

Special Report on Important Matters after the Release of the List of Issues (CCPR/C/JPN/QPR/7) by the Human Rights Committee
- Adoption of Appropriate Measures in Response to Novel Coronavirus Infections (COVID-19)

Date: September 10, 2020
Japan Federation of Bar Associations

I. Content of Recommendations to the Japanese Government

1. The Japanese Government should provide necessary and accurate information and be accountable in the context of COVID-19, as well as consideration shall be given to prevent prejudice, discrimination and violation of human rights.
2. It shall be guaranteed in practice that PCR tests, Antigen tests and other tests to determine infection deemed necessary by a medical doctor are performed promptly and reliably, so that the actual condition of the novel coronavirus pandemic will be accurately grasped and promptly disclosed to the public. At that time, due consideration shall be given to protect the privacy of the people.
3. For meetings held by the Japanese and municipal governments to control against infectious diseases, official minutes of the proceedings containing a description of the speakers and their comments shall be prepared for each meeting held, in order that the decision-making process can be verified at a later date. In particular, for the Japanese government's "Expert Meeting on the Novel Coronavirus Disease Control" and its successor organization "Novel Coronavirus Disease Control Subcommittee" (hereinafter collectively referred to as "Expert Meeting," official minutes of the proceedings shall be prepared and released promptly after each meeting.
4. At detention facilities managed by the national and municipal governments, such as penal institutions, police lock-up facilities , juvenile penal institutions, temporary shelters attached to child guidance centers, immigration detention facilities, etc., infectious disease controls and medical care systems shall be strengthened, and while paying

maximum attention to the prevention of the spread of infections, efforts shall be made to enable normal general visitations as much as possible by providing sufficient protective measures, and if visitations are to be restricted, alternative means such as telephone communication, web-conferencing systems, etc., shall be utilized in a flexible manner.

5. In courts nationwide, efforts shall be made, even in situations where novel coronavirus infections are spreading, not to impede the progress of cases, for example, by conducting hearings on their scheduled dates paying maximum attention to the prevention of the spread of infections, as well as flexibly utilizing alternative means such as telephone conference systems, web conferencing systems, etc., according to the degree and stage of such status of spread of infections so that the judicial functions will be maintained.

II. Basic Facts and Legal Framework for Infectious Disease Control

1. Status of the Spread of Infections in Japan

On January 16, 2020, a male of Chinese nationality in his 30's residing in Kanagawa Prefecture with a travel history to Wuhan, China was reported as the first infected patient of the novel coronavirus in Japan. Subsequently, infections are believed to have also spread by people returning from European countries.

On March 1, 2020, the Ministry of Health, Labour and Welfare ("MHLW") advised people to avoid "poorly-ventilated crowded places,"¹ referring to past small outbreak cases at sport gyms, houseboats, buffet-style dinner meetings and mahjong parlors, etc.

On April 3, 2020, the number of those infected in Japan exceeded 3,000 and on May 3, such number exceeded 15,000. As of August 5, 2020, at the time of preparing this report, the number of those infected and the number of deaths were reported to be 41,129 and 1,022, respectively².

¹ "Avoid the Three Cs!" by the MHLW

<https://www.mhlw.go.jp/content/10900000/000615287.pdf> (English)

<https://www.mhlw.go.jp/content/000645566.pdf> (Japanese)

² "Status Update for Novel Coronavirus and the MHLW's Response (August 5, 2020) by the MHLW

2. Infectious Disease Control in Japan

Infectious disease control in Japan had been operated based on the “Infectious Disease Prevention Act” and the “Tuberculosis Prevention Act,” however, since April 1, 1999 the “Act on Infectious Diseases (Act on the Prevention of Infectious Diseases and Medical Care for Patients with Infectious Diseases)” has been enforced, which provides for policy measures for infectious disease prevention and consideration for the human rights of patients.

