showing symptoms of an infection, and others in certain circumstances.<sup>97</sup> First, if it is deemed necessary to prevent the spread of a category 1 or category 2 infectious disease or new influenza, the local governor may recommend that the patients, persons with similar symptoms, asymptomatic pathogen carriers, or suspected pathogen carriers of category 1 or category 2 infectious disease or new influenza, submit the specimens prescribed or allow relevant officials to collect the specimens.<sup>98</sup> The HLW Minister may also make this recommendation if he or she deems it urgently necessary for the purpose of preventing the spread of the disease.<sup>99</sup> Both the local governor and the HLW Minister may direct relevant officials to collect the specimens from the patient if the patient refuses to follow their recommendation.<sup>100</sup> Second, if the local governor deems it necessary for the purpose of preventing the spread of a category 1, category 2 or category 3 infectious disease or new influenza, he or she may recommend that a person who is reasonably suspected to be infected with the relevant infectious disease be subject to a medical examination.<sup>101</sup> If the person refuses, the local governors may direct relevant officials to conduct a medical examination of the person nonetheless.<sup>102</sup> Third, if reported by the doctors, the local governor will notify the patients or pathogen carriers of a category 1, category 2, or category 3 infectious disease or new influenza of the report, if it is deemed necessary for the purpose of preventing the spread of the infection,<sup>103</sup> and the parties notified are prevented from engaging in the business activities stipulated by the MHLW regulation as business activities which are capable of spreading the infection to the public based on the infection for a period stipulated by the regulation until the danger of spread is no longer perceived.<sup>104</sup>

Furthermore, if the local governor deems it necessary to prevent the spread of a category 1 infectious disease, the local governor may recommend that the patient be hospitalized at a designated hospital<sup>105</sup> and, if refused, may direct relevant officials of the designated hospital to hospitalize them.<sup>106</sup> The period of hospitalization is limited to 72 hours,<sup>107</sup> however, the local governor may recommend that this patient be further hospitalized for a period of no more than ten days<sup>108</sup> if it is necessary to prevent the spread of a category 1 infectious disease. If

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<sup>97</sup> *Id.* art. 16-3 to 22-2.

<sup>98</sup> *Id.* art. 16-3(1).

<sup>99</sup> *Id.* art. 16-3(2).

<sup>100</sup> *Infectious Disease Prevention Act, supra* note 46, art. 16-3(3) to (4).

<sup>101</sup> *Id.* art. 17(1).

<sup>102</sup> *Id.* art. 17(2).

<sup>103</sup> *Id.* art. 18(1).

<sup>104</sup> *Id.* art. 18(2).

<sup>105</sup> *Infectious Disease Prevention Act, supra* note 46, art. 19(1).

<sup>106</sup> *Id.* art. 19(3).

<sup>107</sup> *Id.* art. 19(4) (noting that if it is urgent or unavoidable, the governor can transfer the patients to other hospitals or clinics as deemed appropriate); *Id.* art. 19(5).

<sup>108</sup> *Id.* art. 20(1).

the patient refuses to accept the recommendation, the local governor may direct officials of the designated hospital to hospitalize them.<sup>109</sup> In an emergency, the local governor may direct officials of the designated hospital to hospitalize the patient for an additional ten days from the date on which the patient was initially hospitalized under the previous provision.<sup>110</sup> The governor can further extend the period of hospitalization for up to ten days if deemed necessary.<sup>111</sup> If the patient is no longer carrying the infectious disease pathogen, the hospital must release the patient.<sup>112</sup> All of the measures adopted must be the minimum measures necessary to prevent the spread of the infectious disease at issue.<sup>113</sup> All of these measures, including hospitalization, are also applicable to patients of a category 2 infectious disease and new influenza, with some adjustments.<sup>114</sup>

The *Act* similarly provides for the removal of bodies or pathogen from patients, persons who are showing similar symptoms, the asymptomatic pathogen carriers, or person who is legitimately suspected of infection, of category 1, category 2 or new influenza infections, if it is deemed necessary for the purpose of preventing the outbreak or spread of a category 1, category 2, or new influenza infection.<sup>115</sup> If it is deemed necessary for the purpose of preventing the outbreak or spread of a category 1, category 2, category 3, category 4 infectious disease, or new influenza, the *Act* also allows the local governor to order the disinfection of contaminated places;<sup>116</sup> to order the extermination of rodents or insects which are contaminated or suspected to be contaminated;<sup>117</sup> to restrict or prohibit the use of, or to disinfect or destroy, contaminated property or property suspected to be contaminated;<sup>118</sup> to restrict or prohibit the relocation of contaminated corpses;<sup>119</sup> to restrict or prohibit of the use or supply of water;<sup>120</sup> and to restrict or prohibit entry into a building contaminated by a category 1 infectious disease.<sup>121</sup> Further, the *Act* authorizes the local governor to restrict or block traffic in areas where infected patients are found and other places contaminated or suspected to be contaminated for a period of 72 hours, if it is urgently necessary to prevent the spread of a category

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<sup>109</sup> *Id.* art. 20(2).

<sup>110</sup> *Infectious Disease Prevention Act, supra* note 46, art. 20(3).

<sup>111</sup> *Id.* art. 20(4).

<sup>112</sup> *Id.* art. 22(1).

<sup>113</sup> *Id.* art. 22-2.

<sup>114</sup> *Id.* art. 26.

<sup>115</sup> *Infectious Disease Prevention Act, supra* note 46, art. 26-3 to 26-4.

<sup>116</sup> *Id.* art. 27.

<sup>117</sup> *Id.* art. 28.

<sup>118</sup> *Id.* art. 29(1).

<sup>119</sup> *Id.* art. 30(1).

<sup>120</sup> *Infectious Disease Prevention Act, supra* note 46, art. 31(1).

<sup>121</sup> *Id.* art. 32.

1 infectious disease.<sup>122</sup> The *Act* also allows for similar countermeasures against new influenza infection<sup>123</sup> or a “new infectious diseases.”<sup>124</sup>

## **B. The New Coronavirus Infection Under the Infectious Disease Prevention Act**

The Japanese government decided to designate the new coronavirus infection as a “designated infectious disease,” as defined under the *Infectious Disease Prevention Act*.<sup>125</sup> This judgment is only natural considering the coronavirus itself is already well-known and it is widely accepted that some common colds are triggered by different strains of the coronavirus.<sup>126</sup> The government decided to apply following provisions of the Act:

- (1) Application of the provisions on patients to persons who are showing similar symptoms;
- (2) Doctor’s obligation to report to the government;
- (3) Investigation on the current situation, trend, and causes;
- (4) Mandatory medical examinations;
- (5) Restriction on specified business activities;
- (6) Mandatory hospitalization;
- (7) Mandatory collection of specimens;
- (8) Disinfection of contaminated places,
- (9) Extermination of contaminated rodents or insects,
- (10) Restriction on the use and destruction of contaminated property; or
- (11) Restriction on relocation of contaminated corpses.<sup>127</sup>

However, the government had yet to enforce traffic restrictions or roadblocks because of new coronavirus infection. Apparently, no measure such as lockdown was ever anticipated. It appears the government was treating the new coronavirus infection similar to a category 2 infectious disease, the second most vicious

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<sup>122</sup> *Id.* art. 33 (stating that all these measures need to be limited to the minimum necessary to prevent the outbreak and spread of the infectious disease); *Id.* art. 34.

<sup>123</sup> *Id.* art. 44-2 to 44-5.

<sup>124</sup> *Id.* art. 44-6 to 53.

<sup>125</sup> Cabinet Order to Designate the New Coronavirus Infection as Designated Infectious Disease, *supra* note 47, art. 1.

<sup>126</sup> *Common Human Coronaviruses*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/general-information.html> (last visited Mar. 12, 2021) (common human coronaviruses, including types 229E, NL63, OC43, and HKU1, usually cause mild to moderate upper-respiratory tract illnesses, like the common cold). *See also Common Colds: Protect Yourself and Others*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/features/rhinoviruses/index.html> (last visited Mar. 12, 2021) (many different respiratory viruses can cause the common cold, but rhinoviruses are the most common).

<sup>127</sup> MHLW, Kenkōkyokuchō [Health division chief], *supra* note 49.

infectious disease but not the first.<sup>128</sup> The government then decided to establish the Headquarters on January 30, 2020 to respond to the outbreak.<sup>129</sup>

#### IV. IMMIGRATION CONTROL AND QUARANTINE SYSTEM

##### A. Immigration Control System

Under the *Immigration Control and Refugee Act*, all foreign nationals landing in Japan are required to have a valid passport and visa, and are subject to an immigration check before landing.<sup>130</sup> Some people are prohibited from landing, including patients of a category 1 or category 2 infectious disease, patients of an influenza infectious disease or a “designated infectious disease,” or anyone showing signs of a “new infectious disease.”<sup>131</sup> Moreover, entry may be refused to any foreign national if there are reasonable grounds to believe that the person is likely to commit an act which could be detrimental to the interests or public safety of Japan.<sup>132</sup> The immigration officer must review whether the applicant is precluded from landing in Japan because of this restriction.<sup>133</sup>

On January 31, 2020 the government designated the new coronavirus as a “designated infectious disease,” and as a result, immigration officers were permitted to refuse entry to foreign nationals who were also infected patients.<sup>134</sup> The *Infectious Disease Prevention Act* regards certain persons as “patients,” including a person who is showing similar symptoms of the category 1 infectious disease or category 2 infectious disease;<sup>135</sup> a person who shows similar symptoms of new influenza infectious disease and who is legitimate reason to suspect that the person is suffering from the disease,<sup>136</sup> or disease carrier of the category 1 infectious

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<sup>128</sup> The government was eventually forced to amend the order, however, to add additional countermeasures including the traffic restriction. Shingata coronavirus kansenshō wo shiteikansenshōtoshitesadamerutō no seirei no ichibu wo kaiseisuruseirei [Cabinet Order to Amend Parts of the Cabinet Order to Designate New Coronavirus as Designated Infectious Disease], Cabinet Order No. 60 of 2020 (Japan), <https://kanpou.npb.go.jp/old/20200326/20200326t00033/20200326t000330001f.html> (adding art. 33 provisions applicable to the new coronavirus infection). In this sense, COVID-19 is treated more viciously than other category 2 infectious diseases. *See id.*

<sup>129</sup> *See* Headquarters, *supra* note 50.

<sup>130</sup> Shutsunyukokukannriyobinanminnteihō [Immigration Control and Refugee Act], Law No. 319 of 1951, art. 6, para. 1–2 (Japan).

<sup>131</sup> *Id.* art. 5, para. 1(i).

<sup>132</sup> *Id.* art. 5, para. 1(xiv).

<sup>133</sup> *Id.* art. 7, para. 1(iv).

<sup>134</sup> *See* Cabinet Order to Designate New Coronavirus Infection as Designated Infectious Disease, *supra* note 47.

<sup>135</sup> *Infectious Disease Prevention Act*, *supra* note 46, art. 8, para. 1.

<sup>136</sup> *Id.* art. 8, para. 1.

disease or new influenza infectious disease who are showing no symptoms.<sup>137</sup> The same treatment is given to those infected with the new coronavirus infection. However, this is not enough to prevent persons carrying a passport issued by the Hubei province or who have visited the Hubei province within the previous 14 days from entering into Japan. Therefore, the government had to rely on the clause that excluded the foreigner who is “likely to commit an act which could be detrimental to the interests or public safety of Japan” to exclude them.<sup>138</sup>

## **B. Quarantine System**

The *Quarantine Act* provides that no ship or aircraft departing from a foreign country is permitted to enter into a port or land at an airport in Japan unless the captain receives pre-quarantine clearance and a certificate of quarantine.<sup>139</sup> The types of contagious diseases to be checked during the quarantine procedure are “infectious diseases for quarantine purpose” and include:

Clause 1: Category 1 infectious disease under the *Infectious Disease Prevention Act*;

Clause 2: New influenza infection under the *Infectious Disease Prevention Act*; and

Clause 3: Other diseases specified by a cabinet order as requiring an examination to determine whether the person is infected in order to prevent new infectious diseases from entering the country.<sup>140</sup>

No passenger is permitted to come ashore or disembark from an aircraft unless the chief receives a certificate of quarantine.<sup>141</sup> The quarantine station chief may question the passengers or may direct a quarantine officer to question them,<sup>142</sup> and may conduct medical examinations or may direct a quarantine officer to do so.<sup>143</sup> If a ship or aircraft has left from an infectious disease infected region or has visited such region, or if an infected patient was found on board the vessel, the quarantine station chief may order the isolation of the patients found to carry clause 1 or clause 2 infectious disease or may detain the passengers who are suspected of having

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<sup>137</sup> *Id.* art. 8, para. 2.

<sup>138</sup> *Shingata coronavirus kansenshōnikansuru torikumi nitsuite* [Response to the New Coronavirus Infection], MINISTRY OF JUSTICE (Feb. 12, 2020), [http://www.moj.go.jp/nyuukokukanri/kouhou/nyuukokukanri01\\_00114.html](http://www.moj.go.jp/nyuukokukanri/kouhou/nyuukokukanri01_00114.html) (invoking art. 5(1), c. 14, of the Immigration Control Act for the refusal).

<sup>139</sup> Ken-ekihō [Quarantine Act], Law No. 201 of 1951, art. 4.

<sup>140</sup> *Id.* art. 2.

<sup>141</sup> *Id.* art. 5.

<sup>142</sup> *Id.* art. 12.

<sup>143</sup> *Id.* art. 13.

clause 1 or clause 2 infectious disease.<sup>144</sup> The isolated person is only released when the person no longer carries the virus.<sup>145</sup> A person who is detained may be transferred to a designated hospital or any appropriate hospital or may be kept in a hotel or ship, with the consent of the manager or ship captain, for a period of no longer than 504 hours.<sup>146</sup> The persons detained must be released if they are not found to be carrying the virus.<sup>147</sup> However, the isolation of patients and detention of suspected patients are not authorized for class 3 infectious diseases.

The HLW Minister may direct the quarantine station chief to conduct a medical examination of any person who is suspected of being infected with a “new infectious disease,” as that term is defined in the *Infectious Disease Prevention Act*, if the examination is necessary to prevent the outbreak and spread of the disease.<sup>148</sup> If the patient is found to show signs of infection, that person is designated a clause 1 patient, and various provisions of the *Quarantine Act*, including isolation and detention, may be applicable.<sup>149</sup>

Furthermore, the government could designate the infectious disease as an article 34 infectious disease when the infectious disease was spread in foreign country and its entry into Japan without quarantine could “seriously” affect the lives and the health of the citizens of Japan.<sup>150</sup> Then, various provisions of the *Quarantine Act* could be applied to such designated article 34 infectious disease as specified in the cabinet order. This designation allows the government to detain the patients and possible patients during the special detention period set in light of the incubation period of the disease.<sup>151</sup>

On January 31, 2020 the government enacted a Cabinet Order to amend the *Quarantine Act Enforcement Order*, classifying the new coronavirus infection as a clause 3 infectious disease for the purposes of quarantine procedures.<sup>152</sup> As a result, infected patients as well as suspected patients with the new coronavirus could be subject to quarantine procedures as well as mandatory medical questioning and testing.

But since the designation of the new coronavirus only took effect on February 7, mandatory medical questioning and testing was impossible at the time the first flight carrying evacuees from Wuhan arrived in Japan on January 29. As a result, the two evacuees returning from Wuhan, who initially showed no symptoms, refused to be tested and were permitted to return home, triggering intense public

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<sup>144</sup> Quarantine Act, *supra* note 139, art. 14, para. 1(i)–(ii).

<sup>145</sup> *Id.* art. 15, para. 2.

<sup>146</sup> *Id.* art. 16, para. 1–3.

<sup>147</sup> *Id.* art. 16, para. 4.

<sup>148</sup> *Id.* art. 34-2, para. 1.

<sup>149</sup> Quarantine Act, *supra* note 139, art. 34–2, para. 3.

<sup>150</sup> *Id.* art. 34.

<sup>151</sup> *Id.*

<sup>152</sup> See Cabinet Order to Amend Parts of the Quarantine Act Enforcement Order, *supra* note 48.

condemnation.<sup>153</sup> Once the new coronavirus was designated as a “designated infectious disease,” however, no one was allowed to enter Japan without mandatory medical questioning and testing for new coronavirus infection.

Furthermore, the government eventually decided on February 13, 2020 to designate new coronavirus infection as article 34 infectious disease for the quarantine purpose by enacting the new cabinet order and amended the *Quarantine Act Enforcement Order* to remove it from quarantine infectious disease stipulated in article 2(3).<sup>154</sup> The new designation took effect on February 14, 2020. Thereafter, new coronavirus is treated as a designated article 34 infectious disease for quarantine purpose.<sup>155</sup>

### **C. Cruise Ships and Quarantine**

Japan applied both this quarantine system and its immigration control system to passengers and crew members aboard the Diamond Princess cruise ship. There were 3,711 passengers and crew members on board.<sup>156</sup> Aside from the ten passengers initially confirmed to be infected who were transported to hospitals, the rest were not allowed to disembark and were told to stay inside their cabins for fourteen days to see whether anyone else exhibited symptoms of the new coronavirus infection.<sup>157</sup>

Many people were upset by this decision, calling for immediate medical testing and for the release of passengers and crew members who tested negative for the infection.<sup>158</sup> However, granting this request could have potentially cause at least four complicated problems. The first problem was a jurisdictional issue. The passengers and crew members aboard the Diamond Princess who entered into the Yokohama port were not officially cleared for landing and were still floating at sea. Therefore, Japan was not under any legal obligation to accept these passengers or

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<sup>153</sup> See *New Coronavirus Infection: Two Japanese Evacuees Refused to Be Tested*, *supra* note 60.

