

# An Essay on Restrictions on Property Rights under Article 29 of the Constitution of Japan due to Requests and Instructions for Suspension of Business under the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response

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MINAMI Ryoichi

*Constitution Division, Research and Legislative Reference Bureau, National Diet Library*

## Abstract

Since April 2020, based on the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response, prefectural governors in Japan have been issuing requests or orders of suspension to business operators to prevent the spread of COVID-19. Consequently, businesses experienced considerable declines in sales, incurred losses, and were forced into closure or bankruptcy. However, the government has consistently taken the position that compensation for losses is unnecessary, citing Article 29 Paragraph 3 of the Constitution of Japan as one of the reasons that these requests and orders of suspension are not subject to compensation for losses. This paper first verifies the background of the establishment of such suspension requests and orders as measures to prevent the spread of infectious diseases. Subsequently, it outlines the framework of restrictions on property rights and compensation for losses in Article 29 of the Constitution of Japan. Additionally, it examines the relationship between suspension requests and orders and restrictions on property rights.

## Introduction

On March 13, 2020, a plenary session of the House of Councilors passed and enacted an amendment provisionally applying the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response (Act No. 31 of 2012; hereafter

“Act on Special Measures”) to the novel coronavirus disease<sup>1</sup> (hereafter referred to as “Act on Temporary Measures Against COVID-19”), which went into effect on the same day.

The Act on Special Measures allows prefectural governors to request individuals as well as public and private organizations to provide necessary cooperation in implementing countermeasures against novel influenza A<sup>2</sup> (Article 24(9)). Further, in the case of pandemic influenza or other emergency situations (see I2(2) (iv)), prefectural governors are authorized to request that the administrators of facilities used by numerous people and event organizers (hereafter referred to as “facility administrator, etc.”) take measures such as restricting or suspending the use of said facilities or events (Article 45(2)). If facility administrator, etc. do not implement such measures without justifiable reasons, prefectural governors are authorized to order them to take measures related to said requests under certain conditions (Article 45(3)). After the declaration of a State of Emergency in response to the novel coronavirus disease<sup>3</sup> on April 7, 2020, 45 prefectures requested restrictions on the use of facilities. Moreover, 21 prefectures requested restrictions based on Article 45(2) of the Act on Special Measures, including five prefectures that ordered restrictions on the use of facilities based on Paragraph 3 of the same Article.<sup>4</sup> This was the first instance of issuance of these requests and orders (hereafter referred to as “suspension requests, etc.”) since the enactment of the Act on Special Measures. The duration was over a month, including the period of requests for cooperation under Article 24(9).<sup>5</sup> Consequently, businesses saw considerable declines in sales, incurred losses, and were forced into closure or bankruptcy.<sup>6</sup>

From the outset, voices pointed out the need for compensation for losses associated with these suspension requests, etc., such as the proposal the National Governors’

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\* All information sourced from the Internet in this paper was as of October 16, 2020.

<sup>1</sup> 「新型インフルエンザ等対策特別措置法の一部を改正する法律」(令和2年法律第4号)(The Act Partially Amending the Act on Special Measures against Novel Influenza, etc. (Act No. 4 of 2020)).

<sup>2</sup> See Article 2, Item 2 of the Act on Special Measures.

<sup>3</sup> 「新型コロナウイルス感染症緊急事態宣言」(令和2年4月7日)新型コロナウイルス感染症対策推進室(“State of Emergency in Response to the Novel Coronavirus Disease”(April 7, 2020), Office for COVID-19 and Other Emerging Infectious Disease Control, Cabinet Secretariat) Website, Article 32 Paragraph 1 of the Infectious Diseases Act reads “state of emergency in response to novel influenza, etc.”

<sup>4</sup> 新型コロナウイルス感染症対策本部「新型コロナウイルス感染症緊急事態宣言の実施状況に関する報告」(令和2年6月)(Novel Coronavirus Response Headquarters “Report on the State of Implementation of the Declaration of a State of Emergency in Response to the Novel Coronavirus Disease”(June 2020) Prime Minister’s Office of Japan.