The “Infectious Disease Prevention Act” was amended in 2003 to respond to the outbreak of infectious diseases abroad such as “SARS (severe acute respiratory syndrome),” then combined with the “Tuberculosis Prevention Act” in 2007, and further amended in 2008 in preparation for the spread of avian influenza (H5N1). Under the “Act on Infectious Diseases,” infectious diseases are classified into seven (7) categories, including five (5) types of infectious diseases of Class I through Class V, designated infectious diseases and new infectious diseases depending on the severity of the symptoms and the infectability of the pathogen, etc.

In March 2012, the Japanese government submitted to the Diet the “Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response” (hereinafter referred to as “Act on Special Measures for Pandemic Influenza”), which was enacted into law.

The “Amended Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response” (hereinafter referred to as Act on Special Measures for COVID-19”) proposed by the Japanese government in March 2020, as discussed below, was an amendment to add the novel coronavirus infectious disease to the diseases covered by this Act.

3. Proposal and Enactment of the Act on Special Measures for COVID-19

The Act on Special Measures for COVID-19 was submitted to the Diet on March 10, 2020 in preparation for the rapid spread of novel coronavirus infections, passed the Lower House on the 12th and was enacted on the

13th of the same month.

The bill was passed by a majority despite being opposed by some opposition lawmakers.

4. Declaration and Cancellation of a State of Emergency

Amid such developments, the number of infected people grew rapidly, and a state of emergency was declared by the Cabinet on April 8, 2020 for Tokyo, Kanagawa, Saitama, Chiba, Osaka, Hyogo and Fukuoka Prefectures, which was expanded to cover the entire nation on the 16th of the same month. This nationwide state of emergency was cancelled for 39 prefectures on May 14, and also for the remaining eight (8) prefectures including Tokyo and Osaka on May 25.

5. Subsequent Developments

However, the number of infections has remained considerable since then, and in July 2020, the reported number of infections was comparable to that when the declaration of a state of emergency was issued. The testing situation has improved to a certain extent, but still remains quite limited.

III. International Rules to Be Observed in Infectious Disease Control

1. Related Provisions of the International Covenant on Civil and Political Rights

Article 6 of the International Covenant on Civil and Political Rights (hereinafter referred to as “ICCPR”) guarantees the right to life. General Comment No. 36 on Article 6 of the ICCPR provides that “3. The right to life is a right that should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity.” and requires that equal access to necessary medical care shall be provided.

Further, Article 26 of the ICCPR provides that “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, color, sex, language, religion, political views or other opinions, national or social origin,

property, birth or other status,” and requires that medical treatments and other assistance measures shall be implemented fairly and equally in efforts to control novel coronavirus infections.

Moreover, Article 4 of the ICCPR provides as follows:

“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the grounds of race, color, sex, language, religion or social origin.

2. No derogation from Articles 6 (Right to Life), 7 (Prohibition on Torture and Inhuman Treatment), 8 (Prohibition on Slavery and Servitude) (paragraphs 1 and 2), 11 (Imprisonment for Nonfulfillment of Contract), 15 (Prohibition on Retroactive Punishments), 16 and 18 (Freedom of Thought, Conscience and Religion) may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.”

and articulates that, even where a state of emergency is declared, no discriminatory measures should be permitted and certain important rights should not be suspended by such declaration.

2. Office of the United Nations High Commissioner for Human Rights (OHCHR) – COVID-19 Guidance

OHCHR confirms the human rights principles relating to the responses to the novel coronavirus infections in its OHCHR COVID-19 Guidance³

³ Office of the United Nations High Commissioner for Human Rights (OHCHR) “COVID-

based on international human rights standards such as UN human rights treaties.

IV. Human Rights Issues in the Japanese Government's Responses to Novel Coronavirus Infections

1. Prejudice and discrimination to the people infected by COVID-19

As the COVID-19 pandemic continues to spread, there have been reports where people infected by COVID-19 are driven away from society. Prejudice and discrimination have manifested in an array of incidents including: slandering and labelling people infected by COVID-19, healthcare workers, and others on social media; accusing schools and other facilities where infection was identified; healthcare workers' children getting denied access to schools and daycare facilities; throwing stones at homes of people infected by COVID-19; expelling cars with another prefecture's license plate or drivers of long-distance commercial vehicles; and invading the privacy of those infected by COVID-19 as well as actions and comments provoking prejudice and discrimination.