<sup>154</sup> Shingata coronavirus kansenshō wo ken-ekihō dai34jou no kansenshō no shuruitoshiteshiteisurutō no seirei [Cabinet Order to Designate New Coronavirus Infectious Disease as Article 34 Infectious Disease of the Quarantine Act], Cabinet Order No. 28 of 2020, <https://kanpou.npb.go.jp/old/>; MHLW, *Shingata coronavirus kansenshō wo ken-ekihō dai34jou no kansenshō no shuruitoshiteshiteisurutō no seireitōnitsuite* [Cabinet Order to Designate New Coronavirus Infectious Disease as Article 34 Infectious Disease of the Quarantine Act], [http://dl.med.or.jp/dl-med/kansen/novel\\_corona/2019ken2\\_264.pdf](http://dl.med.or.jp/dl-med/kansen/novel_corona/2019ken2_264.pdf).

<sup>155</sup> *Id.* (noting that detention of suspected patients was stipulated as 336 hours from the beginning).

<sup>156</sup> See Nat’l Inst. of Infectious Diseases, *COVID-19 Infection Among Passengers on the Diamond Princess*, *supra* note 63.

<sup>157</sup> See *id.*

<sup>158</sup> See Hidetoshi Sotooka, *Diamond Princess-go de nanigaokiteitanoka* [What Was Happening on the Diamond Princess], J-CAST NEWS (Apr. 25, 2020), <https://www.j-cast.com/2020/04/25384952.html?p=all> (referring to a call for immediate testing and disembarkment).

provide them with any treatment for infection. Because the Diamond Princess was a British-registered cruise ship, Japan technically did not have jurisdiction over anything that happened on the ship.<sup>159</sup> Japan permitted entry to confirmed patients and passengers who became ill on board the ship to the hospitals according to the provisions of the Infectious Disease Prevention Act, but this was merely on humanitarian grounds. The appropriate country or entity responsible for passengers aboard a foreign ship during quarantine is still not entirely clear.<sup>160</sup>

Second, the capacity to provide medical testing in Japan was limited. As of February 12, the maximum number of people that could be screened for the new coronavirus at medical institutions in Japan was 300 per day.<sup>161</sup> Initially, the PCR testing for the new coronavirus, a unique and difficult testing procedure, was provided only by the National Institute of Infectious Diseases and affiliated local offices.<sup>162</sup> But starting February 5, some private institutions were also permitted to

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<sup>159</sup> See United Nations Convention on the Law of the Sea, art. 92(1), Dec. 10, 1982, 1833 U.N.T.S. 397 (“Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.”); *Id.* art. 94(1) (“Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.”); *Id.* art. 94(2) (“In particular every State shall . . . (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.”); *Id.* art. 94(3) (“Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard . . .”).

<sup>160</sup> *Cruise-sen de nanigaokita [What Happened on the Cruise Ship?]*, NHK (Mar. 4, 2020), <https://www.nhk.or.jp/politics/articles/feature/31092.html>. Confirmed patients received hospitalization and treatment that was consistent with the Infectious Disease Prevention Act but those who tested negative and were nonetheless were treated in hospitals did not receive treatment based on the statutory ground. Nevertheless, the Japanese government shouldered almost all costs of hospitalization and care for all patients.; *Cruise-senshudankansen: Gaikokujinjousensha no iryouhi 94% kouhikutu [New Coronavirus Infection: 94% of All Medical Costs for Foreign Passengers and Crews on the Cruise Ship Was Shouldered by the Government]*, NHK (Nov. 10, 2020), <https://www3.nhk.or.jp/news/html/20201110/k10012704771000.html>. It seems that there is no settled principle on who should bear the costs of such a response.

<sup>161</sup> *New Coronavirus Infectious Disease Control Headquarters (7th)*, PRIME MINISTER OF JAPAN AND HIS CABINET (Feb. 12, 2020), [https://www.kantei.go.jp/jp/98\\_abe/actions/202002/12corona.html](https://www.kantei.go.jp/jp/98_abe/actions/202002/12corona.html) [hereinafter *Headquarters (7th)*] (statement of Prime Minister Shinzo Abe).

<sup>162</sup> See Nat’l Inst. of Infectious Diseases, *PCR kensahō no kaihatsu to shien no jokyonitsuite [Development of the New Coronavirus (SARS-CoV-2) PCR Testing Method and Assistance to Wide Use]* (Mar. 11, 2020), <https://www.niid.go.jp/niid/ja/others/9478-covid19-16.html> [hereinafter *PCR Testing Method*]. All the costs for testing for the new coronavirus infection under the Infectious Disease Prevention Act are shouldered by the government and the government exclusively relied upon this institution to provide testing in order to improve the reliability of the testing.

provide testing.<sup>163</sup> Nevertheless, the ability to provide screenings was seriously limited. Although the government aimed to increase the capacity to 1,000 per day by February 18, 2020,<sup>164</sup> it was not certain whether such a rapid increase would be possible. Consequently, it would not be possible to test all passengers and crew members immediately even if they were to be released from the cruise ship.<sup>165</sup>

Third, the PCR testing is not perfectly reliable: a number of patients who initially tested negative for the new coronavirus later tested positive.<sup>166</sup> Taking one test was simply not reliable enough. Since all of the passengers and crew members aboard the Diamond Cruise had been travelling together in enclosed spaces, and since no measures were adopted to prevent further spread of virus on the ship before arrival, the likelihood that many of the passengers and crew members might be already infected was significantly higher.<sup>167</sup> If any of these individuals were released after one negative test, there would be a risk that persons who later came in close contact with them might become infected too. This was a high risk.<sup>168</sup>

Fourth, there was simply no establishment that could accommodate 3,711 passengers and crew members on the ground in Japan during the fourteen-day quarantine period.<sup>169</sup> Although the government was able to find one hotel with sufficient rooms for the Japanese evacuees from Wuhan, many of them became upset after arriving at the hotel when they learned that they would be forced to share rooms.<sup>170</sup> As a result, the government had to secure single rooms for all evacuees,

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<sup>163</sup> See *New Coronavirus Infectious Disease Control Headquarter (5th)*, PRIME MINISTER OF JAPAN AND HIS CABINET (Feb. 5, 2020), [https://www.kantei.go.jp/jp/singi/novel\\_coronavirus/th\\_siryou/gaiyou\\_r020205.pdf](https://www.kantei.go.jp/jp/singi/novel_coronavirus/th_siryou/gaiyou_r020205.pdf).

<sup>164</sup> *Headquarters (7th)*, *supra* note 161.

<sup>165</sup> Nevertheless, the government managed to increase the testing capacity to 3,000 per day by February 18, 2020. MHLW, *HLW Minister's Press Interview* (Feb. 17, 2020), <https://www.≠.go.jp/stf/seisakunitsuite/bunya/kakokaiken.html>.

<sup>166</sup> James Gallagher, *Are Coronavirus Tests Flawed?*, BBC (Feb. 13, 2020), <https://www.bbc.com/news/health-51491763>.

<sup>167</sup> Nat'l Inst. of Infectious Diseases, *COVID-19 Infection Among Passengers on the Diamond Princess*, *supra* note 63 (stating that in light of the date when the confirmed patients came to show symptoms, most of the passengers and crews were already infected before arrival).

<sup>168</sup> Motoko Rich & Eimi Yamamitsu, *Hundreds Released from Diamond Princess Cruise Ship in Japan*, N.Y. TIMES (Feb. 19, 2020), <https://www.nytimes.com/2020/02/19/world/asia/japan-cruise-ship-coronavirus.html> (reporting on the concern about the safety of allowing passengers to disembark even after two-week quarantine).

<sup>169</sup> Osamu Kunii, *Cruise-sen no kakuriwashippaidattanoka [Detention on the Cruise Ship: Was It a Failure?]*, NEWSWEEK (Mar. 4, 2020), [https://www.newsweekjapan.jp/stories/world/2020/03/post-92597\\_1.php](https://www.newsweekjapan.jp/stories/world/2020/03/post-92597_1.php) (pointing out the difficulties of finding a facility with sufficient capacity, arranging for a sufficient number of charter buses to transport the passengers, and ensuring that no passengers leave the detention facility during the entire detention period).

<sup>170</sup> City of Katsura, *Wuhan karanokikokusha no ichijitazaiukeirenitsuite [Acceptance of Evacuees from Wuhan for a Temporary Stay]*, <https://www.city.katsura.lg.jp/div/soumu/pdf/oshirase/oshirase.pdf>.

except for those who wanted to stay together as a family.<sup>171</sup> However, with respect to such a huge number of passengers and crew members on Diamond Princess, it was simply impossible for the government to find a sufficient number of vacant rooms in a secured and isolated facility in such a short amount of time.

Some of the countries arranged chartered airplanes to transport their citizens back to their home countries,<sup>172</sup> and eventually, after several weeks and by March 1, everyone on board disembarked after being tested.<sup>173</sup> By the time all passengers had disembarked, 712 people were found to be infected, and thirteen had died.<sup>174</sup> It is easy to criticize the Japanese government for mishandling its response to the Diamond Princess,<sup>175</sup> but there really was no easy answer to any of these difficult questions with respect to passengers and crew members on such a large-scale cruise ship destined to arrive in Japan. Moreover, as was already shown,<sup>176</sup> it was highly likely that a large number of passengers and crew members were already infected before arrival. At this point, it is still unclear how many patients became infected after arrival under quarantine. Furthermore, all the evacuees from Wuhan were told to stay in their hotel rooms for fourteen days.<sup>177</sup> It is not clear which situation is better: forcing people to stay in their hotel rooms or forcing them to stay in a luxurious cruise ship cabin? Besides, quarantine aboard the ship was perfectly lawful under the *Quarantine Act*<sup>178</sup> and under WHO guidelines.<sup>179</sup>

<sup>171</sup> *Wuhan kara no kikokusha, aibeyawakaishou e* [Evacuees from Wuhan: Shared Rooms Were Solved], ASAHI SHIMBUN (Jan. 30, 2020), <https://www.asahi.com/articles/ASN1Z6WKJN1ZUTIL03D.html>.

<sup>172</sup> *Bei seihi no charter kitouchaku: Cruise sen no beikokujinjoukyakukikoku e* [American Charter Plane Arrived: Bringing Back American Passengers on the Cruise Ship], NHK (Feb. 16, 2020), <https://www3.nhk.or.jp/news/html>.

<sup>173</sup> MHLW, *Yokohamakō de ken-eki chu no cruise sen no joukyaku/jouinnikakarushingata coronavirus kansenshō PCR kensakekkanitsuite* [PCR Testing Result for Passengers and Crew Members on Board of Cruise Ship Docked at the Yokohama Port] (Mar. 5, 2020), [https://www.mhlw.go.jp/stf/newpage\\_09997.html](https://www.mhlw.go.jp/stf/newpage_09997.html).

<sup>174</sup> See MHLW, *Current Situation*, *supra* note 10.

<sup>175</sup> Adam Miller, *What went wrong on the Diamond Princess? Why cruise ships are a hotbed for viral outbreaks*, CBC (Feb. 15, 2020), <https://www.cbc.ca/news/health/coronavirus-quarantine-cruise-ship-diamond-princess-1.5464975>.

<sup>176</sup> See Nat'l Inst. of Infectious Diseases, *COVID-19 Infection among Passengers on the Diamond Princess*, *supra* note 63.

<sup>177</sup> City of Katsuura, *supra* note 170.

<sup>178</sup> Quarantine Act, *supra* note 139, art. 16(1)-(2).

<sup>179</sup> WHO, *Key considerations for repatriation and quarantine of travelers in relation to the outbreak of novel coronavirus 2019-nCoV* (Feb. 11, 2020), [https://www.who.int/ith/Repatriation\\_Quarantine\\_nCoV-key-considerations\\_HQ-final11Feb.pdf?ua=1](https://www.who.int/ith/Repatriation_Quarantine_nCoV-key-considerations_HQ-final11Feb.pdf?ua=1). However, during the 14-day quarantine, ship crews kept working to provide necessary services to the passengers and, despite the instruction to wear protective suits, some had not. Moreover, since there were so many passengers, complete separation between contaminated areas and safe areas was very difficult. Furthermore, although confirmed patients were transferred to the hospitals, those who shared rooms with patients

#### **D. International Health Regulation**

There has also been a question as to whether the various measures adopted by countries in the world in response to the new coronavirus are violating the International Health Regulations. The WHO conferred the World Health Assembly with the power to adopt regulations “designed to prevent the international spread of disease.”<sup>180</sup> In 1969, the World Health Assembly adopted the International Health Regulations, which entered into force for all WHO Member States that did not affirmatively opt out of them within a specified time period.<sup>181</sup> In 1995, due to the expansion of international travel and trade, as well as the emergence and re-emergence of threats of international disease and other public health risks, the Forty-Eighth World Health Assembly called for a substantial revision of the 1969 Regulations. The current International Health Regulations were adopted by the Fifty-Eighth World Health Assembly on May 23, 2005 and entered into force on June 15, 2007.<sup>182</sup> The purpose and scope of the Regulations are outlined in Article 2: “The purpose and scope of these Regulations are to prevent, protect against, control and provide a public health response to the international spread of disease *in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade*”<sup>183</sup> Article 3 summarizes the four principles which are to guide the conduct of member states:

The implementation of these Regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons.

The implementation of these Regulations shall be guided by the Charter of the United Nations and the Constitution of the World Health Organization.

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were regarded as close contacts and subject to a 14-day quarantine, but it looks like total separation among passengers was not strictly enforced. As a result, there is surely a possibility that the number of infected patients increased during quarantine. There were at least two government officials working on the ship who were infected during their shifts, which is proof that there must have been something wrong with the quarantine. MHLW, *HLW Minister's Press Interview* (Feb. 20, 2020), [https://www.mhlw.go.jp/stf/kaiken/daijin/0000194708\\_00212.html](https://www.mhlw.go.jp/stf/kaiken/daijin/0000194708_00212.html).

<sup>180</sup> Constitution of the World Health Organization, art. 21, July 22, 1946, 14 U.N.T.S. 185, [https://www.who.int/governance/eb/who\\_constitution\\_en.pdf](https://www.who.int/governance/eb/who_constitution_en.pdf).

<sup>181</sup> World Health Organization, *International Health Regulations (1969)* (3d. ed. 1983), <https://apps.who.int/iris/bitstream/handle/10665/96616/9241580070.pdf>.

<sup>182</sup> World Health Organization, *International Health Regulations (2005)*, <https://apps.who.int/iris/bitstream/handle/10665/246107/9789241580496-eng.pdf>.

<sup>183</sup> *Id.* art. 2 (emphasis added).

The implementation of these Regulations shall be guided by the *goal of their universal application for the protection of all people of the world* from the international spread of disease.

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to legislate and to implement legislation in pursuance of their health policies. In doing so they should uphold the purpose of these Regulations.<sup>184</sup>

Further, with respect to the implementation of health measures by each member state, Articles 42 and 43 additionally require that:

Health measures taken pursuant to these Regulations shall be initiated and completed without delay and applied in a transparent and non-discriminatory manner.<sup>185</sup>

1. These Regulations shall not preclude States Parties [sic] from implementing health measures, in accordance with their relevant national law and obligations under international law, in response to specific public health risks or public health emergencies of international concern, which:

- (a) achieve the same or greater level of health protection than WHO recommendations; or
- (b) are otherwise prohibited under Article 25, Article 26, paragraphs 1 and 2 of Article 28, Article 30, paragraph 1(c) of Article 31 and Article 33,

provided such measures are otherwise consistent with these Regulations.

*Such measures shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection.*

2. In determining whether to implement the health measures referred to in paragraph 1 of this Article or additional health measures under paragraph 2 of Article 23, paragraph 1 of Article

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<sup>184</sup> *Id.* art. 3 (emphasis added).

<sup>185</sup> *Id.* art. 42.

27, paragraph 2 of Article 28 and paragraph 2(c) of Article 31, States Parties *shall base their determinations upon*:

- (a) *scientific principles*;
- (b) *available scientific evidence of a risk to human health*, or where such evidence is insufficient, the available information including from WHO and other relevant intergovernmental organizations and international bodies; and
- (c) any available specific guidance or advice from WHO.<sup>186</sup>

Many health law scholars believe, therefore, that the entry restrictions for travelers from China adopted by some countries, such as the United States and Australia, are unjustified by scientific principles because more effective measures exist that countries can take to protect their citizens.<sup>187</sup> These health law scholars also argue that such measures violated international regulation.<sup>188</sup>

## V. VACCINATION SYSTEM

### A. Japan's Vaccination Programs

The most effective countermeasure against a contagious disease is probably vaccination. If a vaccine is available, it should be made available to the public, preferably for free, and in some cases, it should be made mandatory to get a vaccine. At the time of this article, health experts have not developed an effective vaccine against the new coronavirus infection. However, many countries are rushing to develop a vaccine. If such a vaccine is developed, could the government provide vaccinations for free or even make vaccinations mandatory for the public?

Japan offers various vaccinations but none of them are mandatory. The *Vaccination Act* divides various vaccinations into two categories: routine vaccinations and ad hoc vaccinations.<sup>189</sup> In order to distinguish these two types of vaccinations, it divides infectious diseases into two different classes: class A infectious diseases and class B infectious diseases.<sup>190</sup> Class A infectious diseases include diphtheria, whooping cough, polio, measles, rubella, Japanese encephalitis, tetanus, tuberculosis, HPV, and other infectious diseases which are “stipulated by

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<sup>186</sup> *Id.* art. 43 (emphasis added).

<sup>187</sup> See Roojin Habibi et al., *Do Not Violate the International Health Regulations During the COVID-19 Outbreak*, LANCET (Feb. 13, 2020), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30373-1/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30373-1/fulltext).

<sup>188</sup> *See id.*

<sup>189</sup> Yobousesshuhō [Vaccination Act], Law No. 68 of 1948.