<sup>5</sup> For example, Hyogo Prefecture issued a request for cooperation to facilities such as pachinko parlors throughout the prefecture based on Article 24(9) of the Act on Special Measures on April 15, 2020, as well as one based on Article 45(2) of the same Act on April 27, and on May 1, 2020, an order was issued to the facilities that did not comply with these requests. [兵庫県]企画県民部災害対策局災害対策課「新型インフルエンザ等対策特別措置法に基づく施設の使用停止(休業)の指示を行った施設について(公表)」(令和2年5月1日) ([Hyogo Prefecture] Disaster Response Division, Disaster Response Bureau, Civil Policy Planning & Administration Department “Facilities that have been ordered to suspend (close) use of facilities based on the Act on Special Measures (Public Announcement)” (May 1, 2020))

<sup>6</sup> 「新型コロナ 倒産中小なお「予備軍」も多数」『朝日新聞』2020.9.13 (“COVID-19: Many small and medium-sized businesses still at risk” *The Asahi Shimbun*) 2020.9.13; 「遅い政策 消えた「味」なぜコロナ倒産500件 中小企業に打撃」『毎日新聞』 (“Slow policies: Why COVID-19 bankruptcies have hit small and medium-sized enterprises” *The Mainichi*) 2020.9.22.

Association issued calling for the government to compensate facility administrator, etc. for losses incurred due to the suspension requests, etc.<sup>7,8</sup> However, the government deemed compensation for losses unnecessary, citing Article 29 Paragraph 3 of the Constitution of Japan as one of the reasons suspension requests, etc. are not subject to compensation for losses.<sup>9</sup>

This paper examines the relationship between suspension requests, etc. and property rights based on two reviews: (i) a review of the process through which suspension requests, etc. were established as measures for preventing the spread of infections, including novel influenza A, and applied to COVID-19 infections; (ii) a review of the framework regarding general restrictions and compensation for losses as per Article 29 of the Constitution of Japan.

## I Progress of Enactment of the Act on Special Measures and its Application to Novel Coronavirus Disease

### 1 *Positioning of Suspension Requests, etc.*

To prevent the spread of infectious diseases, medical and public health measures have conventionally been taken to control the source of infection, focusing on infected persons and contaminated buildings. These include the following: measures to hospitalize patients; mandatory medical examinations and reports for persons under reasonable suspicion of infection; disinfection of buildings contaminated by the virus in accordance with the Act on the Prevention of Infectious Diseases and Medical Care for Patients With Infectious Diseases (Act No. 114 of 1998, hereafter referred to as “Infectious Diseases Act”).<sup>10</sup> The

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<sup>7</sup> 全国知事会新型コロナウイルス緊急対策本部「「緊急事態宣言」を受けての緊急提言」(令和2年4月8日)(National Governors' Association, Emergency Response Headquarters for COVID-19 “Urgent Proposals in Response to the ‘Declaration of State of Emergency’” (April 8, 2020)) National Governors' Association Website.

<sup>8</sup> For example, 「政府の休業支援 事業者の悲鳴聞こえぬか(社説)」『毎日新聞』(“Government support for suspension of businesses: Can't you hear the screams of businesses (editorial),” *The Mainichi*) 2020.4.20; 依田高典「見返りなき制限には限界」『朝日新聞』(IDA Takanori, “Limits of restrictions without compensation,” *The Asahi Shimbun*) 2020.4.25; 小野善康「所得減の事業に集中補償を」『朝日新聞』(ONO Yoshiyasu, “Concentrate compensation on businesses with declining income,” *The Asahi Shimbun*) 2020.4.29, etc.

<sup>9</sup> 第201回国会衆議院経済産業委員会議録第9号 (Minutes of the 201<sup>st</sup> Session of the Committee on Economy, Trade and Industry, House of Representatives, Japan, No. 9) 13 May 2020, p.21.

<sup>10</sup> 新型インフルエンザ等対策研究会編『逐条解説新型インフルエンザ等対策特別措置法』(Research Group on Countermeasures Against Novel Influenza, etc., “Article-by-Article Commentary on the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response”) Chuohoki Publishing, 2013, p.158.

Act was partially amended<sup>11</sup> in 2008 to include infections such as novel influenza A within the scope of these infection source control measures.

However, in the case of novel influenza, new types of viruses regularly emerge with widely different antigenic properties. As most people have not developed immunity to these new types of viruses, there is concern that their spread could become global pandemics, causing significant associated health problems and social consequences.<sup>12</sup> Under such circumstances, the infection may not be contained by implementing hospitalization measures or disinfection of individual contaminated facilities, and epidemiological relationships may not be identifiable.