Under the Constitution of Japan—which upholds fundamental human rights as a basic principle, and guarantees individual dignity, freedom, and personality rights (Article 13), as well as equality under the law (Article 14) and Article 26 of the ICCPR—such prejudice and discrimination should not be tolerated, because such prejudice and discrimination not only compromise the personality and dignity of people infected by COVID-19 and their families, but also cause devastating impacts on their daily lives.

The Japanese Government should provide necessary and accurate information and be accountable in the context of COVID-19, as well as to undertake, proactively and continuously, awareness campaigns and education programs to prevent prejudice, discrimination, and violation of human rights⁴.

¹⁹ GUIDANCE”

https://www.ohchr.org/Documents/Events/COVID-19_Guidance.pdf

⁴ JFBA: “<COVID-19>Statement Calling for Building a Society without Discrimination in the Midst of the COVID-19 Pandemic” (July 29, 2020)

<https://www.nichibenren.or.jp/en/document/statements/200729.html> (English)

2. Measures to restrict testing were taken.

The Japanese government took measures to restrict testing by performing PCR tests only for those who had a fever of 37.5°C or higher for four (4) consecutive days or more.

On March 6, 2020, the MHLW issued the “Review of the Medical Care System, etc., in Preparation for a Substantial Increase in Novel Coronavirus Patients,”⁵ however, the number of tests did not increase at all even after that⁶.

Several cases have been reported where a person could not have access to a medical test despite visiting a hospital many times and was found to be infected only after becoming seriously ill, or a person who was refused a test by a public health center died at home, etc.⁷

Testing was gradually expanded, but cases have been reported which indicate that the policy to expand testing has not been fully executed.

On May 29, 2020, the Expert Meeting announced the “Analysis of the Responses to the Novel Coronavirus Disease (COVID-19) and Recommendations.”⁸

The Japan Medical Association had also frequently expressed their

<https://www.nichibenren.or.jp/document/statement/year/2020/200729.html> (Japanese)

⁵ MHLW’s Headquarters for Promotion of Novel Coronavirus Disease Control: Announcement “Review of the Medical Care System, etc., in Preparation for a Substantial Increase in Novel Coronavirus Patients (Request)” (March 6, 2020)

<https://www.mhlw.go.jp/content/000605276.pdf>

⁶ Novel Coronavirus Information Website operated by the Tokyo Metropolitan Government [Number of calls to the COVID-19 Hotline]

<https://stopcovid19.metro.tokyo.lg.jp/en/cards/monitoring-number-of-reports-to-covid19-consultation-desk> (English)

<https://stopcovid19.metro.tokyo.lg.jp/cards/monitoring-number-of-reports-to-covid19-consultation-desk/> (Japanese)

[Number of tests]

<https://stopcovid19.metro.tokyo.lg.jp/en/cards/number-of-tested> (English)

<https://stopcovid19.metro.tokyo.lg.jp/cards/number-of-tested/> (Japanese)

⁷ Tokyo Shimbun Newspaper: “A man living away from his family for work regrettably died alone at home: tested six days after fever developed and found to be infected with the coronavirus after death” (April 26, 2020)

<https://www.tokyo-np.co.jp/article/17029>

⁸ Expert Meeting on Novel Coronavirus Disease Control: “Analysis of the Response to the Novel Coronavirus Disease (COVID-19) and Recommendations” (May 29, 2020)

<https://www.mhlw.go.jp/content/10900000/000639223.pdf> (English)

<https://www.mhlw.go.jp/content/10900000/000639224.pdf> (English/Addendum)