<sup>190</sup> *Id.*

cabinet order as diseases against which vaccinations are deemed a required necessity to prevent individuals from developing the disease or the condition from getting worse, and to contribute to preventing the disease from spreading.”<sup>191</sup> Class B infectious diseases include influenza and others infectious diseases that are “stipulated by cabinet order as diseases against which vaccinations are deemed a required necessity to prevent individuals from developing the disease or the condition from getting worse, and to contribute to preventing the disease from spreading.”<sup>192</sup> Routine vaccinations must be offered to residents by the municipal government for the prevention of class A and stipulated class B infectious diseases and are provided for by cabinet order by designating a date or a period.<sup>193</sup> Ad hoc vaccinations can be offered when necessary to prevent the spread of class A and class B infectious diseases stipulated by the MHLW regulation.<sup>194</sup> The government recommends routine vaccinations as well as ad hoc vaccinations for class A infectious diseases.<sup>195</sup> The public must endeavor to undergo these vaccinations,<sup>196</sup> but there is no legal mandate for the public to receive vaccinations and there are no sanctions imposed if the person does not endeavor to get these vaccinations. Those who become ill or disabled as a result of routine or ad hoc vaccinations will be compensated.<sup>197</sup> Routine and ad hoc vaccinations under the *Vaccination Act* are free of charge.<sup>198</sup>

Japan used to require vaccinations.<sup>199</sup> The original *Vaccination Act*, enacted in 1948, mandated twelve types of vaccines and imposed criminal punishment on those who failed to comply.<sup>200</sup> As a result of the law, infectious diseases drastically decreased in Japan.<sup>201</sup> Yet, with growing concerns related to the side effects of vaccinations, in 1976, criminal punishment was removed and in 1994, all legal mandates were replaced with a mere duty to endeavor to undergo a vaccination.<sup>202</sup>

Aside from the vaccinations listed under the *Vaccination Act*, all other vaccinations are voluntary. Patients must pay out-of-pocket for the costs of those voluntary vaccinations. Although there is a separate compensation system for

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<sup>191</sup> *Id.* art. 2(2).

<sup>192</sup> *Id.* art. 2(3).

<sup>193</sup> *Id.* art. 5(1).

<sup>194</sup> *Vaccination Act*, *supra* note 188, art. 6(1).

<sup>195</sup> *Id.* art. 8(1).

<sup>196</sup> *Id.* art. 9(1).

<sup>197</sup> *Id.* art. 16.

<sup>198</sup> *Id.* art. 25(1), 26(1) & 27(1); see MHLW, *Yobouseishuseidonitsuite [Vaccination System]*, <https://www.mhlw.go.jp/>.

<sup>199</sup> *Nihon no wakuchinseisaku no hensen [History of Vaccination Policy in Japan]*, RHRMA, [http://www.phrma-jp.org/wordpress/wp-content/uploads/old/library/the\\_value\\_of\\_vaccine/the\\_value\\_of\\_vaccine04.pdf](http://www.phrma-jp.org/wordpress/wp-content/uploads/old/library/the_value_of_vaccine/the_value_of_vaccine04.pdf) (last visited Mar. 12, 2021).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

patients who suffer illness or disability because of voluntary vaccinations, since it is voluntary, the immunization rate is very low.<sup>203</sup>

Japan is often criticized for its reluctance to mandate vaccinations.<sup>204</sup> Some countries require that all children be vaccinated before going to school,<sup>205</sup> but there is no such requirement in Japan. As such, many vaccinations that are widely used and proven to be effective are only offered in Japan as a voluntary measure, thus reducing the number of people who are getting vaccinated and thereby facilitating the spread of infectious diseases.<sup>206</sup> As a result, there are sometimes significant outbreaks of infectious diseases, such as measles, even though the measles vaccination is provided as a routine vaccination for free and the government recommends it.<sup>207</sup> The HPV vaccination, for example, is extremely safe, according to the WHO, and has no causal connection between pain or motor dysfunction, as some data from Japan suggests.<sup>208</sup> Although it is still listed as a recommended routine vaccination, the Japanese government has stopped recommending the vaccine because of some potential side effects, and it is now up to individual parents to decide whether they want their children vaccinated.<sup>209</sup> International medical communities are strongly urging Japan to reconsider its reluctance to actively support the HPV vaccine.<sup>210</sup> So far, Japan has not decided to recommend, let alone, mandate the vaccine.<sup>211</sup>

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<sup>203</sup> The percentage of people among the applicable population who were vaccinated in 2017 for measles was 93.4% and it was 48.2% for influenza. See MHLW, *Teiki no yobousesshujisshishasu* [Number of Persons who Received Routine Vaccination], <https://www.mhlw.go.jp/topics/bcg/other/5.html> (last visited Feb. 18, 2020).

<sup>204</sup> *Wakuchinkoushinkoku, nihon: Kadaiwa* [Japan is Poor Vaccination Country: What are the Agendas?], ASAHI SHIMBUN (Jun. 17, 2018), <https://www.asahi.com/articles/ASL6J7X9QL6JUBQU013.html> [hereinafter *Japan Is Poor Vaccination Country*].

<sup>205</sup> Erin Walkinshaw, *Mandatory Vaccinations: The International Landscape*, 183 CANADIAN MED. ASS'N. J. E1167, E1168 (2011); *Growing Up with Vaccines: What Should Parents Know?*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/growing/school-vaccinations.html> (last visited Feb. 18, 2020).

<sup>206</sup> *Japan is Poor Vaccination Country*, *supra* note 204.

<sup>207</sup> See MHLW, *Mashin no hasseijoukyo* [Measles Outbreak], [https://www.mhlw.go.jp/file/05-Shingikai-10601000-Daijinkanboukouseikagakuka-Kouseikagakuka/siryol\\_1.pdf](https://www.mhlw.go.jp/file/05-Shingikai-10601000-Daijinkanboukouseikagakuka-Kouseikagakuka/siryol_1.pdf).

<sup>208</sup> World Health Organization, *Safety Update of HPV Vaccines (2017)*, [https://www.who.int/vaccine\\_safety/committee/topics/hpv/June\\_2017/en/](https://www.who.int/vaccine_safety/committee/topics/hpv/June_2017/en/).

<sup>209</sup> MHLW, *HPV Vaccine Q&A*, [https://www.mhlw.go.jp/bunya/kenkou/kekkaku-kansenshou28/qa\\_shikyukeigan\\_vaccine.html](https://www.mhlw.go.jp/bunya/kenkou/kekkaku-kansenshou28/qa_shikyukeigan_vaccine.html) (last updated June 2013).

<sup>210</sup> Hans Jürgen Dornbusch et al., *Human papillomavirus vaccination crisis in Japan*, 51 J. OF PEDIATRICS & CHILD HEALTH 1146 (2015).

<sup>211</sup> As a result, the percentage of women who received the HPV vaccination is less than one percent and it is estimated that 3,400 to 3,800 twelve-year-old girls will suffer from cervical cancer during their lifetime and 700 to 800 will die. Press Release, Hokkaido Univ. (Feb. 18, 2020), <https://www.hokudai.ac.jp/news/2020/02/hpv120207080.html>.

## **B. Vaccination for the New Coronavirus**

Since no vaccination has been developed yet for the new coronavirus at the time of this writing, there is only speculation as to what the government will do once it is developed. As previously noted, it is very difficult to mandate vaccinations in Japan.<sup>212</sup> If the government imposes mandatory vaccinations, it will certainly face strong opposition by some members of the public. Therefore, unless the vaccination is completely free from any harmful side effects, it will be extremely difficult for the government to mandate the vaccination.

If it is mandated, however, it is very likely that some people would file suit against the government to halt the vaccinations, insisting on possible negative side effects. Although there is no court decision directly addressing the constitutionality of mandatory vaccinations, at least one court has held that vaccinations that result in harmful side effects are illegal and entitle a victim to damages from the government, not a just compensation for lawful deprivation of private property for public goods.<sup>213</sup> On the other hand, some commentators question whether mandated vaccination could be justified in the name of public welfare, believing that mandatory vaccination deprive the self-autonomy of an individual to decide whether to receive a vaccination and that there is no public safety interest to justify mandatory vaccination because the unvaccinated people do not infringe the rights and liberties of other persons.<sup>214</sup> These commentators also point to the availability of a less restrictive alternative, for example, mandatory isolation, which renders mandatory vaccination unnecessary.<sup>215</sup>

However, it is well known that some people who become infected with a disease can infect other people without showing any symptoms (asymptomatic transmission). Furthermore, some infectious diseases are so contagious that, once the confirmed patient is found, it is too late to contain the infection. Vaccinations can prevent infections in advance and can be more effective. It is also well known that, in order to prevent the outbreak and spread of an infectious disease, a substantial proportion of the population needs to be vaccinated. In other words, herd immunity is necessary.<sup>216</sup> If a large number of people are permitted to refuse

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<sup>212</sup> See *History of Vaccination Policy in Japan*, *supra* note 199; *Japan is Poor Vaccination Country*, *supra* note 204.

<sup>213</sup> Tokyo kōtōsaibansho [Tokyo high court] Dec. 18, 1992, 1984 (ne) 1517, 45:3 Kosai hanreishu 212.

<sup>214</sup> Isao Takenaka, *Yobōsesshuseido no gōkensei to yobōsesshukenhōgaimitaisurukēnpojō no kyūsaiken* [Constitutionality of the Vaccination System and the Constitutional Remedies against the Health Side Effects from Vaccination], 60 DOSHISHA HŌGAKU 1745, 1757-59 (2008).

<sup>215</sup> *Id.* at 1759.

<sup>216</sup> Gypsyamber D'Souza & David Dowdy, *What is Herd Immunity and How Can We Achieve It With COVID-19?*, JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH (Apr. 10, 2020), <https://www.jhsph.edu/covid-19/articles/achieving-herd-immunity-with-covid19.html>.

vaccinations, then it is impossible to achieve herd immunity and the infection will continue to spread. Therefore, mandating vaccinations seems to be vital for preventing the spread of infectious diseases. In that sense, if it is necessary to secure herd immunity, mandatory vaccination should be justified.

Of course, the government must do its best to ensure that the vaccination is safe and does not cause any serious side effects. In the end, however, the government must weigh the benefits of achieving herd immunity against the costs of negative side effects and strike an appropriate balance. Therefore, anyone who suffers an illness or disability as a result of vaccination must accept it for the sake of public interest, but they should be eligible to claim just compensation from the government. The government will need to establish a compensation system to alleviate the potential harms caused by vaccinations in addition to making best efforts to avoid any illness or disability to be caused by the vaccination.

Moreover, if a person refuses the vaccine for compelling health reasons, those reasons should be recognized. No one should be forced to undergo vaccination if there are clear health risks. Medical professionals providing vaccinations should also check the patient's health to ensure that the vaccination is safe for that patient and, if they are not confident that it is safe, they should not provide the vaccine. But it is doubtful whether any other refusal should be permitted.<sup>217</sup> Even religious freedom is not absolute and could be subject to restriction for the public welfare in Japan. Mandatory vaccination should be justified even against the claim of religious freedom.

## V. TREATMENT SYSTEM

### A. Treatment of Patients

To promote measures that prevent contagious diseases from spreading, the HLW Minister is mandated to establish a "Fundamental Guideline" on infectious disease prevention.<sup>218</sup> Local governors are also required to establish and implement a prevention plan.<sup>219</sup> In order to respond to different types of infectious diseases, both the HLW Minister and the local governors need to certify certain hospitals as qualified to accept hospitalization and treatment.

In order to treat patients with category 1 infectious diseases, hospitals must be designated by a local governor as a "Designated Medical Institution for Class 1

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<sup>217</sup> For a discussion of the recent controversy over the religious exemption in the United States, see Marie Killmond, *Note: Why Is Vaccination Different, A Comparative Analysis of Religious Exemptions*, 117 COLUM. L. REV. 913 (2017), and Sarah Pulliam Bailey, *Some Anti-Vaccination Parents Cite Religious Exemptions; Measles Outbreaks Could Change That*, WASH. POST (Feb. 21, 2019), <https://www.washingtonpost.com/religion/2019/02/21/some-anti-vaccination-parents-cite-religious-exemptions-measles-outbreaks-could-change-that/>.

<sup>218</sup> *Infectious Disease Prevention Act*, *supra* note 46, art. 9(1).

<sup>219</sup> *Id.* art. 10(1).

Infectious Diseases” and must be selected from the list of hospitals which satisfy the criteria set by the HLW Minister.<sup>220</sup> Similarly, hospitals must be designated by a local governor as a “Designated Medial Institution for Class 2 Infectious Diseases” to treat patients with category 2 infectious diseases or new influenza.<sup>221</sup> In order to treat patients with “new infectious diseases,” as well as category 1 or category 2 infectious diseases, hospitals must be designated by the HLW Minister, with consultation of the local governor, as a “Designated Medical Institution for Specified Infectious Diseases.”<sup>222</sup> Together with “Designated Medical Institutions for Tuberculosis,” which treat patients with tuberculosis,<sup>223</sup> these medical institutions are generally called “Designated Medical Institutions for Infectious Diseases.”<sup>224</sup> The medical costs for diagnosis, treatment, and hospitalization, according to the provisions of the *Infectious Disease Prevention Act*, are all shouldered by the local governments.<sup>225</sup>

The central and local governments are also required to adopt necessary measures to enable patients with infectious diseases to receive high-quality and appropriate treatment.<sup>226</sup> The public must endeavor to obtain accurate knowledge on infectious diseases and to exercise vigilance to prevent its spread, while at the same time respecting the human rights of infected patients.<sup>227</sup> Physicians and other medical professionals must cooperate in the measures implemented by the central and local governments for the prevention of infectious diseases, and must strive to offer high-quality and appropriate treatment to infected patients, recognizing the circumstances under which infected patients are placed, and to obtain their consent by providing appropriate explanations about the medical treatment.<sup>228</sup>

As of April 1, 2019, four hospitals were certified as “Designated Medical Institutions for Infectious Diseases;” fifty-five hospitals were certified as “Designated Medial Institutions for Class 1 Infectious Diseases;” and 351 hospitals were certified as “Designated Medial Institutions for Class 2 Infectious Diseases.”<sup>229</sup> In the “Designated Medial Institutions for Class 2 Infectious Diseases,” there were a total of 1,758 hospital beds available.<sup>230</sup>

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<sup>220</sup> *Id.* art. 6(14), 38(2).

<sup>221</sup> *Id.* art. 6(15), 38(2).

<sup>222</sup> *Id.* art. 6 (13), 38(1).

<sup>223</sup> *Infectious Disease Prevention Act*, *supra* note 46, art. 6(16).

<sup>224</sup> *Id.* art. 6(12).

<sup>225</sup> *Id.* art. 37(1).

<sup>226</sup> *Id.* art. 3(1).

<sup>227</sup> *Id.* art. 4(1).

<sup>228</sup> *Infectious Disease Prevention Act*, *supra* note 46, art. 5(1).

<sup>229</sup> MHLW, *Kansenshōshiteiryōkikan no shiteijoukyō* [Certified Infectious Disease Designated Medical Institutions] (Apr. 1, 2019), <https://www.mhlw.go.jp/bunya/kenkou/kekkaku-kansenshou15/02-02.html>.

<sup>230</sup> *Id.*

## **B. Treatment of New Coronavirus Patients**

Initial countermeasures against the new coronavirus, adopted on February 13, 2020 by the Headquarters, were focused on border restrictions.<sup>231</sup> They were designed to prevent the entry of the new infectious disease. Therefore, aside from the border control issues, the government only urged the increase of the testing capacity, facilitation of the development of much easier testing equipment and development of treatment.<sup>232</sup> It also urged for the increased production of masks and pointed out the necessity of providing masks to medical professionals who need them.<sup>233</sup>

Doctors and hospitals have started advising potential patients to notify them in advance if they intend to visit a “Designated Medical Institution for Infectious Diseases” and to take precautionary measures before coming to the hospital, such as using face masks and avoiding the use of public transit to travel to the hospital.<sup>234</sup> The general hospitals and clinics are supposed to refer the possible patients to expert doctors in the designated medial institutions for infectious diseases. The growing number of infected physicians indicates, however, that hospitals had been seeing patients without any knowledge that the patients might be infected and that the precautionary measures they had implemented were not sufficient.<sup>235</sup> Moreover, there are some medical professions at the designated infectious disease facilities who were possibly infected from contact with infected patients.<sup>236</sup> This would mean that the protective measures for medical professionals might be insufficient or improperly followed even in hospitals dedicated to treatment of infectious disease patients.

Part of the reason for the spread of virus among medical professions is the testing system adopted by the Japanese government. Initially, the PCR testing capacity was extremely limited and there were serious hurdles for getting access to testing.<sup>237</sup> As a result, many infected persons were not able to get access to the PCR testing and were not properly diagnosed. Moreover, most of the patients, even when

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<sup>231</sup> *Emergency Countermeasures*, *supra* note 54.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> Tokyo Metro. Infectious Disease Surveillance Ctr., *Shingata coronavirus kansenshō Q&A [Q&A on new Coronavirus Infectious Disease]*, <http://idsc.tokyo-eiken.go.jp/diseases/2019-ncov/qa/qa2/> (last visited Mar. 24, 2021).

<sup>235</sup> *Iryojujisha 153nin no kansenhanmei: In-naikanseimohassei [153 Medical Professionals Were Infected: Some Community Infections inside Hospitals]*, MAINICHI SHIMBUN (Apr. 4, 2020), <https://mainichi.jp/articles/20200404/k00/00m/040/127000c> (reporting that at least 153 medical professionals were infected, and that some of those infections were the result of community spread inside the hospitals).

<sup>236</sup> *Shiteikikan no ishikansen: Iryotaiseiseibigakyumu [Doctor at the Designated Infectious Disease Facility Was Infected: Urgent Need to Intensify the Preparation for the Infection]*, TOKYO SHIMBUN (Apr. 7, 2020), <https://www.tokyo-np.co.jp/article/saitama/list/202004/CK2020040702000175.html>.

<sup>237</sup> *See Headquarters (7th)*, *supra* note 161; *infra* notes 322–23, 345–49.

they are infected, only show mild symptoms, like the common cold.<sup>238</sup> Therefore, the doctors could not tell whether the patients were suffering from new coronavirus infection and patients could transmit their disease to others, including doctors.<sup>239</sup> But this cannot be an excuse for a failure to introduce sufficient protective measures for medical professions.

### **C. Human Rights Issues**

In Japan, there are several human rights issues implicated by the COVID-19 pandemic, which are quite similar to other countries in the world.