Therefore, anticipating situations in which it is difficult to respond adequately to novel influenza with only those measures traditionally taken based on the Infectious Diseases Act—hospitalization and disinfection of infection sources—the Act on Special Measures provides suspension requests, etc.<sup>13</sup> “as a measure to deal with the social disruption to peoples’ lives, the national economy, and the medical care system caused by the pandemic, with a focus on the general public and administrators.”<sup>14</sup> In other words, these suspension requests, etc. differ from previous measures to counter the spread of infectious diseases.

These measures were formulated as action plans prior to the enactment of the Act on Special Measures, which was ratified to enhance their effectiveness. The following section describes this process retroactively, beginning with the World Health Organization’s (WHO) development of the first action plan.

## **2 Developments up to the Legalization of Suspension Requests, etc. in Japan**

### **(1) Developments at the WHO**

In May 2005, the WHO published the WHO Global Influenza Preparedness Plan (hereafter referred to as “WHO 2005 Plan”), marking a major revision to the Influenza Pandemic Plan: The Role of WHO and Guidelines for National and Regional Planning (hereafter referred to as the “WHO 1999 Plan”), which the WHO published in 1999. This revision was based on the status of bird-to-human and human-to-human transmission of the highly pathogenic avian influenza (A/H5N1) as of December 2003, as well as experience with control measures against the 2003 severe acute respiratory syndrome

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<sup>11</sup> 「感染症の予防及び感染症の患者に対する医療に関する法律及び検疫法の一部を改正する法律」 (“Act on the Prevention of Infectious Diseases and Medical Care for Patients with Infectious Diseases and the Act Partially Amending the Quarantine Act”) (Act No. 30 of 2008).

<sup>12</sup> 新型インフルエンザ等対策研究会編 (Research Group on Countermeasures Against Novel Influenza, etc.), *op.cit.*(10), p.3; 第201回国会衆議院内閣委員会議録第3号 (Minutes of the 201<sup>st</sup> Session of the Committee on the Cabinet, House of Representatives, No. 3) March 11, 2020, p.6.

<sup>13</sup> 新型インフルエンザ等対策研究会編 (Research Group on Countermeasures Against Novel Influenza, etc.) *Ibid.*, p.158.

<sup>14</sup> *Ibid.*

(SARS) epidemic.<sup>15</sup>

A major change reflected in the WHO 2005 Plan, as compared to the WHO 1999 Plan, is the “use of nonpharmaceutical public health interventions.”<sup>16</sup> The “measures at the national level (for persons living or traveling within an affected country)” listed in “Annex 1: Recommendations for nonpharmaceutical public health interventions”<sup>17</sup> under “measures to increase social distance” include “population-wide measures to reduce mixing of adults (furlough nonessential workers, close workplaces, discourage mass gatherings).” These are positioned with other measures as needing to be implemented in “Phase 4 (small clusters are observed but the spread is localized)” and the six subsequent phases.<sup>18</sup> It introduces requests to cancel mass gatherings and suspension requests, etc. This is based on the situation in Hong Kong in 2003 during the SARS epidemic. The closure of schools, swimming pools, and other facilities where numerous people typically gather, the cancellation of sports events, and the implementation of mask-wearing in public places and frequent hand washing resulted in a clear decrease in the number of infected cases.<sup>19</sup>

Thus, measures such as suspension requests, etc. to prevent the spread of infections, including novel influenza A, were included in the WHO 2005 Plan.

## (2) Developments in Japan

### (i) 2005 Action Plan

In Japan, suspension requests, etc. were initially positioned as a measure against infections, including novel influenza A, at the time of the WHO 2005 Plan. This was reflected in the Pandemic Influenza Preparedness Action Plan of the Japanese Government (November 2005) (hereafter referred to as “2005 Action Plan”) compiled mainly by the Ministry of Health, Labour and Welfare and approved by the Inter-Ministerial Avian

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<sup>15</sup> 世界保健機関 (World Health Organization) ([国立感染症研究所 (National Institute of Infectious Diseases)] 感染症情報センター第一室訳・監修 (First Office Translation and Supervision, Infectious Disease Surveillance Center)) 「WHOの世界インフルエンザ事前対策計画—WHOの役割と前パンデミック期とパンデミック期における国家レベルの対策への提言— (WHO Global Influenza Preparedness Plan: The Role of WHO and Recommendations for National Measures Before and During Pandemics)」2005.8.31, p.8, 国立感染症研究所感染症情報センター (The National Institute of Infectious Diseases Infectious Disease Surveillance Center) Website; 厚生労働省「新型インフルエンザ対策行動計画」(Ministry of Health, Labour and Welfare, “Pandemic Influenza Preparedness Action Plan of the Japanese Government”) (November 2005) p.2, 首相官邸 (Prime Minister’s Office) Website.