<https://www.mhlw.go.jp/content/10900000/000635389.pdf> (Japanese)

opinion asking for expansion of PCR tests, and on August 5, 2020, it announced an urgent recommendation⁹ to enhance PCR and antigen testing capabilities to better grasp the status of novel coronavirus infections. The president of the association, Toshio Nakagawa, said, “people should be able to receive a test with a sense of certainty if a doctor deems it necessary.”¹⁰

However, it must be noted that information on any sort of plague is sensitive information, which should be highly protected based on privacy rights. Nonetheless, in the case of novel coronavirus infections, there have been quite a few people who have suffered serious violations of privacy, defamation, etc., due to information disclosure without consent by the national and municipal governments related to their privacy information, and therefore improvement in this respect is also highly required.

3. Official minutes of the proceedings of meetings of the Expert Meeting were not prepared.

Meetings of the Expert Meeting have been held to provide the Headquarters for Novel Coronavirus Disease Control with advice and other recommendations from medical points of view.

The Japanese government as also acknowledged that the Expert Meeting falls under the category of “round-table meeting” under the Guidelines for the Management of Administrative Documents (hereinafter referred to as “Guidelines”). However, the minutes of its meetings published to date are not the full minutes but merely the agenda of the meetings, and information on those who spoke at the meeting is also not recorded.

It has been explained that it is mandatory in accordance with the purport of Articles 1 and 4 of the Public Records and Archives Management Act to include the names of the speakers in the minutes of a meeting and the content of their statements, irrespective of the title of such minutes of a

⁹ Japan Medical Association: “Urgent Recommendation for Further Expansion and Enhancement of the PCR and Other Test Systems Anticipating Future Spread of Novel Coronavirus Infections” (August 5, 2020)

http://dl.med.or.jp/dl-med/kansen/novel_corona/2020ken2_236.pdf

¹⁰ Asahi Shimbun Newspaper: Japan Medical Association urgently recommends “enhancement of PCR and antigen testing capabilities” (August 5, 2020)

<https://www.asahi.com/articles/ASN8563XCN85UBQU001.html>

meeting, so that the decision-making process and actual administrative operations can be traced and verified at a later date. Further, it has been considered that, in the case of a “historical emergency” – “which is deemed historically significant policy matters of which records should be shared as the state and society to learn lessons thereof,” the necessity of the verification is even more significant, hence a description of the speakers and the content of their comments should be preserved so that the decision-making process can be verified at a later date.

In this regard, the Japanese government has stated that (i) there is no need to prepare “the minutes of a description of the speakers and the content of their comments, etc.,” since the Expert Meeting does not fall under the category of “the meetings and other assemblies that decide on or give agreement to government policy” in times of “historical emergency” as defined in the Guidelines and (ii) the summary of discussion has been functioning appropriately because the anonymous format encourages candid and frankly discussion among the experts.

However, the view of the Japanese government presented in (i) points to a paradox that omission in stating the names of the speakers in the minutes of the meeting is allowed in times of “historical emergency,” whereas the information is required in ordinary times. This is clearly unreasonable and contrary to the purpose of the Public Records and Archives Management Act.

Additionally, (ii) it is hardly conceivable that the experts in infectious disease should find it difficult to make statements related to the realm of their specialty because their names will be recorded in the minutes of a meeting.

The JFBA released the president’s Statement on June 11, 2020 urging that, in the spirit of the principles of the Public Records and Archives Management Act and the Guidelines, the official minutes of the proceedings containing a description of the speakers and their comments be prepared at every meeting of the Expert Meeting held, in order that the process leading to decision-making can be verified at a later date¹¹.

¹¹ JFBA: “<COVID-19> Statement Calling for Producing the Official Records of the

4. Contact with the outside world was restricted at some detention facilities.

For penal institutions, general visitations were suspended except for exceptional cases at penal institutions located in the areas designated as prefectures under special warning during the period of the state of emergency. This measure was implemented without legal basis as an emergency measure to prevent infections¹²¹³. Such measure was discontinued upon the termination of the state of emergency.