One important issue raised during the pandemic is possible discrimination against patients and their family members. Once it is confirmed that a patient has been infected with the new coronavirus, they will be hospitalized but their family or close contacts need to be tested and isolated. Even if the family members test negative and are cleared, it is likely that other people will avoid contact with them. Even after the patient is released, it is likely that the patient and their family will be subject to discrimination. It is as though they committed a wrongdoing. Unfortunately, there is no civil rights or human rights legislation which bans unreasonable discrimination among private persons or corporations. Even if there were, it is likely that the discrimination against patients of COVID-19 or their families would not be included in the prohibited grounds of discrimination. The only available remedy against unreasonable discrimination is a civil suit for tort under the Civil Code,<sup>240</sup> where the plaintiff can ask for damage awards; but this is quite costly and time consuming and is not particularly effective for the average citizen.

Moreover, during the panic of the new coronavirus infection, some people have refused service to Chinese people. Some restaurants, for example, posted signs that read “No Chinese Please,” which triggered huge backlash against such discrimination.<sup>241</sup> Indeed, since not all Chinese people are infected with the new coronavirus and non-Chinese people can also be infected with the infection, the exclusion of all and only Chinese people is highly unreasonable. In other countries, there are reports that this discrimination is directed to people of Asian descent, not just Chinese people.<sup>242</sup> Of course, such racial discrimination is profoundly

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<sup>238</sup> See *Symptoms of Coronavirus*, *supra* note 28.

<sup>239</sup> See Rabin, *supra* note 32.

<sup>240</sup> MINPŌ [Civ. C.] art. 709 (Japan).

<sup>241</sup> Aristos Georgiou, *Japanese Shop Owner Tries to Ban Chinese Tourist over Coronavirus Fears*, NEWSWEEK (Jan. 22, 2020), <https://www.newsweek.com/japanese-shop-owner-ban-chinese-tourists-coronavirus-1483420>.

<sup>242</sup> Ed Park, *Confronting Anti-Asian Discrimination During the Coronavirus Crisis*, NEW YORKER (Mar. 17, 2020), <https://www.newyorker.com/culture/culture-desk/confronting-anti-asian-discrimination-during-the-coronavirus-crisis>; Lauren Aratani,

unreasonable and disturbing. Such racial discrimination suggests the urgent necessity of passing civil rights legislation or human rights legislation which bans such unreasonable private discrimination.

Furthermore, serious discrimination is also directed to medical professionals who are dedicating their lives to treatment of the infected patients of COVID-19 and their families. Some of the doctors and nurses complain that their children were excluded from childcare or that they were refused taxi service.<sup>243</sup> Many people simply fear that they are much more prone to COVID-19 infection because they are treating the patients and many people tend to avoid them to prevent transmission. The HLW Minister expressed extreme outrage against such unreasonable discrimination.<sup>244</sup> Such an unreasonable discrimination may be difficult to regulate under the traditional civil rights or human rights legislation, but there definitely is a need to protect these medical professionals and their families from unreasonable discrimination.

#### **D. Privacy Issues**

A further issue which was raised by patients during treatment was concerns over their privacy. The government, hospitals, clinics, and medical professions are mandated to respect the privacy of patients.<sup>245</sup> Medical information is highly sensitive personal information and should not be released by the government.<sup>246</sup> On the other hand, sharing some of this information with the public may be vital for the prevention of further spread of the infection.<sup>247</sup> The Japanese government has attempted to strike an appropriate balance between the privacy rights of patients and

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*'Coughing While Asian': Living in Fear as Racism Feeds off Coronavirus Panic*, GUARDIAN (Mar. 24, 2020), <https://www.theguardian.com/world/2020/mar/24/coronavirus-us-asian-americans-racism>.

<sup>243</sup> *Kangoshi no ko, hoikuengakyohi [Nurse's Child Was Refused by Nursery]*, NHK (Apr. 18, 2020, 5:19 AM), <https://www3.nhk.or.jp/news/html/20200418/k10012393931000.html>; *Ishirakansen no byouin, shokuinnitakusijoushakyohinadosabetsu [Staffs of the Hospitals where Doctors Were Infected Were Refused Taxi Service]*, NHK (Mar. 23, 2020, 9:37 PM), <https://www3.nhk.or.jp/news/html/20200323/k10012345941000.html>.

<sup>244</sup> MHLW, *Summary of Minister Kato's Interview* (May 1, 2020), [https://www.mhlw.go.jp/stf/kaiken/daijin/0000194708\\_00239.html](https://www.mhlw.go.jp/stf/kaiken/daijin/0000194708_00239.html).

<sup>245</sup> *Infectious Disease Prevention Act*, *supra* note 46, art. 16(2); MHLW, *Iryou/kangokankeijigyoushaniokerukojinjoho no tekisetsunatoriatsukainotameno guideline [Guideline for the Proper Handling of Personal Information by Medical Professionals]*, <https://www.mhlw.go.jp/topics/bukyoku/seisaku/kojin/dl/170805-11a.pdf> (Sept. 17, 2010).

<sup>246</sup> *Id.*

<sup>247</sup> Personal Information Protection Commission, *Shingata coronavirus kansensho no kakudaiboushi wo mokutekitoshitakojin data no toriatsukainitsuite [Handling of personal data for the purpose of preventing the spread of the new coronavirus infections]*, [https://www.ppc.go.jp/news/careful\\_information/covid-19/](https://www.ppc.go.jp/news/careful_information/covid-19/) (last visited Mar. 24, 2021).

their families and the public's right to know the identity of the infected patients and where they visited after infection.

So far, the government has refused to disclose the identity of patients and the details of their infection or medical condition. In most cases, however, the government has revealed the sex, approximate age and place of residence of the patients (only municipality or local area).<sup>248</sup> Notwithstanding, the public is still interested in knowing where the patient worked or whether the patient had any close contact with other people so that they can know whether there was a possibility of infection. As a result, the public was frustrated when the government refused to disclose even the sex, approximate age, or place of residence of some patients.<sup>249</sup> In some cases, the government was forced to disclose the names of the places where the patients were working: in one case, a physician working in a hospital became infected and continued seeing patients after having a fever and, in another case, a junior high school teacher was confirmed to be infected and continued teaching classes after feeling a fever.<sup>250</sup> The same issues arose, not so long ago, when Japan faced a measles outbreak and the government was forced to disclose details relating to where patients visited or went.<sup>251</sup> This time, however, it appears that the government generally has given priority to patients' privacy rights.

Currently, there are no concrete guidelines with respect to disclosing patients' personal information, and the government's response is quite ad hoc and unprincipled.<sup>252</sup> The government may need to reexamine its approach to ensure that

<sup>248</sup> MHLW, *Koushuseiseijōtokunijūyūdearukansenshō no kokunaihatsujireigahasseishitabaainiokerujouhou no kouhyounikakawarukihonshishinnitsuite (tatakidai)* [Basic Guideline for Disclosure of Information When the First Patient of Serious Infectious Disease Occurred in Japan (draft)], <https://www.mhlw.go.jp/content/10901000/000352454.pdf>.

<sup>249</sup> *Yokohama-shi, kansensha no seibetsu/nendai wo mikouhyō* [Yokohama City Refused to Disclose the Sex and Rough Age of the Patients], ASAHI SHIMBUN (Feb. 22, 2020), <https://www.asahi.com/articles/ASN2Q3DK0N2PULOB00J.html>.

<sup>250</sup> Gunma Prefecture, *Shingata coronavirus kansenshōkanja no hassei* [Patients Infected with New Coronavirus Were Found] (Mar. 14, 2020), [https://www.pref.gunma.jp/chiji/z90g\\_00087.html](https://www.pref.gunma.jp/chiji/z90g_00087.html) (disclosing the name of the hospital the infected physician was working at); *Shingata corona Akaiwa no chugakukyōuingakansen* [Junior High School Teacher in Akaiwa Was Infected], SANYO SHIMBUN (Aug. 12, 2020), <https://www.sanyonews.jp/article/1041082> (disclosing the name of junior high school the patient was teaching).

<sup>251</sup> *Hashika no kouhyōjouhou, jichitaidesa* [Imbalance among Municipalities on Publication of the Measles Patients' Personal Information], MAINICHI SHIMBUN (Feb. 16, 2019), <https://mainichi.jp/articles/20190216/k00/00m/040/170000c>.

<sup>252</sup> The MHLW notified the new guideline for disclosure of information when the category 1 infectious disease patient was found in Japan. MHLW, *Ichiruikansenshōgakokunai de hasseshitabaainiokerujouhou no kouhyōnikakawarukihonshishin* [Basic Guideline for Disclosure of Information When the Category 1 Infectious Disease Occurred in Japan] (Feb. 27, 2020), <https://www.mhlw.go.jp/content/000601059.pdf>. It must be noted that this guideline is filled

it is striking the proper balance between the prevention of infectious diseases and the protection of privacy.

## VI. GOVERNMENT RESPONSE TO THE NEW CORONAVIRUS

### A. Additional Countermeasures

Despite the various countermeasures implemented to contain the spread by many countries in the world, the new coronavirus quickly spread all over the world. The WHO declared the COVID-19 a pandemic on March 11, 2020.<sup>253</sup> By November 24, 2020, the number of confirmed patients in China reached 92,829, with a death toll of 4,749, and the world-wide number of confirmed patients reached 58,712,326, with 1,388,528 deaths as of November 24.<sup>254</sup> Italy was hard hit by the new coronavirus, with 1,4314,795 confirmed cases and 50,453 deaths.<sup>255</sup> Spain was also hit hard, with 1,556,730 confirmed cases and 42,619 deaths.<sup>256</sup> The United Kingdom was also hit hard, with 1,527,499 confirmed cases and 55,230 deaths.<sup>257</sup> Europe was declared to be “epicenter” of the pandemic in March.<sup>258</sup> Now, it looks

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with ambiguities and that it looks like there are no similar guidelines for other infectious diseases. Nevertheless, the MHLW advised that this guideline should be referenced with respect to COVID-19 patients as well. MHLW, *Shingata coronavirus kansenshōgahasseishitabaainiokerujouhou no kouhyōnitsuite* [Publication of Information as to the New Coronavirus Patients] (Jul. 28, 2020), <https://www.mhlw.go.jp/content/000652973.pdf>.

<sup>253</sup> World Health Organization, *WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19 - 11 March 2020* (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

<sup>254</sup> See *China Situation*, *supra* note 5; *WHO COVID-19 Dashboard*, *supra* note 7. There are some doubts on the accuracy of the Chinese data since many suspect the information manipulation by the Chinese government; Scott N. Romaniuk & Tobias Burgers, *Can China’s COVID-19 Statistics Be Trusted?*, *DIPLOMAT* (Mar. 26, 2020), <https://thediplomat.com/2020/03/can-chinas-covid-19-statistics-be-trusted/>.

<sup>255</sup> World Health Organization, *Coronavirus Disease (COVID-19) Dashboard for Italy*, <https://covid19.who.int/region/euro/country/it> (last visited Nov. 24, 2020).

<sup>256</sup> World Health Organization, *Coronavirus Disease (COVID-19) Dashboard for Spain*, <https://covid19.who.int/region/euro/country/es> (last visited Nov. 24, 2020).

<sup>257</sup> World Health Organization, *Coronavirus Disease (COVID-19) Dashboard for the United Kingdom*, <https://covid19.who.int/region/euro/country/gb> (last visited Nov. 24, 2020).

<sup>258</sup> World Health Organization, *Opening Remarks by Director-General to the Media* (Mar. 13, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-mission-briefing-on-covid-19---13-march-2020>.

like that the United States is faced with a nightmare, with 12,119,654 confirmed cases and 254,798 deaths.<sup>259</sup>

Japan also saw the gradual increase of infected patients. As of November 24, 2020, the number of confirmed domestic patients reached a total of 133,929, with a death toll of 1,989.<sup>260</sup> The gradual spread of the new coronavirus has already significantly impacted the lives of people living in Japan. Despite the increased production in face masks, fears over the spread of the disease have caused masks shortages.<sup>261</sup> People are avoiding going out or eating in restaurants, are cancelling many tour reservations, and large-scale events are gradually being called off.<sup>262</sup> Many people were afraid of going out, especially to schools, workplaces, concerts or gatherings. Coronavirus rumors have created panic, causing people to rush to superstores and convenience stores to buy toilet papers, tissue papers, and diapers.<sup>263</sup> As a result, the national and local governments of Japan have been forced to introduce additional countermeasures to prevent further spread of the disease and to stabilize social life.

On February 25, 2020, following the Headquarters' meeting, Prime Minister Shinzo Abe advised the public to stay home if they were not feeling well or experiencing mild symptoms of a cold, and to avoid visits to hospitals.<sup>264</sup> The Prime Minister also asked companies and business operators to allow their employees to stay home if they were feeling unwell and to consider the remote work.<sup>265</sup> The Prime Minister also advised general hospitals to be prepared to see an increased number of patients, to prepare respirators and beds for patients, and to maximize the anti-infection measures inside the hospitals.<sup>266</sup> On February 26, the

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<sup>259</sup> World Health Organization, *Coronavirus Disease (COVID-19) Dashboard for the United States*, <https://covid19.who.int/region/amro/country/us> (last visited Nov. 24, 2020).

<sup>260</sup> See MHLW *New Coronavirus Infection: Current Infection Status*, *supra* note 9.

<sup>261</sup> *Mask yodokoni?: Shu ichiokumai no full seisan demo shinausugatsudoku [Where is Mask?: Despite the Full Production of 100 Million Mask per a Week, Still It Is Short]*, ASAHI SHIMBUN (Feb. 28, 2020), <https://www.asahi.com/articles/ASN2W7QGVN2WULFA023.html>.

<sup>262</sup> See, e.g., *Kokunairyokounimo cancel dehajimeru [Moving toward the Booking Cancellation even for Domestic Travel]*, NHK (Feb. 4, 2020), <https://www3.nhk.or.jp/news/html/20200204/k10012272381000.html>.

<sup>263</sup> See, e.g., *Dema datoshirinagaramo kau: Aru uwasaniyori toilet paper gakakuchi de urikire [Even Though Everyone Knows it an Unfounded Rumor: Toilet Papers Are Running out Everywhere]*, FNN (Feb. 28, 2020), <https://www.fnn.jp/articles/-/22845>.

<sup>264</sup> *New Coronavirus Infection Control Headquarters (13th)*, PRIME MINISTER OF JAPAN AND HIS CABINET (Feb. 25, 2020), [https://www.kantei.go.jp/jp/98\\_abe/actions/202002/25corona.html](https://www.kantei.go.jp/jp/98_abe/actions/202002/25corona.html).

<sup>265</sup> *Id.*

<sup>266</sup> *Shingata coronavirus kansenshōtaisaku no kihonhoushin [Basic Policy on Countermeasures against New Coronavirus Infection]*, PRIME MINISTER OF JAPAN AND HIS CABINET (Feb. 25, 2020), <https://www.mhlw.go.jp/content/10900000/000599698.pdf>.

Prime Minister requested the cancellation or postponement of large-scale events.<sup>267</sup> Following another Headquarters' meeting on February 27, 2020, the Prime Minister requested that all schools be closed temporarily to prevent the spread of infection among school children after March 2, 2020.<sup>268</sup>

The Governor of Hokkaido acted before even the Prime Minister in instructing local education boards to shut down all public schools on February 26,<sup>269</sup> and declaring a state of emergency on February 28, 2020, while urging residents of Hokkaido to remain at home.<sup>270</sup> This declaration was unprecedented, and it is questionable whether the governor has any power to declare a state of emergency. When the new influenza virus hit Japan in 2012, the Japanese government let the Diet, the Japanese national legislature pass the *New Influenza Infection Countermeasures Special Measures Act*,<sup>271</sup> which authorized the Prime Minister, as the head of the New Influenza Infection Countermeasures Headquarters, to declare a state of emergency if the requirements specified in the cabinet order—such as a nationwide rapid spread of a new influenza infection that threatened Japan's citizens and the national economy—were satisfied.<sup>272</sup> The declaration must specify the period during which emergency countermeasures may be implemented, the areas where they may be implemented, and must outline the emergency countermeasures.<sup>273</sup> The local governor in the declared area may request the public to cooperate by refraining from going out, unless it is necessary for social life, in order to prevent the spread of new influenza, to protect the life and health of its local residents, and to ensure the stability of the daily lives of the people and the national economy.<sup>274</sup> The affected local governor can also ask managers of schools, theatres, or other facilities which are open to the public, or planners who use these facilities, to restrict or suspend their use, or restrict or suspend the events.<sup>275</sup> If the managers or planners ignore these requests without a legitimate reason, and the governor believes that the request is imperative to prevent the spread of new influenza, to protect the life and health of its local residents, and to ensure the

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<sup>267</sup> *New Coronavirus Infectious Disease Control Headquarters (14th)*, PRIME MINISTER OF JAPAN AND HIS CABINET (Feb. 26, 2020), [https://www.kantei.go.jp/jp/98\\_abe/actions/202002/26corona.html](https://www.kantei.go.jp/jp/98_abe/actions/202002/26corona.html).

<sup>268</sup> *Zenkoku no shouchukou, 3gatsu2nichikara rinjikyuuukoyousei, shushou* [PM Requested All Schools to Be Temporarily Closed from March 2], NIKKEI (Feb. 27, 2020), <https://www.nikkei.com/article/DGXMZO56131560X20C20A2MM8000/>.

<sup>269</sup> Hokkaidochō, *Chijirinjishakaiken* [Governor Ad Hoc Press Interview] (Feb. 26, 2020), <http://www.pref.hokkaido.lg.jp/ss/tkk/hodo/pressconference/r1/r20226gpc.htm>.

<sup>270</sup> Hokkaidochō, *Shingata coronavirus hijoujitaisengen* [New Coronavirus Infection Emergency Declaration] (Feb. 28, 2020), <http://www.pref.hokkaido.lg.jp/hf/kth/kak/kinnkyuuzitaisengenn0228.pdf>.