<sup>16</sup> 世界保健機関 (World Health Organization), *Ibid.*, p.9.

<sup>17</sup> *Ibid.*, pp.66-74.

<sup>18</sup> *Ibid.*, pp.68, 74.

<sup>19</sup> World Health Organization Writing Group, “Nonpharmaceutical Interventions for Pandemic Influenza, National and Community Measures,” *Emerging Infectious Diseases*, Vol. 12 No. 1, January 2006, pp.88-94. However, implementation in combination with other measures was necessary, and no effect was observed in other cases where only facility closures or event suspensions were implemented.

Influenza Committee.<sup>20</sup>

Prior to this plan, although measures to respond to novel influenza infections in Japan had been formulated in the October 1997 Report for Measures Against New Influenza<sup>21</sup> and the August 2004 Report for Measures Against New Influenza,<sup>22</sup> the measures therein did not include suspension requests, etc.

In this context, the risk of an outbreak of a new influenza virus increased, as evidenced by the outbreak of the highly pathogenic avian influenza (A/H5N1) in Japan. As mentioned in I2(1), the WHO 2005 Plan was published in May 2005, stating that countries should develop or update national influenza preparedness plans.<sup>23</sup> Accordingly, in Japan, the 2005 Action Plan was formulated in accordance with the WHO 2005 Plan<sup>24</sup> and published in November of the same year.

The 2005 Action Plan outlines specific measures for seven phases—each of the six phases (Phases 1–6) established in the WHO 2005 Plan, with the addition of the Post-Pandemic Period (Recovery Phase). The 2005 Action plan first explains that the “major five categories of the Action Plan” were “developed for the five action categories” with reference to the comprehensive goals the WHO indicated for the member states. Further, the 2005 Action Plan states that under “③ Prevention and Containment,” “restraint of citizens’ social activities (e.g., order of self-restraint regarding meetings or gatherings and recommendation of absence and medical check for those with novel influenza-like symptoms) shall be implemented as necessary.”<sup>25</sup>

Additionally, the 2005 Action Plan indicates specific measures for each phase. The measures corresponding to suspension requests, etc. are listed in Table 1.

Thus, the 2005 Action Plan introduced self-restraint regarding participation in social activities involving gatherings of unspecified numbers of people—large gatherings—as a measure for the control of infectious diseases to Japan.<sup>26</sup> Notably, requests to restrict the usage of facilities were not positioned as an infectious disease countermeasure at this stage.

<sup>20</sup> 鳥インフルエンザ等に関する関係省庁対策会議「新型インフルエンザ対策行動計画に基づく対策の推進について」(平成17年12月6日)(Inter-Ministerial Avian Influenza Committee, “On Promoting Measures Based on the Pandemic Influenza Preparedness Action Plan of the Japanese Government” (December 6, 2005)) 厚生労働省 (Ministry of Health, Labour and Welfare) Website.

<sup>21</sup> [厚生省] 新型インフルエンザ対策検討会「新型インフルエンザ対策報告書」(平成9年10月24日)(Ministry of Health and Welfare, Study Group for the Response to New Influenza, “Report for Measures Against New Influenza” (October 24, 1997))

<sup>22</sup> [厚生省] 新型インフルエンザ対策に関する検討小委員会「新型インフルエンザ対策報告書」(平成16年8月)(Ministry of Health and Welfare, Review Subcommittee on Measures Against New Influenza, “Report for Measures Against New Influenza” (August 2004))

<sup>23</sup> 世界保健機関 (World Health Organization), *op.cit.*(15), p.9.

<sup>24</sup> 厚生労働省 (Ministry of Health, Labour and Welfare), *op.cit.*(15), pp.2-3.

<sup>25</sup> *Ibid.*, p.12.

<sup>26</sup> Notably, the recommendation to refrain from leaving the house, which is supposed to be given to the public in Phase 5, is not listed in Phase 6.