General visitations were similarly prohibited or restricted at detention facilities managed by the national and municipal governments, such as police lock-up facilities, juvenile penal institutions, temporary shelters attached to child guidance centers, immigration detention facilities¹⁴, etc., on the grounds of preventing the spread of infections. Telephone communication is allowed at immigration detention facilities, and even if visitations are restricted to prevent the spread of infections, it is required that alternative means such as telephone communication, web-conferencing systems, etc., shall be utilized in a flexible manner, however, use of a telephone is not progressing at other detention facilities.

5. Measures were taken to cancel, in principal, dates of hearings for civil cases, criminal cases and domestic cases.

Article 14 of the ICCPR provides that “In the determination of any criminal charge against him, or of his rights and obligations in a suit at

Proceedings of Every Meeting of the Novel Coronavirus Expert Meeting Specifying the Speaker Information and Respective Utterance Contents” (June 11, 2020)

<https://www.nichibenren.or.jp/en/document/statements/200611.html> (English)

<https://www.nichibenren.or.jp/document/statement/year/2020/200611.html> (Japanese)

¹² JFBA: “<COVID-19> Statement Calling for Infection Spread Prevention in Penal Detention Facilities” (April 23, 2020)

<https://www.nichibenren.or.jp/en/document/statements/20200423.html> (English)

https://www.nichibenren.or.jp/document/statement/year/2020/200423_3.html (Japanese)

¹³ JFBA: “<COVID-19> Statement Calling to Cease the Excessive Restriction on Ordinary Visits in Penal Institutions” (May 7, 2020)

<https://www.nichibenren.or.jp/en/document/statements/200507.html> (English)

https://www.nichibenren.or.jp/document/statement/year/2020/200507_2.html (Japanese)

¹⁴ JFBA: “<COVID-19> Statement Calling for the elimination of the risk of ‘Three C’s’ (closed spaces, crowded places, close-contact settings) at immigration detention facilities.” (April 15, 2020)

<https://www.nichibenren.or.jp/en/document/statements/20200415.html> (English)

https://www.nichibenren.or.jp/document/statement/year/2020/200415_02.html

(Japanese)

law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law,” guaranteeing in principle the right to a fair trial to all persons.

In Japan, after a state of emergency was declared on the grounds of the spread of novel coronavirus infections, measures were taken by courts nationwide to cancel, in principle, dates of hearings for civil cases, criminal cases and domestic cases on the grounds of the declaration of the state of emergency¹⁵.

Trials were gradually reopened after the cancellation of the state of emergency, and it is understandable on the one hand that such measures were taken to prevent the spread of novel coronavirus infections, but on the other hand, those who are dependent upon court proceedings have their own urgent circumstances, and if their trials do not progress, it cannot be said that the right to a fair trial is being guaranteed to them.

The courts serve one of the state’s core functions along with legislation, administration and are a stronghold in the protection of human rights. Hence, even in the case of a further spread of novel coronavirus infections in the future, such as a declaration of another state of emergency, the courts should continue operations so that the progress of cases will not stop, for example, by conducting hearings on their scheduled dates paying maximum attention to prevent the spread of infections, as well as flexibly utilizing alternative means such as telephone conference systems, web conferencing systems, etc., according to the degree and stage of such status of spread of infections, and maintain judicial functions so that the right to a fair trial will be guaranteed under any circumstances.

V. Conclusion

Thus, the JFBA earnestly hopes that the Human Rights Committee will issue such recommendations as listed at the beginning of this Statement on the Concluding Observation that will adopt at the seventh periodic review of

¹⁵ JFBA: “<COVID-19> Statement on the Postponement of Criminal Trial Dates, etc.” (April 15, 2020)

https://www.nichibenren.or.jp/en/document/statements/20200415_2.html (English)

https://www.nichibenren.or.jp/document/statement/year/2020/200415_4.html (Japanese)

the Japanese Government Report.