<sup>271</sup> *Shingatainfluenzatōtaisakutokubetsusochihō* [New Influenza Infection Countermeasures Special Measures Act], Law No. 31 of 2012.

<sup>272</sup> *Id.* art. 32(1).

<sup>273</sup> *Id.* The prime minister needs to report this to the Diet and the declaration is valid only for two years. *Id.* art. 32(2). But it could be extended up to one year. *Id.* art. 32(3)–(4).

<sup>274</sup> *Id.* art. 45(1).

<sup>275</sup> *Id.* art. 45(2).

stability of the daily lives of the people and the national economy, then the governor can instruct them to adopt the emergency measures.<sup>276</sup> When a state of emergency is declared, hospitals, as well as drug manufacturers, distributors, and retailers need to adopt necessary measures to secure the necessary drugs and medical equipment,<sup>277</sup> the government can set up temporary hospitals,<sup>278</sup> use private property as temporary hospitals,<sup>279</sup> the government can request the supply of necessary materials and equipment,<sup>280</sup> and gas and water suppliers are mandated to supply gas and water in a stable and appropriate manner.<sup>281</sup> Transport business operators as well as telecommunications and postal mail service providers are also mandated to provide stable and adequate services.<sup>282</sup> The government may request the transportation of emergency supplies when urgently necessary.<sup>283</sup> The government can also request the sale of necessary materials from the operators who produce, process, collect, sell, deliver, store, or transport as a business,<sup>284</sup> and, if refused without a legitimate reason, can confiscate them if urgently necessary.<sup>285</sup> The government can also implement measures to stabilize the price of necessary goods in order to prevent an upsurge in prices of such goods.<sup>286</sup>

These emergency measures may only be implemented when there was an outbreak of new influenza or a new infectious disease as stipulated by the *Infectious Disease Prevention Act*.<sup>287</sup> However, the new coronavirus did not fall into either of these categories so, technically, this statute could not be invoked in response to the new coronavirus outbreak. This is why the Prime Minister, as head of the Headquarters, was hesitant to invoke this statute.

## **B. Second Countermeasures**

The government eventually decided to adopt further countermeasures against the spread of new coronavirus on March 10, 2020. It thus submitted the amendment bill to the Diet to amend the *New Influenza Infection Special Measure*

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<sup>276</sup> New Influenza Infection Countermeasures Special Measures Act, *supra* note 271, art. 45(3).

<sup>277</sup> *Id.* art. 47.

<sup>278</sup> *Id.* art. 48.

<sup>279</sup> *Id.* art. 49.

<sup>280</sup> *Id.* art. 50.

<sup>281</sup> New Influenza Infection Countermeasures Special Measures Act, *supra* note 271, art. 52.

<sup>282</sup> *Id.* art. 53.

<sup>283</sup> *Id.* art. 54.

<sup>284</sup> *Id.* art. 55(1).

<sup>285</sup> *Id.* art. 55(2).

<sup>286</sup> New Influenza Infection Countermeasures Special Measures Act, *supra* note 271, art. 59.

<sup>287</sup> *Id.* art. 2(1).

Act to be applied to the new coronavirus infection, and the Diet quickly passed the amendment bill on March 13.<sup>288</sup> As a result, the government is, after the amendment took effect, allowed to use all the countermeasures against new influenza against the new coronavirus. But the prime minister was still reluctant to declare an “emergency” against the new coronavirus infection.

Nevertheless, the government intensified its effort to contain the spread of new coronavirus and urged the airlines, railroad, and transportation industry, to step up their disinfection efforts and urged the elderly care facilities, or facilities for persons with disabilities, to take stronger precautions against infection in its second countermeasures against the new coronavirus infection on March 10.<sup>289</sup> The government also urged the increase of the testing capacity and facilitated the development and provision of instant testing equipment.<sup>290</sup> It decided to apply the national health insurance system to cover the cost of testing.<sup>291</sup>

Moreover, the government decided to subsidize companies to allow special paid leave for workers who were forced to take leave to take care of children due to the cancellation of schools.<sup>292</sup> The government further decided to provide special loans for families who needed support.<sup>293</sup> The government also provided special support for companies that were affected by COVID-19 and its spread.<sup>294</sup> The same kind of support was also available for the tourism industry.<sup>295</sup>

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<sup>288</sup> Shingatainfluenzatōtaisakutokubetsusochihō no ichibu wo kaiseisuruhōritus [Act to Amend Parts of the New Influenza Countermeasures Special Measures Act], Law No. 4 of 2020.

<sup>289</sup> *Shingata coronavirus kansenshōnitaipurukinkyūtaiousaku (dai2dan)* [Second Emergency Countermeasures against New Coronavirus Infection], PRIME MINISTER AND HIS CABINET (Mar. 10, 2020), [https://www.kantei.go.jp/jp/singi/novel\\_coronavirus/th\\_siryou/kinkyūtaiou2\\_corona.pdf](https://www.kantei.go.jp/jp/singi/novel_coronavirus/th_siryou/kinkyūtaiou2_corona.pdf) [hereinafter *Second Emergency Countermeasures*].

<sup>290</sup> *Id.* The government thereafter significantly increased the testing capacity. As of November 24, 2020, the maximum capacity of PCR testing was 84,585 cases a day and, so far, 3,717,921 tests have been conducted. MHLW, *Current Infection Status*, *supra* note 9. But the number of daily tests is modest: only 33,876 tests were conducted on November 19, 2020 MHLW, *Kokunainiokerushingata coronavirus nikakawaru PCR kensa no jissijoukyō* [Current PCR Testing against New Coronavirus Infection] (Nov. 20, 2020), <https://www.mhlw.go.jp/content/10906000/000697262.pdf>.

<sup>291</sup> MHLW, *Shingata coronavirus kansenshōnikakawaru PCR kensa no hokentekiyonitomonautaiounitsuite* [Consequences of Application of National Health Insurance to PCR Testing for New Coronavirus Infection], <https://www.mhlw.go.jp/content/12404000/000612063.pdf> [hereinafter *Consequences of Application to PCR Testing*]. This would allow doctors to ask testing institutions directly even if the local health care centers were not convinced of the necessity of official testing by applying the health insurance.

<sup>292</sup> *Second Emergency Countermeasures*, *supra* note 289, at 4.

<sup>293</sup> *Id.* at 5.

<sup>294</sup> *Id.* at 8.

<sup>295</sup> *Id.* at 10. The government on March 18, 2020, further expanded the support by expanding the loan with immunity to independent business operators, deferring the utility payment, and deferring national as well as local taxes. *Seikatsuhannitaiourutamenokinkyūsochi* [Emergency Measures against Life

Furthermore, the government decided to introduce a much stronger stance against the shortage of masks. In the past, the government only tried to facilitate the production and supply of masks but was reluctant to introduce any regulation.<sup>296</sup> But in light of the increase of resale of masks online with extraordinarily high prices, the government decided to prohibit the resale of masks for a price higher than the original purchase price.<sup>297</sup> The government also subsidized mask-makers and purchased masks to be distributed primarily to medical professionals who need them.<sup>298</sup>

The government also decided to tighten border control measures. Thus, it requested all persons coming from China and South Korea to self-quarantine for fourteen days and not to use the public transportation system.<sup>299</sup> It also limited the arrival airport to Narita and Osaka and cancelled visas issued in China and South Korea.<sup>300</sup> Furthermore, the government decided to refuse foreigners entry if a foreigner had visited certain places in Italy and Iran during the previous fourteen days, in addition to China and South Korea.<sup>301</sup>

The government further indicated the necessity of increasing the capacity to accept increased number of serious pneumonia patients due to new coronavirus. It is well known that Italy suffered from serious shortage of respiratory equipment and beds to accept a sudden wave of serious patients, necessitating triage, giving priority to patients with greater chances of recovery than patients with less hope of survival, abandoning many senior patients with pre-existing medical conditions,<sup>302</sup>

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*Anxieties*], PRIME MINISTER AND HIS CABINET (Mar. 18, 2020), [https://www.kantei.go.jp/jp/singi/novel\\_coronavirus/th\\_siryou/kinkyutaiou3\\_corona.pdf](https://www.kantei.go.jp/jp/singi/novel_coronavirus/th_siryou/kinkyutaiou3_corona.pdf).

<sup>296</sup> See *supra* text accompanying note 55.

<sup>297</sup> *Second Emergency Countermeasures*, *supra* note 289. The government invoked the Kokuminseikatsuanteikinkyusochihō [National Life Stabilization Emergency Special Measures Act], law no. 121 of 1973, which authorizes the government to designate certain items by cabinet order as national life necessity to be controlled by the government in times of emergency, and amended the cabinet order to add mask wearing as a national life necessity; Kokuminseikatsuanteikinkyusochihōsekourei no ichibu wo kaiseisuruseirei [Cabinet Order to Amend Parts of the National Life Emergency Special Measures Act Enforcement Order], cabinet order no. 42 of 2020, <https://kanpou.npb.go.jp/old/20200311/20200311t00024/20200311t000240001f.html>.

<sup>298</sup> *Second Emergency Countermeasures*, *supra* note 289, at 3.

<sup>299</sup> *Id.* at 12.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> Erica di Blasi, *Italians over 80 'will be left to die' as country overwhelmed by coronavirus*, TELEGRAPH (Mar. 14, 2020, 4:38 PM), <https://www.telegraph.co.uk/news/2020/03/14/italians-80-will-left-die-country-overwhelmed-coronavirus/>; Aurora Bosotti, *Coronavirus horror: Over-70s left to die in Italy as doctors told focus on young patients*, EXPRESS (Mar. 20, 2020, 10:01 AM), <https://www.express.co.uk/news/world/1257840/Coronavirus-news-Italy-over-70s-dead-covid-19-death-toll-Bergamo-funeral-latest>; Jason Horowitz, *Italy's Health Care System Groans Under Coronavirus — a Warning to the World*, N.Y. TIMES (Mar. 12, 2020),

and it looks like that the Japanese government is aware of this issue. But the plan of increasing the number of beds and number of respiratory equipment still lacked specific details, and the government had to wait for much detailed plan.

### **C. Declaration of Emergency**

Eventually, the government took additional countermeasures in accordance with the *New Influenza Special Measures Act* and established the New Coronavirus Infection Response Headquarters on March 26, 2020, in accordance with its article 15(1).<sup>303</sup> The name remains the same, but its legal status was changed and it was granted far more stronger powers.

Beginning April 1, 2020, the government further intensified immigration control. It expanded the entry restrictions to foreigners coming from a list of risky countries, practically prohibiting any entry from seventy-three countries and regions with huge number of patients. The government also intensified quarantine measures, mandating everyone who has visited these places to mandatory testing and forcing everyone to wait for the result with their own responsibility. It also requested everyone entering Japan to self-quarantine for fourteen days without using public transportation.<sup>304</sup>

Even after the amendment took effect, the government was initially reluctant to declare an “emergency” and adopt further countermeasures. However, the government was eventually forced to declare an “emergency” in Tokyo and six other prefectures for a month on April 7.<sup>305</sup> The government then expanded the scope of its coverage to nationwide on April 16.<sup>306</sup> It revised the fundamental

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<https://www.nytimes.com/2020/03/12/world/europe/12italy-coronavirus-health-care.html>.

<sup>303</sup> *Shingata coronavirus kansenshōtaisakuhonbu no sechinitsuite [Establishment of the New Coronavirus Infection Control Headquarters]*, PRIME MINISTER OF JAPAN AND HIS CABINET (Mar. 26, 2020), [https://www.kantei.go.jp/jp/singi/novel\\_coronavirus/th\\_siryou/houteihonbu\\_konkyo.pdf](https://www.kantei.go.jp/jp/singi/novel_coronavirus/th_siryou/houteihonbu_konkyo.pdf). Several days prior to this decision, the government agreed to postpone the 2020 Tokyo Olympic Games. *Olympic Games postponed to 2021*, TOKYO 2020 (Mar. 24, 2020), <https://tokyo2020.org/en/news/joint-statement-from-international-olympic-committee-and-tokyo2020>.

<sup>304</sup> *New Coronavirus Infection Control Headquarters (25th Meeting)*, PRIME MINISTER OF JAPAN AND HIS CABINET (Apr. 1, 2020), [https://www.kantei.go.jp/jp/singi/novel\\_coronavirus/th\\_siryou/sidai\\_r020401.pdf](https://www.kantei.go.jp/jp/singi/novel_coronavirus/th_siryou/sidai_r020401.pdf) [hereinafter Headquarters 25<sup>th</sup> Meeting Materials].

<sup>305</sup> *Shingata coronavirus kansenshōtaisaku no kihontekitaishohoushin [Basic Policy for Measures against New Coronavirus Infectious Disease]*, PRIME MINISTER OF JAPAN AND HIS CABINET (Apr. 7, 2020), [https://www.kantei.go.jp/jp/singi/novel\\_coronavirus/th\\_siryou/kihon\\_h\(4.7\).pdf](https://www.kantei.go.jp/jp/singi/novel_coronavirus/th_siryou/kihon_h(4.7).pdf). Some of the remaining prefectures not included in the order later declared emergencies on their own. *Aichi Prefectural New Coronavirus Infectious Disease Control Headquarters Meeting Decision*, AICHI PREFECTURAL GOV'T (Apr. 10, 2020), [https://www.pref.aichi.jp/uploaded/life/314606\\_1215010\\_misc.pdf](https://www.pref.aichi.jp/uploaded/life/314606_1215010_misc.pdf).

<sup>306</sup> *New Coronavirus Infectious Disease Control Headquarters (29th)*, PRIME MINISTER OF JAPAN AND HIS CABINET (Apr. 16, 2020), <https://www.kantei.go.jp/jp/singi/>

guidelines for countermeasures against the new coronavirus infection to follow this new declaration.<sup>307</sup>

This revision allowed the government to officially request schools and facilities to shut down and direct the managers of the schools or facilities to shut down if they refused to accept the recommendation without legitimate reasons. This revision would also allow the government to officially request companies to cooperate with the government in enforcement of the various countermeasures and to confiscate necessary goods. But with respect to the public, the government can only recommend staying home. Unlike France, Italy, or Spain, where police enforcement introduced country-wide lockdowns,<sup>308</sup> the government in Japan does not have a legal authority to mandate the public to stay home and to enforce the criminal punishment against its violation. The declaration of emergency seriously impacted the life of the Japanese people and economy, but life in Japan under lockdown is quite different from life in France, Italy, or Spain under lockdown. In Japan, it is a much softer “lockdown.”<sup>309</sup> Indeed, many of the companies continued to operate even under the declaration of emergency, and many of the workers still commuted to their workplaces.<sup>310</sup> Many of the small businesses must have feared that they would not be able to survive if they closed their businesses, and similarly many workers cannot afford to stay home without pay because they desperately need incomes to sustain themselves.

Meanwhile, the government announced the emergency economic stimulus package to help the Japanese economy by spending 108 trillion JPY (1 trillion USD)

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novel\_coronavirus/th\_siryou/sidai\_r020416.pdf.

<sup>307</sup> *Shingata coronavirus kansenshōtaisaku no kihontekitaishohoushin [Basic Policy for Measures against New Coronavirus Infectious Disease]*, PRIME MINISTER OF JAPAN AND HIS CABINET (Apr. 16, 2020), [https://www.kantei.go.jp/jp/singi/novel\\_coronavirus/th\\_siryou/kihon\\_h\\_0416.pdf](https://www.kantei.go.jp/jp/singi/novel_coronavirus/th_siryou/kihon_h_0416.pdf).

<sup>308</sup> Valentina Di Donato et al., *All of Italy is in lockdown as coronavirus cases rise*, CNN (Mar. 13, 2020, 2:50 PM), <https://www.cnn.com/2020/03/09/europe/coronavirus-italy-lockdown-intl/index.html>; *Coronavirus: Spain set to declare national lockdown*, BBC NEWS (Mar. 14, 2020), <https://www.bbc.com/news/world-europe-51888936>; Romina McGuinness, *Emmanuel Macron chaos: More than 350,000 break France lockdown laws as death toll soars*, EXPRESS (Apr. 2, 2020, 10:30 AM), <https://www.express.co.uk/news/world/1263887/france-coronavirus-emmanuel-macron-covid-19-paris-lockdown>.

<sup>309</sup> Julian Ryall, *Coronavirus: Can Japan's 'soft lockdown' stop COVID-19?*, DEUTSCHE WELLE (Apr. 7, 2020), <https://www.dw.com/en/coronavirus-can-japans-soft-lockdown-stop-covid-19/a-53048921>.

<sup>310</sup> Saša Petricic, *Japan's traditional work culture takes precedence over physical distancing in Tokyo*, CBC NEWS (May 3, 2020, 4:00 AM), <https://www.cbc.ca/news/world/japan-covid-19-coronavirus-1.5549504>. Moreover, some of the businesses such as pachinko parlors steadfastly refused to accept the shut-down requests, and there was a call for introducing legal orders together with criminal punishment. *Minutes of the 6th Press Conference: Results of Reiwa 2020 Meeting*, CABINET OFF. (Apr. 27, 2020), <https://www5.cao.go.jp/keizai-shimon/kaigi/minutes/2020/0427/interview.html>.

on April 7, 2020.<sup>311</sup> It also revised the emergency economic assistance package to assist the economy with an additional 48.4 trillion JPY (400 billion USD) on April 20, 2020, including assistance to companies who retain their workforce, interest-free loans to companies, special grants to business owners of small and medium-sized companies that had suffered a significant loss due to COVID-19, and a grant of 100,000 JPY (\$900 USD) for everyone.<sup>312</sup>

The government extended the nationwide declaration of an emergency on May 4 until the end of May.<sup>313</sup> When the increase of confirmed patients slowed, however, the government finally decided to lift the declaration of emergency in the majority of prefectures, except for eight urban prefectures including Tokyo, on May 14.<sup>314</sup> The government again revised the fundamental guidelines for countermeasures against new coronavirus infection in order to accommodate this change.<sup>315</sup>

On May 25, 2020, the Headquarters lifted the emergency declaration in all prefectures and revised fundamental policy.<sup>316</sup> The lift of the emergency declaration allowed companies to open and restaurants and bars were allowed to offer services under strict guidelines. The government focused on the prevention of three C's: closed spaces, crowded situation, and close-contact settings.<sup>317</sup> Although the number of infected patients increased somewhat after the lifting of lockdown, the government was reluctant to declare an emergency again, in part because the

<sup>311</sup> “*Shingata coronavirus kansenshōkinkyukeizaitaisaku*” nitsuite [About “Emergency Economic Measures for New Coronavirus Infection”], PRIME MINISTER OF JAPAN AND HIS CABINET (Apr. 7, 2020), [https://www.kantei.go.jp/jp/singi/novel\\_coronavirus/th\\_siryou/200407kinkyukeizaitaisaku.pdf](https://www.kantei.go.jp/jp/singi/novel_coronavirus/th_siryou/200407kinkyukeizaitaisaku.pdf).