**Table1 Measures Corresponding to Suspension Requests, etc. in the 2005 Action Plan**

Phase	Measures
4B (Small cluster(s) with limited human-to-human transmission, but spread is highly localized) --- Outbreak in Japan---	Recommend and disseminate the following among Japanese citizens and relevant parties: ➤ Recommend self-restraint <u>regarding nonurgent largescale meetings or gatherings in a region where infection is observed.</u>
5B Larger cluster(s) of human-to-human transmission of a new subtype with increased risk of pandemic) ---Outbreak in Japan---	Recommend and disseminate the following among Japanese citizens and relevant parties: ➤ Recommend self-restraint <u>regarding nonurgent largescale meetings or gatherings throughout the country.</u>
6B (Pandemic – infection spreading rapidly throughout the world) ---Outbreak in Japan-	Recommend and disseminate the following among Japanese citizens and relevant parties: ➤ Recommend self-restraint <u>in principle regarding all nonurgent largescale meetings or gatherings.</u>

(Note 1) Underlining added by the author to indicate where the description differs between phases.

(Note 2) This plan has six phases, spanning before the occurrence of a pandemic to the peak of the pandemic; phases are categorized according to the WHO 2005 Plan. Each phase is further divided into two categories: a situation where there is no domestic outbreak of novel influenza (No outbreak in Japan: A) and one where there is a domestic outbreak of novel influenza (Outbreak in Japan: B)

(Source) Prepared by the author based on 厚生労働省「新型インフルエンザ対策行動計画」(平成 17 年 11 月) pp.7, 51, 63, 72. (Ministry of Health, Labour and Welfare, “Pandemic Influenza Preparedness Action Plan of the Japanese Government” (November 2005) pp.7, 51, 63, 72.) Prime Minister’s Office Website.

## (ii) 2009 Action Plan

Given the strengthening of novel influenza countermeasures through border control coupled with the scientific knowledge accumulated since the publication of the 2005 Action Plan, the Action Plan in Response to Enhancement of Pandemic Influenza Countermeasures (Revised in February 2009) (hereafter referred to as the “2009 Action Plan”) is considered to be a drastic revision of the 2005 Action Plan based on the April 2008 enactment of the Act to Partially Revise the Act on the Prevention of Infectious Diseases and Medical Care for Patients Suffering Infectious Diseases and the Quarantine Act (Act No. 30 of 2008).<sup>27</sup>

The 2009 Action Plan divides the outbreak phases, which the 2005 Action Plan classified into seven phases, into five phases—the Pre-Epidemic Phase (No outbreak), Phase 1 (Overseas outbreak), Phase 2 (Early stage of domestic outbreak), Phase 3 (Increase in infections/Spread of infection/Recovery), and Phase 4 (Remission). It lists the measures to be taken at each.<sup>28</sup> Additionally, the 2009 Action Plan includes six major items, compared to the five in the 2005 Action Plan. The heading “③ Infection Prevention/Prevention of Spread” is included, alongside temporary closure of schools and

<sup>27</sup> 新型インフルエンザ及び鳥インフルエンザに関する関係省庁対策会議「新型インフルエンザ対策行動計画」(平成 21 年 2 月改定) (Inter-Ministerial Novel Influenza and Avian Influenza Committee, “Pandemic Influenza Preparedness Action Plan of the Japanese Government” (Revised February 2009)) pp.2-3, Cabinet Secretariat Website.

<sup>28</sup> *Ibid.*, pp.7-12.

daycare facilities and postponement of entrance examinations. The updated plan also includes social measures as “regional measures, such as request of self-restraint from going out or gatherings, and workplace measures, such as requesting voluntary restraint from nonessential and nonurgent business activities. The purpose is to reduce opportunities for contact in social activities and decrease opportunities for infection in the community and workplace.”<sup>29</sup>

As previously mentioned, the 2009 Action Plan also provides specific measures for each phase. The measures corresponding to suspension requests, etc. are listed in Table 2.

**Table 2 Measures Corresponding to Suspension Requests, etc. in the 2009 Action Plan**

Phase	Measures
Phase 2 – Early stage of domestic outbreak (in the case of a novel influenza outbreak in Japan)	<ul style="list-style-type: none"> <li>• Request that prefectures or business associations make the following requests of <u>residents and related persons in the outbreak area</u> or make such requests directly.               <ul style="list-style-type: none"> <li>➢ Request that organizers of gatherings and facility administrator, etc. refrain from their activities.</li> </ul> </li> </ul>
Phase 3 – Increase in infections/Spread of infection/Recovery (In Japan, it is impossible to trace patients’ contact history through epidemiological surveys)	<ul style="list-style-type: none"> <li>• Request that prefectures or business associations make the following requests of <u>residents or related persons</u> or make such requests directly.               <ul style="list-style-type: none"> <li>➢ Request that organizers of gatherings and facility administrator, etc. refrain from their activities.</li> </ul> </li> </ul>

(Note) Underlining added by the author to indicate where the descriptions differ between phases.