<sup>312</sup> “*Shingata coronavirus kansenshōkinkyukeizaitaisaku*” no henkonitsuite [About Change to the “Emergency Economic Measures for New Coronavirus Infection”], PRIME MINISTER OF JAPAN AND HIS CABINET (Apr. 20, 2020), [https://www.kantei.go.jp/jp/singi/novel\\_coronavirus/th\\_siryou/200420kinkyukeizaitaisaku.pdf](https://www.kantei.go.jp/jp/singi/novel_coronavirus/th_siryou/200420kinkyukeizaitaisaku.pdf).

<sup>313</sup> *New Coronavirus Infectious Disease Control Headquarters (33rd)*, PRIME MINISTER OF JAPAN AND HIS CABINET (May 4, 2020), [https://www.kantei.go.jp/jp/singi/novel\\_coronavirus/th\\_siryou/sidai\\_r020504.pdf](https://www.kantei.go.jp/jp/singi/novel_coronavirus/th_siryou/sidai_r020504.pdf).

<sup>314</sup> *New Coronavirus Infectious Disease Control Headquarters (34th)*, PRIME MINISTER OF JAPAN AND HIS CABINET (May 14, 2020), [https://www.kantei.go.jp/jp/singi/novel\\_coronavirus/th\\_siryou/sidai\\_r020514.pdf](https://www.kantei.go.jp/jp/singi/novel_coronavirus/th_siryou/sidai_r020514.pdf).

<sup>315</sup> *Shingata coronavirus kansenshōtaisaku no kihontekitaishohoushin* [Basic Policy for Measures against New Coronavirus Infectious Disease], PRIME MINISTER OF JAPAN AND HIS CABINET (May 14, 2020), [https://www.kantei.go.jp/jp/singi/novel\\_coronavirus/th\\_siryou/kihon\\_h\\_0514.pdf](https://www.kantei.go.jp/jp/singi/novel_coronavirus/th_siryou/kihon_h_0514.pdf).

<sup>316</sup> *Shingata coronavirus kansenshōtaisaku no kihontekitaishohoushin* [Basic Policy for Measures against New Coronavirus Infectious Disease], PRIME MINISTER OF JAPAN AND HIS CABINET (May 25, 2020) [hereinafter *Basic Policy*], [https://www.kantei.go.jp/jp/singi/novel\\_coronavirus/th\\_siryou/kihon\\_h\\_0525.pdf](https://www.kantei.go.jp/jp/singi/novel_coronavirus/th_siryou/kihon_h_0525.pdf).

<sup>317</sup> *Shingata coronavirus kansenshōnikansurukongo no torikumi* [New Policy toward New Coronavirus Infection], PRIME MINISTER OF JAPAN AND HIS CABINET (Aug. 28, 2020), [https://www.kantei.go.jp/jp/singi/novel\\_coronavirus/th\\_siryou/houkoku\\_r020828.pdf](https://www.kantei.go.jp/jp/singi/novel_coronavirus/th_siryou/houkoku_r020828.pdf); MHLW, *Avoid the “Three Cs,”* <https://www.mhlw.go.jp/content/10900000/000615287.pdf>.

number of death tolls is still under the control.<sup>318</sup> The Headquarters declared a new fundamental policy toward the new coronavirus infection.<sup>319</sup>

One of the noteworthy points of this development is the willingness to reconsider the classification of the new coronavirus as a designated infectious disease, granting more flexibility to the government than the other category two infectious disease. The government now directs the asymptomatic as well as mild-symptom patients to be observed at hotels or at home and directs the hospitals to focus on more serious patients.<sup>320</sup> Anticipating the increase of seasonal flu patients, the government also intensified the PCR testing capacity and infectious disease medical system to cope with both infections, tried to secure the sufficient dosage of vaccine if developed, and while closely watching the further development, attempted to achieve both the prevention of further spread and promotion of economic activities.<sup>321</sup> The government provided various aids and grants for individuals suffering, as well as small- and medium-sized business operators struggling to survive.<sup>322</sup>

## VII. FUTURE CHALLENGES

When we look at Japan's response to the outbreak of the new coronavirus, so far Japan seems to be successfully managing to lower the number of patients and slow down its increase. Japan adopted rather unique approach to COVID-19. Although it is still unclear whether it will be successful in the end, it may be working so far. However, there are some serious problems and weaknesses with the Japanese system to face future challenges.

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<sup>318</sup> However, the Tokyo Metropolitan Government requested that restaurants serving alcoholic drinks and karaoke shops close at 10 PM during August to stem the tide of rising numbers of infected patients. *Tokyo-to, 8gatsuchu no eigyojikantanshukuyousei e [Moving toward Asking the Stores to Cut Down the Business Hours during August]*, ASAHI SHIMBUN (Jul. 30, 2020), <https://www.asahi.com/articles/ASN7Z44VNLN7ZUTIL021.html>.

<sup>319</sup> *Basic Policy, supra* note 316.

<sup>320</sup> *Id.*; *Shingata coronavirus kansenshō wo shiteikansenshōtoshitesadamerutō no seirei no ichibuwokaiseisuruseirei [Cabinet Order to Amend Parts of Cabinet Order to Classify New Coronavirus Infection as Designated Infectious Disease]*, Cabinet Order 310 of 2020, <https://kanpou.npb.go.jp/old/20201014/20201014h00352/20201014h003520003f.html> (effective Oct. 14, 2020). The government now takes hospitalization measures only against serious and high-risk patients. *Id.*

<sup>321</sup> *Basic Policy, supra* note 316.

<sup>322</sup> For a list of these various aids and grant, see *Shingata coronavirus kansenshōnitomonaukakashushien no goan-nai [List of Aids for the Public Affected by the New Coronavirus Infection]*, PRIME MINISTER OF JAPAN AND HIS CABINET, <https://corona.go.jp/action/>.

## A. Japanese Approach to the New Coronavirus

First, the Japanese government has adopted a rather unique approach that is different from other countries. It has limited the PCR testing to persons who are strongly suspected of infection, and once confirmed, hospitalized every confirmed patient to designated hospitals for observation and treatment.<sup>323</sup> Instead of providing testing to everyone at all times, the government has been concentrating on treating serious patients with more focus on prevention of cluster transmission.<sup>324</sup>

It seems that the Japanese approach is working in light of the small number of infected patients and low death tolls, although it has been subjected to strong criticisms, both abroad and domestically. With respect to low numbers of confirmed patients, these critics suspect that this small number is merely caused by the reluctance to conduct testing.<sup>325</sup> Testing is limited to persons who showed unique symptoms of COVID-19 and those who had close contact with the patients; and even if the person exhibits a high fever, cold, or flu-like symptoms, the testing is not offered.<sup>326</sup> Japan's approach differs greatly from the position adopted by

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<sup>323</sup> MHLW, *Shingata coronavirus kansenshōtaisakusenmonkakaigi [New Coronavirus Infection Expert Council]*, *Shingata coronavirus kansenshōtaisaku no kihonhoushin no gutaikanimuketakenkai [Opinion toward Implementation of Basic Policy for Measure against New Coronavirus Infectious Disease]* (Feb. 24, 2020), [https://www.mhlw.go.jp/stf/seisakunitsuite/newpage\\_00006.html](https://www.mhlw.go.jp/stf/seisakunitsuite/newpage_00006.html).

<sup>324</sup> *Id.*

<sup>325</sup> Yutaka Harada, *Corona kanjaganihon de sukunainowakensagasakunaikarasetzu wo toukeitekinikenshou [Statistical Proof for the Theory that the Number of Deaths Due to COVID-19 Is Small because of the Small number of Testing]*, DIAMOND (Apr. 29, 2020), <https://diamond.jp/articles/-/236074>. Initially, the capacity of the PCR testing was severely limited, and the government limited the official testing only to the National Institute for Infectious Diseases, the national research and lab for infectious disease, and its affiliated local office. See *Headquarters (7th)*, *supra* note 161; *Second Emergency Countermeasures*, *supra* note 289. Moreover, there was a serious hurdle for getting access to the PCR testing: doctors needed to ask the local health-care centers whether the testing was justified. Aya Kubota, *Shingata coronavirus, kensataisei no kakujugaatodenimawattaurajijo [Why New Coronavirus Testing System Was Delayed]*, NIKKEI (Feb. 28, 2020), <https://bio.nikkeibp.co.jp/atcl/news/p1/20/02/28/06625/>. The Returners and Close Contacts Center located in the local health-care centers evaluate test requests and decide whether to ask for official testing and decide whether to refer them to Returners and Close Contacts Clinics, which are staffed with expert doctors, for diagnosis. As a result, even when the doctors refer the patients for testing, some of the requests were simply turned down.

<sup>326</sup> Initial guideline for medical professions to refer the patients to health-care centers for PCR testing indicated to test patients showing more than four days of cold-like symptoms and high fever over 37.5 C or extreme exhaustion or breathing difficulty. MHLW, *Shingata coronavirus kansenshōnitsuitenosoudan/jushin no meyasunitsuite [Guideline for Referring Patients on New Coronavirus Infection]* (Feb. 17, 2020) [hereinafter *Guideline for Referring Patients*], <https://www.mhlw.go.jp/content/10900000/000596978.pdf>. Many medical professions construed it as a requirement and, as a result, many people who just came to show high fever or muscle pains, could not be tested. Later, the MHLW dropped the requirement

South Korea<sup>327</sup> and recommended by the WHO, both of which call for much broader testing.<sup>328</sup> Even in Japan, some people criticize the government's reluctance to offer testing more broadly. However, an overwhelming majority of the medical community, especially experts on infectious disease, oppose the idea of offering testing to everyone.<sup>329</sup> Broad testing would lead many people to rush to the hospitals, and medical professions might be totally swamped, leaving no room for treatment of more serious patients. The majority of experts agree that the doctors and hospitals should better focus on serious patients and not on much broader, milder patients, or anyone who may not be infected.<sup>330</sup>

Moreover, the government has historically taken the position that if testing confirms a person is infected, that person needs to be hospitalized, even if the person has not shown any serious symptoms.<sup>331</sup> This approach would deprive available beds from more serious patients and force them away from the necessary treatment. It is simply impossible to offer testing more widely, thereby increasing the number

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of high fever of 37.5C over four days from the guideline. *PCR kensasoudanmeyasuminaoshi, 35.7 C ijouhyoukinakusu [Reconsideration of the Reference Guideline for PCR Testing: Dropping the 37.5C Requirement]*, NHK (May 8, 2020), <https://www3.nhk.or.jp/news/html/20200508/k10012423041000.html> [hereinafter *Reconsideration of the Reference Guideline for PCR Testing*].

<sup>327</sup> Dasl Yoon & Timothy W. Martin, *How South Korea Put Into Place the World's Most Aggressive Coronavirus Test Program*, WALL ST. J. (Mar. 16, 2020), <https://www.wsj.com/articles/how-south-korea-put-into-place-the-worlds-most-aggressive-coronavirus-testing-11584377217>. South Korea provided close to 2.8 million tests to its residents between February 1 to November 15. Won So, *Cumulative number of coronavirus (COVID-19) tests conducted in South Korea from January 23 to November 15, 2020*, STATISTA, <https://www.statista.com/statistics/1102818/south-korea-covid-19-test-total-number/>. South Korea registered 31,353 confirmed patients with 510 deaths as of November 24, 2020, and many believe that South Korea was among the most successful countries to contain the COVID-19. World Health Organization, Republic of Korea, <https://www.who.int/countries/kor/> (last visited Nov. 24, 2021).

<sup>328</sup> World Health Organization, *Laboratory testing strategy recommendations for COVID-19 (Interim guidance)* (Mar. 21, 2020), [https://apps.who.int/iris/bitstream/handle/10665/331509/WHO-COVID-19-lab\\_testing-2020.1-eng.pdf](https://apps.who.int/iris/bitstream/handle/10665/331509/WHO-COVID-19-lab_testing-2020.1-eng.pdf).

<sup>329</sup> MHLW, *Shingata coronavirus kansenshōtaisaku no kihonshishin no gutaikanimuketakenkai [Comments on Implementation of Basic Policy for Measures against New Coronavirus Infectious Disease]* (Feb. 24, 2020) [hereinafter *Comments on Implementation of Basic Policy*], [https://www.mhlw.go.jp/stf/seisakunitsuite/newpage\\_00006.html](https://www.mhlw.go.jp/stf/seisakunitsuite/newpage_00006.html).

<sup>330</sup> *Id.*

<sup>331</sup> MHLW, *Shingata coronavirus kansenshō taisaku nitsuite [Countermeasures against New Coronavirus Infection]*, <https://www.mhlw.go.jp/content/10906000/000597156.pdf> (noting that after enforcement of the cabinet order to classify the new coronavirus infection as a designated infectious disease, it would become possible to take hospitalization measures against any person who tested positive). It was only after Oct. 14, 2020 that it became possible to supervise patients showing no symptoms or mild symptoms at home or at rented hotel rooms. See *supra* note 317.

of infected patients, without adopting some measures that allow those who tested positive but are asymptomatic to be treated at home.

Furthermore, testing is unreliable. There would be some infected patients even if they tested negative. Those persons who were cleared could go out and unknowingly transmit the infection to others. Additionally, those who test negative at first could ultimately contract COVID-19 anyway. A negative result might give people a false sense of security.

Finally, inviting everyone to come to hospitals for new coronavirus testing is risky because some of the patients who are infected but show no symptoms, or some of the patients who only show mild symptoms, could end up transmitting the disease to other vulnerable patients who come to hospitals for treatment of other illnesses. This could trigger community transmission inside the hospitals.

As a result, many medical professions argue that testing should be better focused on persons who show typical symptoms, those who had close contact with confirmed patients, and on prevention of uncontrolled spread of community transmission. Even under the strict guidelines, testing could be offered if there was a risk of community transmission, and it allowed the government to take countermeasures as early as possible. Medical professionals thus oppose the idea of providing testing for everyone who wishes to receive it.<sup>332</sup> In other words, Japan's approach against the new coronavirus has been to focus on how to keep the death toll at a minimum and prevent cluster infection.

There is definitely a convincing reason why these medical professions were worried about the possibility of “overshoot,” an expression now widely used in Japan to mean a sudden uncontrolled increase in the number of serious patients, exceeding intensive care facility capacities, especially with regards to ventilators.<sup>333</sup> Italy, as we saw, lost the capacity to respond due to sudden uncontrolled increases of serious patients. The medical professions were forced to triage the patients according to their likelihood of survival and were only able to provide ventilators to patients who were more likely to recover after treatment, thus leaving many senior patients without the required treatment, which led to a significant increase in the death toll.<sup>334</sup> The Japanese government has been trying to prevent this kind of “overshoot” by preventing the widespread community transmission.<sup>335</sup>

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<sup>332</sup> Kiboushazen-in ni PCR kensa wo to shuchousurunowanazemachigainanoka [*Why It Is Wrong to Argued that the PCR Testing Should Be Provided to Everyone*], BUNSHUN ONLINE (Mar. 13, 2020), <https://president.jp/articles/-/33665> (citing the voices of infectious disease treatment experts).

<sup>333</sup> MHLW, *Atarashikoronaviruskansensenmonkahyōgi-kai [New Coronavirus Infection Expert Council], Shingata coronavirus kansenshōtaisaku no joukyōbunseki/teigen [Analysis of the Current New Coronavirus Infection Countermeasures and Proposals]* (Mar. 19, 2020), <https://www.mhlw.go.jp/content/10900000/000610566.pdf>.

<sup>334</sup> Aurora Bosotti, *Coronavirus horror: Over-70s left to die in Italy as doctors told focus on young patients*, EXPRESS (Mar. 20, 2020, 10:01 AM), <https://www.express.co.uk/news/world/1257840/Coronavirus-news-Italy-over-70s-dead-covid-19-death-toll-Bergamo-funeral-latest>.

<sup>335</sup> MHLW, *Shingata coronavirus kansenshōnitsuite [New Coronavirus Infection]*,

However, with the gradual increase in confirmed patients, the Japanese government gradually increased its capacity of PCR testing and made it more easily accessible for doctors and patients.<sup>336</sup> Although the government's capacity for PCR testing may be small compared with other countries, the testing is at least available when a doctor suspects that a patient might have COVID-19. Moreover, the government decided to allow confirmed patients with mild symptoms or no symptoms to stay in rented hotel rooms for isolation and observation or to stay home for self-isolation and observation.<sup>337</sup> This better allows hospitals to concentrate their treatment on more serious patients.

Finally, the Japanese lockdown is much softer, and is not legally enforced.<sup>338</sup> Despite the occasional call for the introduction of legal sanctions for those who violate the lockdown, it seemed that as a whole, the softer lockdown has worked. With the government's request, people have stayed home and avoided going out, thereby bringing down the number of infected patients and the death toll.<sup>339</sup> The medical system to treat the new coronavirus patients, facing serious challenges, seems to be surviving. When the government faced the reopening of businesses after lifting the declaration of emergency, the softer approach might prove to be better suited to go back to the normal. Even after the lifting of the declaration of emergency, the death toll in Japan seems to be under control despite the increased number of confirmed patients.<sup>340</sup>

No one can tell whether the Japanese approach will be successful in the end, although many observers cast a serious doubt on the sustainability of such an approach and warn that Japan might be following in Italy's footsteps.<sup>341</sup> Nevertheless, the death toll is low compared with other countries in the world that have suffered a devastating loss due to the new coronavirus.<sup>342</sup> In this sense, Japan

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[https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000164708\\_00001.html](https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000164708_00001.html) (last visited Mar. 15, 2021) (indicating the availability of hospitals for patients).

<sup>336</sup> See *Guideline for Referring Patients*, *supra* note 323.

<sup>337</sup> See *Basic Policy*, *supra* note 316.

<sup>338</sup> See Ryall, *supra* note 309.

<sup>339</sup> Thisanka Siripala, *Japan Ends Coronavirus State of Emergency, Aims to Gradually Reopen the Economy*, THE DIPLOMAT (May 27, 2020), <https://thediplomat.com/2020/05/japan-ends-coronavirus-state-of-emergency-aims-to-gradually-reopen-the-economy/> (noting that Japan's emergency measures seem to be working).

<sup>340</sup> See MHLW, *Current Infection Status*, *supra* note 9. See also *Cumulative number of coronavirus-positive (COVID-19) patients in Japan as of November 13, 2020, by state of health*, STATISTA, <https://www.statista.com/statistics/1096516/japan-coronavirus-patients-with-symptoms-by-state/>.

<sup>341</sup> Ryusei Takahashi, *Japanese officials say Tokyo is at risk of an 'overshoot,' but what exactly does that mean?*, JAPAN TIMES (Apr. 4, 2020), <https://www.japantimes.co.jp/news/2020/04/04/national/tokyo-overshoot-coronavirus/#.Xop9vi9U1gg>.

<sup>342</sup> The number of COVID-19 death per 100,000 population as of November 24, 2020,

has successfully managed the new coronavirus outbreak so far, while limiting the effect on economy as well as everyday life, and while keeping the medical system from breaking down.<sup>343</sup> But it is undeniable that this approach is risky and may turn out to be a failure.

## **B. Complexity and Inflexibility of Japan's Statutory Scheme**

Regardless of whether Japan is succeeding or not, there are some troubling aspects of the infectious disease control system and the government response to the new coronavirus. One of the clearest problems is the complexity of the statutory scheme and its strict limits on the power of the government to respond to emerging and developing contagious diseases. The *Infectious Disease Prevention Act* classifies various contagious diseases into different categories and allows the government to exercise different powers depending on the category of the infectious disease. There is no flexibility and there is no broad discretion. Moreover, both the *Quarantine Act* and the *Vaccination Act* use somewhat different classifications from those used in the *Infectious Disease Prevention Act*, and these differences can be quite confusing. Therefore, it is hard to know what government countermeasures are available for a particular infectious disease. An attempt to specify the power of the government as narrowly as possible<sup>344</sup> has backfired—so as to prevent the government from expanding the countermeasures and to prevent proper public

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was roughly 92.31 in Spain, 83.21 in U.K., 83.49 in Italy, and 78.76 in the US. *Mortality Analysis*, John Hopkins University, Coronavirus Resource Center, <https://coronavirus.jhu.edu/data/mortality>. It was 1.54 in Japan. Some criticize that this small number of COVID-19 deaths is a result of arbitrary limitations of PCR testing. It is true that because of the limited availability of the PCR testing, the COVID-19 death toll may be less than the actual death toll. However, it looks like there is no significant “excessive death” during most of the period in major cities. Nat'l Inst. of Infectious Disease, *Influenza/Pneumonia shibohoukoku [Death Report Due to Influenza or Pneumonia]* (May 24, 2020), <https://www.niid.go.jp/niid/ja/flu-m/2112-idsc/jinsoku/1847-flu-jinsoku-2.html>. Even considering the possibility of deaths being attributed to other illnesses, the number of COVID-19 deaths in Japan is still very small. Besides, the death counts in other countries suffer the same kind of inaccuracies in counting.

<sup>343</sup> Jake Adelstein, *Japan's winning its quiet fight against Covid-19*, ASIA TIMES (Mar. 25, 2020), <https://asiatimes.com/2020/03/japans-winning-its-quiet-fight-against-covid-19/>; William Sposato, *Japan's Halfhearted Coronavirus Measures Are Working Anyway*, FOREIGN POLICY (May 14, 2020), <https://foreignpolicy.com/2020/05/14/japan-coronavirus-pandemic-lockdown-testing/>. If Japan successfully manages to contain COVID-19, it may be partly due to the overall willingness of the Japanese people to follow the advice of their government, the absence of social customs that involve bodily contact such as handshakes or hugs and kisses in personal relationships, an obsession with cleanliness, a custom of taking shoes off at the entrance of the home, and a widely accepted custom of wearing masks during winter and spring to prevent colds and allergies.

<sup>344</sup> Infectious Disease Prevention Act, *supra* note 46, art. 22-2.

understanding on the possible countermeasures against the new contagious disease, thus leading to chaos.<sup>345</sup>

Moreover, when Japan was hit by the new influenza, the government enacted the *New Influenza Infection Special Measures Act* and introduced significantly broader powers against the new influenza, but the government was still unwilling to integrate these special measures into the general infectious disease prevention scheme or to totally revise the infectious disease prevention scheme. As a result, all the measures then available for new influenza were not available for the new coronavirus infection.<sup>346</sup> The government was eventually forced to amend the *New Influenza Infection Special Measures Act* to apply it to the new coronavirus infection.

To make the situation even worse, Japan does not have general emergency legislation that allows the government to adopt emergency measures against a public health emergency.<sup>347</sup> The public has strong concerns with granting broad and unlimited powers to the government because of the possibility of government abuse and misuse of all these powers. This has historically prevented the enactment of such emergency legislation. As a result, even during the time of a public health emergency, the government could only rely upon the specific infectious disease prevention statutes.

In sum, the statutory scheme against the new contagious disease was not well stipulated or well prepared. Japan needs to enact emergency legislation to better prepare for serious public health emergencies.<sup>348</sup>

### **C. Unpreparedness**

The government should have been well prepared to deal with the challenges brought by the new coronavirus. The government's capacity to provide medical testing for the new coronavirus was initially very limited.<sup>349</sup> Moreover, the

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<sup>345</sup> See N.Y. Pub. Health Law § 3082 (McKinney) (granting far broader and flexible powers).

<sup>346</sup> Compare with Emergencies Act, R.S.C. 1985, c. 22 (4th Supp.) (Can.), and Civil Contingencies Act 2004, c. 36 (UK), <https://www.legislation.gov.uk/ukpga/2004/36/contents>.

<sup>347</sup> See generally Infectious Disease Prevention Act, *supra* note 46.

<sup>348</sup> Some blame the lack of emergency clause in the constitution and argue for the constitutional amendment to add the emergency clause, to grant broad and flexible exercise of government power during the emergency. Kinkyujitaijokou, *soukyuni giron wo [Emergency Clause Needs to Be Discussed Immediately]*, JIJ (May 7, 2020), <https://www.jiji.com/jc/article?k=2020050700358&g=pol>. However, the legislature can easily prepare for emergencies by passing emergency legislation.

<sup>349</sup> See *PCR Testing Method*, *supra* note 161. The government was thus forced to expand the testing capacity after the shortage became obvious. See *Consequences of Application to PCR Testing*, *supra* note 287; see also *Reconsideration of the Reference Guideline for PCR Testing*, *supra* note 322. Moreover, it sometimes took more than several

government required very stringent requirements for seeking official testing.<sup>350</sup> Japan concentrated its testing on persons who were strongly suspected of infection and were reluctant to test persons who were not showing symptoms.<sup>351</sup> Although the government increased the capacity of testing and now allows doctors to directly collaborate with private testing institutions,<sup>352</sup> only infectious disease doctors could initially ask for testing. In other words, general hospitals or clinics could only refer suspected COVID-19 patients to infectious disease doctors for official testing.<sup>353</sup> This kind of limitation is a reflection of the government policy to focus on serious patients, but it is also a reflection of the government's failure to prepare for the high number of requests for testing.

Moreover, with the gradual rise of the infected patients, it became apparent that the medical professionals lacked enough personal protective gear.<sup>354</sup> With the rise of serious patients, there were also serious fears that the available intensive care units with ventilators may not be sufficient to provide care for all of the serious patients.<sup>355</sup> The government rushed to increase the number of personal protective gear, as well as ventilators, to face the critical increase of patients.<sup>356</sup> The government should have prepared this equipment well in advance.

Furthermore, the government also did not anticipate having to evacuate Japanese citizens living in the epicenters of the outbreak in foreign countries. Therefore, the government had to ask a private commercial airliner to assist in evacuating its citizens and had to find hotels, which would allow those citizens to complete a fourteen day quarantine period.<sup>357</sup> In the past, the issue of evacuation of Japanese citizens living abroad was discussed only in a situation when some riot or military civil war happened, and usually the discussion was focused on whether the government could send the Self Defense Force to rescue them.<sup>358</sup> Facing the

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days before the results came back. *Shingata coronavirus nikanrenshitakansenshōnikansuru Q&A [Q&A on New Coronavirus Infection]*, Nat'l Inst. Pub. Health (Feb. 12, 2020), <https://h-crisis.niph.go.jp/?p=133680#Q3>. It now requires several hours for the PCR test results to be completed.

<sup>350</sup> See Yoon & Martin, *supra* note 323.

<sup>351</sup> See *Comments on Implementation of Basic Policy*, *supra* note 329.

<sup>352</sup> MHLW, *Shingata coronavirus knsenshōnikansurukensanitsuite [Testing on New Coronavirus Infection]*, [https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000121431\\_00132.html](https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000121431_00132.html) (last visited Feb. 17, 2021).

<sup>353</sup> *Id.*

<sup>354</sup> *Iryokikanyakuhansu de mask tsukaimawasi [Half of the Hospitals Using the Same Disposable Mask Repeatedly]*, NHK (Apr. 21, 2020), <https://www3.nhk.or.jp/news/html/20200421/k10012397581000.html>.

<sup>355</sup> *Jinkoukokyukigatarinakuattabaai no kangaekata [How to Respond when the Ventilators Are Running out]*, NHK (Apr. 3, 2020), <https://www3.nhk.or.jp/news/html/20200403/k10012367041000.html>.

<sup>356</sup> See *Emergency Countermeasures*, *supra* note 54.

<sup>357</sup> See *Real Story of Rescue Mission*, *supra* note 57.

<sup>358</sup> Seigo Iwamoto, *Jeitainiyoruzai gaihōjinyūsoukarazai gaihōjinkyūshutsu e [From 'Transport' to 'Rescue' of Nationals Abroad by the Japan Self-Defense Forces: Reconciliation of Japanese Law with International Law]*, 48: 3/4 SANDAIHOUGAKU 856

outbreak of the new coronavirus in China, sending the Self Defense Force to China was out of the question,<sup>359</sup> and it was more appropriate to send medical professionals to organize the evacuation. But there was no discussion on such possibility in the past. Moreover, in the context of military conflict, there was no need to conduct fourteen-day quarantines after the return of evacuated citizens. There was thus no discussion on where the government could ask evacuees from Wuhan to stay during the fourteen-day quarantines.<sup>360</sup> The government should have anticipated these and prepared for them.

Similarly, the government did not anticipate the arrival of a large cruise ship carrying many infected patients alongside huge numbers of possible patients.<sup>361</sup> The government probably did all it could, but evidently the absence of preparation hampered and prevented a more appropriate response. The government should have anticipated this kind of situation and should have been prepared for it.

Finally, there is no civil rights or human rights legislation that prohibits unreasonable discrimination against infected patients or their families, against people of a particular race or nationality, or against the medical professions and their families because of the fear of infection. There is an urgent need to enact such legislation. Further, the government should have established clearer guidelines with respect to publishing an infected patient's personal information. The absence of these measures is a clear indication of the government's unpreparedness.

#### **D. Reluctance to Respond Quickly**

Fourth, there are some questions whether the government response was sufficiently timely. In the early response, the Japanese government did introduce precautionary measures in relation to visitors who had visited the Hubei province within the previous fourteen days during immigration control and quarantine.<sup>362</sup> However, these measures only took effect on February 1, 2020,<sup>363</sup> almost one

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(2015) (Japan).

<sup>359</sup> See *Real Story of Rescue Mission*, *supra* note 57.

<sup>360</sup> See Nat'l Inst. of Infectious Diseases, *People Returned from Wuhan*, *supra* note 59.

<sup>361</sup> See *Headquarters (7th)*, *supra* note 161 (serious limitation of the PCR testing capacity); Sotooka, *supra* note 158 (no facility to allow them to stay during detention).

<sup>362</sup> See *Response to New Coronavirus*, *supra* note 52.

<sup>363</sup> The Cabinet Order to Designate New Coronavirus as Designated Infectious Disease and related Cabinet Orders were passed on January 28, 2020 and were initially supposed to take effect ten days after promulgation (on February 7, 2020). MHLW, *Shingata coronavirus kansenshō wo shitei kansenshō toshite sadamerutō no seirei no ichibuwo kaiseisuru seirei* [Cabinet Order to Amend Parts of the Cabinet Order to Designate New Coronavirus as Designated Infectious Disease] (Jan. 31, 2020), <https://www.mhlw.go.jp/content/10900000/000591614.pdf>. Then, the Cabinet further revised the Order to shorten the preparation period to four days after promulgation. *Id.* The

month after the first reported case of the new coronavirus infection in China and one week after WHO declared the outbreak a “public health emergency of international concern.” Some criticize this as being too late. By that time, many Wuhan residents had already left Wuhan before its lockdown on January 23, 2020, and were permitted entry into Japan without any restrictions.<sup>364</sup> Moreover, unlike the United States or Australia, Japan did not take any further action against Chinese visitors. It was only in mid-March that the government was forced to adopt additional entry restrictions, including China. Apparently, for many, the government failed to take action quickly to stop the entry of infected foreigners into Japan.<sup>365</sup>

Furthermore, the government’s quarantine system was significantly flawed. The government did not anticipate the fourteen-day quarantine before making a decision. It did not anticipate where to direct a huge number of foreign nationals under quarantine to stay and how to treat them during the quarantine. As a result, the government failed to adopt the most effective measures swiftly enough to prevent the entry of foreign patients into Japan.

### **E. Insufficiency of Domestic Countermeasures**

Fifth, there might be questions on whether the countermeasures currently available might not be sufficient. When it comes to domestic countermeasures against new infectious diseases, the *Infectious Disease Prevention Act* provides for various countermeasures. However, the *Act* always authorizes recommendation first, and then the use of force.<sup>366</sup> In an emergency situation, such an ordinary routine may not be enough. Sometimes, the government should be allowed to exercise force directly from the beginning. It is questionable whether the listed powers are sufficient enough.

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order thus took effect on February 1, 2020. *Id.*

<sup>364</sup> Homare Endo, *Xi Jinping kokuhinrainitienosontakugamaneitanihon no mizugiwashippai* [Consideration of Xi Jinping’s Visit as a Government Guest Forced the Border Control Failure], NEWSWEEK (Feb. 20, 2020, 1:00 PM), [https://www.newsweekjapan.jp/stories/world/2020/02/post-92453\\_1.php](https://www.newsweekjapan.jp/stories/world/2020/02/post-92453_1.php).

<sup>365</sup> Yoichiro Aonuma, *Shingata coronavirus: Chuugokujin no nyukokuseigenososugitadaisho* [New Coronavirus Infection: Price of Too-late Entry Restriction of Chinese People], TOYO KEIZAI (Mar. 6, 2020), <https://toyokeizai.net/articles/-/335084>.

<sup>366</sup> See *Infectious Disease Prevention Act*, *supra* note 46, arts. 17(1), 19(1), & 20(1). Moreover, all the government can issue is a “direction,” not a “legal order,” and there are some questions of whether the direction can be legally binding. It is believed that the direction issued by the government is legally binding unlike a recommendation, and surely government officials are mandated to implement it. But for the public, it cannot be legally enforced, and there is also no criminal punishment against violators. Therefore, the “direction” is surely different from the legal “order” backed by enforcement and criminal punishment.

The current infectious disease prevention system is directed to confirmed patients, patients who show symptoms of the disease, or patients who are reasonably suspected to be disease carriers. Yet not all Wuhan residents or persons who visited the Hubei province within the previous fourteen days necessarily raise a legitimate suspicion of infection. In that sense, the government should be allowed to exercise the power to all those who might be infected, not limited to confirmed patients or persons who could be reasonably suspected of infection. Furthermore, when the infectious disease spreads throughout a city, such as in Wuhan, then some kind of lockdown may be necessary. Such extreme measures are never anticipated.

Now, it became possible to apply the additional countermeasures stipulated in the *New Influenza Infection Special Measures Act* that used to be unavailable to the new coronavirus infection. But it is still debatable whether all the countermeasures stipulated in this statute are sufficient to prevent the pandemic of the new contagious disease. As we already pointed out, the government still cannot order the public to obey the command of the government and to impose criminal punishment against violators. In this sense, the government can direct the public but still cannot compel the public to obey the order. It is debatable whether this would be sufficient, especially when the risk of infection transmission is real, although overall the public is very cooperative.<sup>367</sup>

Moreover, a number of the measures implemented to contain the spread of the new coronavirus have been provided for by the dedicated efforts of medical professionals, some of which were infected as a result of these efforts. No system currently exists to compensate these professionals for the sacrifices they have made in responding to the health crisis. Of course, this work is part of their professional duties, but this was far above and beyond what is normally expected of them. Moreover, in some cases, their families were also affected. It is therefore necessary for there to be some type of assurance that their dedication and sacrifice will be compensated, and that they will receive the needed care and their families will be sufficiently compensated. Thus, some kind of compensation system for medical professional must be introduced. Furthermore, since many hospitals came to refuse treatment of other patients and since many patients came reluctant to visit doctors and hospitals, many doctors and hospitals lost revenue and are facing a serious risk of closure or loss of income. Many of the medical professionals employed by these hospitals are now facing the reduction of salary, or worse, loss of jobs.<sup>368</sup> There must be some ways to make sure that they can survive this crisis to continue offering essential service for the COVID-19 patients and for the other patients.