(Source) Prepared by the author based on 新型インフルエンザ及び鳥インフルエンザに関する関係省庁対策会議「新型インフルエンザ対策行動計画」(平成21年2月改定) pp.44, 49. (Inter-Ministerial Novel Influenza and Avian Influenza Committee “Pandemic Influenza Preparedness Action Plan of the Japanese Government” (Revised in February 2009) pp.44, 49.) Cabinet Secretariat Website.

As in the 2005 Action Plan, the first phase only targets the outbreak area, while subsequent phases include other areas. The 2005 Action Plan only provides for “recommend[ing] and disseminat[ing] among Japanese citizens and relevant parties.” However, the 2009 Action Plan, in addition to these direct measures, provides for indirect measures such as “request that prefectures or business associations make [relevant] requests of residents and related persons.”

### (iii) 2011 Action Plan

The Pandemic Influenza Preparedness Action Plan of the Japanese Government (September 2011) (hereafter referred to as “2011 Action Plan”) was a revision of the 2009 Action Plan. It was based on experience gained with implementing countermeasures following the confirmation of novel influenza (A/H1N1) in Mexico in 2009, which occurred after the publication of the 2009 Action Plan and subsequently became a global pandemic.<sup>30</sup>

<sup>29</sup> *Ibid.*, pp.15-16.

<sup>30</sup> 新型インフルエンザ対策閣僚会議「新型インフルエンザ対策行動計画」(Ministerial Meeting on Measures Against Novel Influenza, "Pandemic Influenza Preparedness Action Plan of the Japanese Government" (20 September 2011), p.2, Cabinet Secretariat Website.



The 2011 Action Plan retains the five outbreak phases in the 2009 Action Plan—no outbreak, overseas outbreak, early stage of domestic outbreak, domestic infection, and remission. However, it adds a new item titled “Vaccines” under the major items and regroups the items. Nevertheless, as in the 2009 Action Plan, suspension requests, etc. are under “Infection Prevention/Prevention of Spread.” Along with the temporary closure of schools and childcare facilities and postponement of entrance examinations, the 2011 Action Plan provides for the following: social measures to be implemented “from the early stage of the outbreak, if necessary, to reduce the chance of contact through social activities, [as well as] regional measures such as requests for self-restraint from going out or gatherings, workplace measures such as requests for self-restraint from certain businesses, and infection prevention measures at the workplace.”<sup>31</sup> Although the content of the 2011 Action Plan is almost identical to that of the 2009 Action Plan, the former represents a revision in the direction of more restrictive measures (e.g., requiring implementation “from the early stages of the outbreak,” replacing “nonurgent” with “some” regarding requests for self-restraint, and adding “infection prevention measures in the workplace”).

The 2011 Action Plan also presents specific measures for each phase. The measures corresponding to suspension requests, etc. are listed in Table 3.

**Table3 Measures Corresponding to Suspension Requests, etc. in the 2011 Action Plan**

Phase	Measures
<p>Early stage of domestic outbreak</p> <ul style="list-style-type: none"> <li>• Although there are cases of novel influenza infection in one of Japan’s prefectures, it is possible to trace patients’ contact history through epidemiological surveys.</li> <li>• Even within Japan, the situation may vary across regions.</li> </ul>	<ul style="list-style-type: none"> <li>• <u>In the early stages of a regional outbreak, it is important to take proactive measures to prevent an increase in infections throughout the region.</u> Provide prefectural governments with guidelines that contribute to the implementation of measures to prevent an increase of infections: temporary closure of schools and childcare facilities; requesting self-restraint from gatherings; requesting that prefectural governments or business associations make the following requests of residents and related parties in the <u>outbreak areas</u> or directly make such requests. <ul style="list-style-type: none"> <li>➤ Request that organizers of gatherings and facility administrator, etc. refrain from their activities.</li> </ul> </li> </ul>
<p>Domestic infection period</p> <ul style="list-style-type: none"> <li>• It is impossible to trace the contact history of novel influenza patients in any Japanese prefecture through epidemiological surveys.</li> <li>• This period encompasses increased infections, spread of infections, and a decrease in the number of patients.</li> <li>• Even within Japan, the situation may vary across regions.</li> </ul>	<ul style="list-style-type: none"> <li>• Provide guidelines for prefectures to contribute to the implementation of measures to prevent an increase in infections: temporary closure of schools and childcare facilities; requesting self-restraint from gatherings; requesting that prefectures and business associations make the following requests of residents and related persons in the outbreak area or directly make such requests. <u>In particular, during the regional infection period, when the epidemic is smaller in scale, request that the entire community take active measures for a certain period to prevent the spread of the disease in the region.</u> <ul style="list-style-type: none"> <li>➤ Request that organizers of gatherings and facility administrator, etc. refrain from their activities.</li> </ul> </li> </ul>

(Note 1) Underlining added by the author to indicate where the descriptions differ between phases.

(Note 2) The “regional infection period” in the table refers to “a situation where it is no longer possible to trace the contact history of influenza patients in each prefecture using epidemiological surveys.”

(Source) Prepared by the author based on 新型インフルエンザ対策閣僚会議「新型インフルエンザ対策行動計画」(平成23年9月20日) pp.25, 53, 59-60. (Ministerial Meeting on Measures Against Novel Influenza, “Pandemic Influenza Preparedness Action Plan of the Japanese Government”

<sup>31</sup> *Ibid.*, p.20.

(September 20, 2011) pp.25, 53, 59-60) Cabinet Secretariat Website.

Thus, under the 2011 Action Plan, it was newly decided that the national government would “provide guidelines to prefectures to contribute to the implementation of measures to prevent the spread of infection, such as requesting that prefectures temporarily close schools and childcare facilities and requiring self-restraint from holding public gatherings.”

(iv) Act on Special Measures (Enacted in May 2012)

Thus, at the stage of the 2011 Action Plan, it was decided that prefectures would make suspension requests, etc. of residents and related parties or that the national government would make such requests directly. However, various quarters have questioned the effectiveness of implementing strong measures such as suspension requests, etc. without legal backing.<sup>32</sup> Such concerns may be addressed by legally defining the scope of measures that can be implemented in advance, avoiding situations where local governments cannot make suspension requests, etc. because they are hesitant to place such burdens on the private sector.<sup>33</sup> This is the reason the National Governors’ Association has repeatedly emphasized<sup>34</sup> that “it is necessary to create a law to implement self-restraint from gatherings.”

To this end, in November 2011, the 47<sup>th</sup> Meeting of Relevant Ministries and Agencies on Countermeasures Against Pandemic Influenza and New Infectious Diseases, Avian Influenza was held to discuss the legal system necessary to facilitate the implementation of novel influenza countermeasures. In January 2012, the Draft Proposal of Legislation for Measures Against Novel Influenza was compiled and published.<sup>35</sup> It clearly stated the following: “In cases where an outbreak of a novel influenza strain may cause serious harm to the lives and health of the public and have a profound impact on the lives of the people and the national economy, the national government shall specify the area and duration and

<sup>32</sup> 神ノ田昌博・大月克己「インタビュー 新型インフルエンザ (下) 神ノ田昌博・厚生労働省健康局 新型インフルエンザ対策推進室長 新型インフル発生警戒を—特別措置法、4 月末成立—」『厚生福祉』5911 号, 2012.6.12 (KAMINOTA Masahiro, OTSUKI Katsumi, “Interview: Novel Influenza (2) KAMINOTA Masahiro, Director, Novel Influenza Preparedness Promotion Office, Health Service Bureau, Ministry of Health, Labour and Welfare, New Influenza Outbreak Alert –Act on Special Measures passed at the end of April (Japanese only) *Health and Welfare* No. 5911, 2012.6.12) pp.2-4; 伊藤哲朗「巻頭インタビュー 危機管理のプロが語る 「緊急事態」のキーポイント」『明日への選択』412 号, 2020.5 (ITO Tetsuro, “Wrap-up interviews: Crisis management professionals speak on key points of emergency situations” *Choices for Tomorrow*, No. 412, 2020.5) p.6.