Further, while the vaccination system in Japan is completely voluntary, the government may nonetheless recommend that people get vaccinated. Currently, the

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<sup>367</sup> See Petricic, *supra* note 310.

<sup>368</sup> *Shouyoga 3 bun no 1, nakiso: Iryosha coronavirus de taiguakka [Bonus Was Cut to One Third: Payment for Medical Staff Suffered because of the New Coronavirus Infection]*, ASAHI SHIMBUN (May 30, 2020), <https://www.asahi.com/articles/ASN5Z5S47N5ZULFA005.html>.

new coronavirus appears to be far less deadly than other infectious diseases and, as such, it is unlikely that there would be a need for the government to mandate vaccinations, even if such a vaccine were to be developed.<sup>369</sup> However, the government needs a strong incentive for the public to get vaccinated for COVID-19. Moreover, in order to respond to more dangerous infectious diseases, the government should reconsider its vaccination policy and introduce some type of mandatory vaccination program together with an appropriate compensation system.

## **F. Absence of Leadership**

Sixth, all of these problems ultimately led to the more fundamental question: who should take a leading role in responding to this kind of international health crisis triggered by the outbreak and spread of a new infectious disease in Japan? At present, immigration control issues are handled by the Ministry of Foreign Affairs, while domestic health issues are handled by the MHLW and the management of the port belongs to the jurisdiction of the Ministry of Land, Infrastructure, and Transport. All fundamental decisions on countermeasures against the new coronavirus are made by the Headquarters, headed by the Prime Minister and consisting of all state ministers. Indeed, it is common in Japan to establish this kind of headquarters to respond to an emergency.<sup>370</sup> But during a time of emergency, it is meaningless to invite many members to gather together and discuss what to do. It is much better to designate a particular agency or a person who can take charge and make all critical decisions.

This leads us to the Center for Disease Control and Prevention (CDC) of the United States.<sup>371</sup> The CDC is an agency inside the Department of Health and Human Services whose mission is to “protect America from health, safety, and security threats, both foreign and in the US. Whether diseases start at home or abroad, are chronic or acute, curable or preventable, human error or deliberate attack, the CDC fights disease and supports communities and citizens to do the same.”<sup>372</sup> The CDC thus stands at the forefront of countermeasures against infectious diseases and, notably, has a mission of securing the health of the nation against deliberate attacks as well. In other words, the CDC functions to protect

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<sup>369</sup> The MHLW decided to provide the vaccines bought by the government for COVID-19 free of charge. *Coronavirus wakuchin, sesshu wo doryokugimuni: Hou kaisei e [Vaccination for New Coronavirus Infection Would Be Encouraged: The Government Heads to Amendment of the Law]*, NIKKEI (Oct. 2, 2020), <https://www.nikkei.com/article/DGXMZO64574160S0A001C2EA4000/>. It recommends its use but does not make it mandatory. *Id.* The MHLW submitted a bill to the Diet to amend the Vaccination Act to provide this measure. *Id.*

<sup>370</sup> SHIGENORI MATSUI, *DISASTER AND LAW: EARTHQUAKE, TSUNAMI AND NUCLEAR MELTDOWN 34M* (Routledge 2019).

<sup>371</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov> (last visited Mar. 12, 2021).

<sup>372</sup> *Id.*

national security against new contagious diseases. Thus, the CDC has very broad powers, including the power to order isolation and quarantine to all travelers coming to the United States and to take action against any communicative disease.

Unfortunately, Japan does not have such an agency. Although the CDC has been criticized, even in the United States, for having extremely broad powers, and some cast doubt on the role the CDC has played against this new coronavirus,<sup>373</sup> it is clear that some sort of leading agency is necessary during a time of emergency. The Japanese system of establishing an ad hoc collegiate headquarters headed by the Prime Minister to deliver and make all important decisions is evidently not efficient enough. Some have called for the establishment of a CDC-like agency in Japan.<sup>374</sup> This is something that the public should seriously consider in the future.

This also raises a question of whether Japan should have a doctor who can play a leadership role in responding to this kind of public health emergency. Unlike some other countries,<sup>375</sup> Japan apparently does not have a chief medical officer or someone who can decide what kind of countermeasures should be introduced based on medical knowledge. The Headquarters consists of the prime minister and all state ministers, whom are politicians and most of them are representatives, but they do not have medical expertise. There is no system to allow a high-ranking doctor to decide or even provide critical advice on what countermeasures should be adopted against the new contagious disease.<sup>376</sup>

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<sup>373</sup> Anthony Rivas, *5 former CDC directors on where US went wrong in its COVID-19 response*, ABC NEWS (Aug. 7, 2020, 4:01 AM), <https://abcnews.go.com/Politics/cdc-directors-us-wrong-covid-19-response/story?id=72219740>.

<sup>374</sup> Kenji Shibuya, *Nihonban CDC setsuritsu de kuni wo mamore [In order to Defend the Country, The Japanese Version of CDC Is Needed]*, PHP (Apr. 15, 2020), <https://thinktank.php.co.jp/voice/6132/>.

<sup>375</sup> For instance, in British Columbia, Canada, there is a provincial health officer, the highest doctor in the province, who is taking charge of all responses to COVID-19. MHLW, *Shingata coronavirus kansenshō wo shitei kansenshō toshite sadamerutō no seirei no ichibuwo kaiseisuru seirei [Cabinet Order to Amend Parts of the Cabinet Order to Designate New Coronavirus as Designated Infectious Disease]* (Jan. 31, 2020), <https://www.mhlw.go.jp/content/10900000/000591614.pdf>. He or she could issue a declaration of emergency, issue orders to the public, and make them enforceable by the police. *Id.*

<sup>376</sup> There is surely an expert group that advises the government on how to respond to new coronavirus infection. Headquarters, *Shingata coronavirus kansenshōtaisakusenmonkakaigi no kaisaintuute [Expert Group on New Coronavirus Infection]*, (Feb. 14, 2020), [https://www.kantei.go.jp/jp/singi/novel\\_coronavirus/th\\_siryou/senmonka\\_konkyo.pdf](https://www.kantei.go.jp/jp/singi/novel_coronavirus/th_siryou/senmonka_konkyo.pdf). But this is an ad hoc organization of a group of experts and not a single individual. Moreover, on July 3, 2020, the Headquarters decided to abolish this expert group, presumably because of its aggressive involvement with the government policy making. The government established a new advisory institution under the New Influenza Special Measures Act as a sub-branch of the expert committee on new influenza infection countermeasures, this time consisting of other non-medical professionals. Cabinet Office, *Shingata influenza kakuryoukaigi [State Minister's Meeting on Countermeasures against*

### **G. Need to Reconsider Principle that Government Restriction Should Be Minimal**

However, the most significant problem with respect to the infectious disease prevention system is the principle underlying the whole system. The *Infectious Disease Prevention Act* allows the government to exercise the minimum measures necessary to prevent the outbreak or spread of an infectious disease: the “minimum necessary principle.”<sup>377</sup> When confronting an unknown emerging contagious disease, however, it may be better to adopt maximum precautionary and preventive measures. Yet, such a philosophy is not found in the *Act*. As the *Act* makes clear, its purpose is to promote the public welfare by preventing the outbreak and spread of infectious diseases.<sup>378</sup> It is not a public safety measure but a social welfare measure. Then, the accomplishment of its objective necessitates maximum utilization of the power of the government to promote public welfare. Such precautionary and preventive measures could be justified because there are so many uncertainties about the new coronavirus: the nature and mechanism of infection is still unclear, the risk of infection is also unclear, and the death toll continues to rise. The usual “minimum necessary principle,” which needs to be observed when it comes to public safety measures—the principle that the government regulation needs to be minimally necessary—should not be applicable in these circumstances.

The elaboration of such alternative principles will require a somewhat different jurisprudence, a “jurisprudence of prevention.” This will allow the government to exercise maximum precautionary and preventive measures to prevent unclear and possibly serious consequences. Such jurisprudence would not allow unnecessary regulation. But so long as it is necessary, the measure does not have to be minimally necessary. It could allow the government to adopt precautionary and preventive measures. Since the precise nature of the infectious

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New Influenza] (Aug. 3, 2020), <https://www.cas.go.jp/jp/seisaku/ful/yusikisyakaigi/konkyo.pdf>; *Shingata coronavirus kansenshōtaisakubunkakai (dai1kai)* [The First Meeting of the sub branch on New Coronavirus Infection Countermeasures] CABINET SECRETARIAT (Jul. 6, 2020), <https://www.cas.go.jp/jp/seisaku/ful/bunkakai/corona1.pdf>. The government may be able to rely upon the WHO, but that could raise questions on the neutrality and reliability of the WHO in light of its handling of new coronavirus, e.g., WHO’s over-reliance on information from China in forming a proper understanding of the virus, the downplaying on the human-to-human transmission in the virus’s early phase, its praise for Chinese countermeasures, and its optimistic hope that containment was possible without border control. Ben Riley-Smith, *Donald Trump threatens to cut funding to “China-centric” World Health Organization*, TELEGRAPH (Apr. 9, 2020, 7:18 AM), <https://www.telegraph.co.uk/news/2020/04/08/donald-trump-threatens-cut-funding-world-health-organisation/>. Although the Trump Administration notified the WHO about its withdrawal on July 6, 2021, the next Biden Administration might reconsider this decision. *Id.*

<sup>377</sup> Infectious Disease Prevention Act, *supra* note 46, art. 22-2.

<sup>378</sup> *See id.*

disease is unclear and the risks could be devastating, the adoption of such jurisprudence may be justified.<sup>379</sup>

Take for example the traveler's entry restriction. The WHO, the Chinese government, and many health law professors strongly opposed and protested a measure to restrict the entry of Chinese travelers to the United States,<sup>380</sup> but, upon reflection, this kind of measure might be adopted as a precautionary and preventive measure despite the absence of scientific evidence to show necessity for such measure or its efficacy and despite the serious infringement of freedom to travel and significant economic impact.

It is also questionable whether the mandatory mask requirement in the public spaces can be justified against the new coronavirus infection. Since there is no sufficient evidence to prove that the ordinary masks can protect the people from getting infected, it is surely not justifiable as a means to protect the public from the infection. That was a main reason why the CDC did not recommend the mask-wearing as a countermeasure against the new coronavirus infection. However, since the evidence came to show that masks could prevent the spread of infection to others, now the CDC recommend it for the protection of others.<sup>381</sup> Even if there is sufficient evidence to prove that masks could protect the public from getting infected, the mandatory mask wearing in the public spaces might be justified as a precautionary and preventive measure under the "jurisprudence of prevention."<sup>382</sup>

There exists some previous works on the jurisprudence of prevention.<sup>383</sup> Yet, such jurisprudence is not well developed in the infectious disease prevention

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<sup>379</sup> See generally *World Commission on the Ethics of Scientific Knowledge and Technology, Precautionary Principle*, UNESCO (2005), <https://unesdoc.unesco.org/ark:/48223/pf0000139578>, for a similar discussion on the "precautionary principle" that would enable decision-makers to adopt precautionary measures when scientific evidence about an environmental or human health hazard is uncertain and the stakes are high; see also *The Precautionary Principle: Definitions, applications and governance*, EUROPEAN PARLIAMENT THINK TANK (2015), [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_IDA\(2015\)573876](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA(2015)573876); Jocelyn Stacey, *Preventive Justice, the Precautionary Principle and the Rule of Law* 23, in *REGULATING PREVENTIVE JUSTICE: PRINCIPLE, POLICY AND PARADOX* (Tamara Tulich et al. eds., N.Y., Routledge, 2016). But there is still no consensus on what the "precautionary principle" would justify in contrast to traditional justification. If it merely justifies the government regulation so long as it is supported by the scientific evidence, then it may not be sufficient.

<sup>380</sup> See Regalado, *supra* note 39; Somos, *supra* note 40; Habibi, *supra* note 187.

<sup>381</sup> *Guidance for Wearing Masks*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html> (last updated Feb. 18, 2021).

<sup>382</sup> Caroline Roberts & Sarah Mitroff, *Where are face masks required? The rules for all 50 states and D.C.*, CNET, <https://www.cnet.com/health/where-are-face-masks-required/> (last updated July 16, 2020) (stating that an increasing number of jurisdictions in the United States have come to mandate the mask-wearing in the public spaces).

<sup>383</sup> See, e.g., Edward P. Richards, *The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals*, 16 HAST. CON. L. Q. 329 (1989).

area. It is true that there is uncertainty between the area where this jurisprudence of prevention can be accepted, and there is also a grave danger that the government can manipulate this jurisprudence to justify arbitrary power.<sup>384</sup> Therefore, we need more elaboration of this new jurisprudence. In light of the uncertainties and serious risks involved, this kind of elaboration may be desperately needed.<sup>385</sup>

## VIII. CONCLUSION

COVID-19 and the resulting lockdown left a serious impact on the Japanese economy. It is now estimated that the annual GSP could be more than 27.8% less than last year.<sup>386</sup> Because of the need for subsidies and grants to help the public and corporations, the government is spending a huge amount of money, necessitating a huge debt.<sup>387</sup> This would surely exacerbate the huge amount of government debt the Japanese government already carries. This would have a long-lasting impact on Japanese economy.

We still do not know whether Japan or any other countries will be able to successfully contain the spread of the new coronavirus. Many experts now believe that containment of the virus is impossible and that the new coronavirus infection will become similar to the seasonal flu; it will then be with us in the future.<sup>388</sup> The

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<sup>384</sup> Compare Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. L. REV. 1 (2003) (arguing that the invocation of preventative measures and subsequent deprivations in liberty can lead to dangerous antisocial behaviors), with Stacey, *supra* note 375, at 23 (arguing that such jurisprudence can be justified in environmental regulation), and MATSUI, *supra* note 366 (arguing that such jurisprudence can be justified in natural disaster law and nuclear power regulation).

<sup>385</sup> See Joshua Kurlantzick, *Dictators are using the coronavirus to strengthen their grip on power*, WASH. POST (Apr. 3, 2020), [https://www.washingtonpost.com/outlook/dictators-are-using-the-coronavirus-to-strengthen-their-grip-on-power/2020/04/02/c36582f8-748c-11ea-87da-77a8136c1a6d\\_story.html](https://www.washingtonpost.com/outlook/dictators-are-using-the-coronavirus-to-strengthen-their-grip-on-power/2020/04/02/c36582f8-748c-11ea-87da-77a8136c1a6d_story.html) (showing that some of the world dictators are taking advantage of this crisis to strengthen their powers).

<sup>386</sup> *DGP jisshitsu 27.8% gen, 4-6gatu nenristu [DGP Dropped by 27.8%]*, NIHON KEIZAI SHIMBUN (Aug. 17, 2020), <https://www.nikkei.com/article/DGXMZO62699240X10C20A8MM0000/>.

<sup>387</sup> *Shingata corona taisaku de zaiseiakka [New Coronavirus Likely to worsen Governmental Finance]*, JIJI (May 28, 2020), [https://www.jiji.com/jc/graphics?p=ve\\_pol\\_yosanraisei20200601j-08-w410](https://www.jiji.com/jc/graphics?p=ve_pol_yosanraisei20200601j-08-w410) (estimating that the government spending will reach to 160 trillion JPY (some 19 trillion USD), far higher than estimated revenue of 63 trillion JPY (some 7 trillion USD) and the government bond will likely be increased to 90 trillion JPY (some 10 trillion USD)); see also *Zaiseinikansurushiryō [Data on National Finance]*, MINISTRY OF FIN., [https://www.mof.go.jp/tax\\_policy/summary/condition/a02.htm](https://www.mof.go.jp/tax_policy/summary/condition/a02.htm) (last visited Mar. 12, 2021) (showing that Japan already is facing a cumulative 9,320 trillion JPY (some 1 quadrillion USD) in national debt, or 240% of the national GDP—the worst among major developed countries).

<sup>388</sup> Elizabeth Pratt, *COVID-19 Could Become a Seasonal Illness: What We'll Need to Do*, HEALTHLINE (Apr. 2, 2020), <https://www.healthline.com/health-news/covid19-could-become-seasonal-just-like-the-flu>.

CDC estimates that the seasonal flu causes 9,300,00 to 45,000,000 illnesses, 140,000 to 810,000 hospitalizations, and 12,000 to 61,000 deaths every year in the United States.<sup>389</sup> Although the death toll resulting from the new coronavirus has surpassed the death toll of SARS,<sup>390</sup> the new coronavirus seems to be less vicious than SARS. At this point, it is very difficult to determine the mortality rate of the new coronavirus with any precision, but it is estimated that it will be close to 3.4%, which is much lower than the 10% mortality rate of SARS, although it is significantly higher than the seasonal flu.<sup>391</sup> In light of this low mortality rate, it is therefore reasonable to ask whether we are worrying too much about the new coronavirus infection. It is then questionable whether the countermeasures adopted by various countries in the world in an attempt to contain the disease are really necessary. Yet, confirmed patients worldwide already reached to 58,712,326 with 1,388,528 deaths as of November 24, and confirmed patients in the United States reached 12,119,654 with 254,798 deaths.<sup>392</sup> It is a serious infectious disease. Moreover, a new infectious disease always carries the risk of mutation and could suddenly become more vicious. Therefore, it is not too much for the governments of the world to prepare for the worst. We can only hope that the new coronavirus infection is contained as soon as possible and never comes back again.



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<sup>389</sup> *Disease Burden of Influenza*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/about/burden/index.html> (last updated Oct. 5, 2020).

<sup>390</sup> See *SARS Basic Fact Sheet*, *supra* note 6.

<sup>391</sup> Jamie Ducharme & Elijah Wolfson, *The WHO Estimated COVID-19 Mortality at 3.4%. That Doesn't Tell the Whole Story*, TIME (Mar. 9, 2020), <https://time.com/5798168/coronavirus-mortality-rate/>.

<sup>392</sup> See *WHO COVID-19 Dashboard*, *supra* note 7; see also World Health Organization, *Coronavirus Disease (COVID-19) Dashboard for the United States*, *supra* note 259.