<sup>33</sup> KAMINOTA, ITO, *Ibid.*; ITO, *Ibid.*

<sup>34</sup> The first request was made on May 30, 2006, and six such requests have been made since then. 福田富一 (全国知事会社会文教常任委員会委員長・栃木県知事)「新型インフルエンザ対策の法制化の経過について」(平成 24 年 5 月 18 日) (FUKUDA Tomikazu (Chairman, Standing Committee on Education, Tochigi Prefectural Government, National Governors’ Association) “Progress of Legislation for the Novel Influenza Measures” (May 18, 2012)); 同「新型インフルエンザ対策行動計画 (案) について」(平成 23 年 9 月 2 日) (FUKUDA Tomikazu (Chairman, Standing Committee on Education, Governor of Tochigi Prefecture, National Governors’ Association) “On the Pandemic Influenza Preparedness Action Plan (Draft) September 2, 2011))

<sup>35</sup> 新型インフルエンザ等対策研究会編 (Research Group on Countermeasures Against Novel Influenza) , *op.cit.* (10), pp.5-6.

declare a state of emergency for the novel influenza.” Furthermore, the draft proposal lists nine measures to be implemented during a state of emergency, including “requests for self-restraint regarding nonurgent outings and requests and orders for restrictions on schools, gatherings, etc.”<sup>36</sup>

Based on this draft proposal, discussions were held via working-level study meetings with local government officials and at meetings called to hear the opinions of academic experts. Accordingly, the contents of the bill were finalized. The Cabinet approved the Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response Bill on March 9, 2012.<sup>37</sup> The Act was passed and enacted by a plenary session of the House of Representatives and the House of Councilors on March 28 and April 27, respectively. The Infectious Diseases Act was promulgated on May 11 of the same year and came into effect on April 13, 2013, through the Order to Set the Effective Date of the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response (Order No. 121 of 2013).

Article 6 of the Act on Special Measures obliges the government to establish a “plan to implement countermeasures against novel influenza and other infectious diseases” (National Action Plan). On April 18, five days after the law came into effect, the 49<sup>th</sup> Meeting of Relevant Ministries and Agencies on Countermeasures Against Pandemic Influenza and New Infectious Diseases, Avian Influenza discussed a draft National Action Plan for Pandemic Influenza and New Infectious Diseases. On June 7 of the same year, the Cabinet approved the National Action Plan for Pandemic Influenza and New Infectious Diseases (hereafter “2013 Action Plan”).<sup>38</sup>

### **3 Contents of Article 45 of the Act on Special Measures**

As mentioned above, as part of measures to cope with the disruption to peoples’ lives and the national economy due to the spread of disease,<sup>39</sup> Article 45 of the Act on Special Measures establishes provisions for novel influenza-related or other emergency situations. Through these, the government can request or order citizens or administrators of facilities

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<sup>36</sup> 内閣官房新型インフルエンザ等対策室「新型インフルエンザ対策のための法制のたたき台(案)」(平成 24 年 1 月) (Office for Pandemic Influenza and New Infectious Disease Preparedness and Response, Cabinet Secretariat, “Proposal of Legislation for Measures Against Novel Influenza (Draft) (January 2012)”)

<sup>37</sup> The details of the bill were not clarified between the publication of this preliminary draft and the Cabinet decision, and the media response was slow. Therefore, there was little public discussion. 井上愛彩「特集 新型インフルエンザ(上) 私権制限、科学的根拠乏しく 新型インフル特措法が成立」『厚生福祉』5909 号, 2012.6.5, (INOUE Aya, “Special feature: Pandemic influenza (1) restrictions on private rights and lack of scientific basis: Pandemic influenza special measures enacted,” *Health and Welfare*, No. 5909, 2012.6.5) p.2.

<sup>38</sup> 「新型インフルエンザ等対策政府行動計画」(平成 25 年 6 月 7 日) (“National Action Plan for Pandemic Influenza and New Infectious Diseases” (June 7, 2013)) Cabinet Secretariat Website.

<sup>39</sup> 新型インフルエンザ等対策研究会編 (Research Group on Countermeasures Against Novel Influenza), *op.cit.*(10), p.157.

such as schools, social welfare facilities, and entertainment venues to restrict certain activities if the disease progresses and certain requirements are satisfied.

Unlike the traditional medical and public health infectious disease countermeasures provided in the Infectious Diseases Act, Article 45 provides measures to “address the social disruption in the lives of the general public, the national economy, and the healthcare system caused by the spread of the infectious disease, focusing on the general public and facility administrator, etc.”<sup>40</sup> As reviewed in I2, such measures to restrict social activities first appeared in the WHO 2005 Plan and were introduced in Japan via the 2005 Action Plan. Each revision of the Action Plan has strengthened these measures, and they became laws for the first time in Article 45 of the Act on Special Measures.

Specifically, the following provisions have been stipulated. Prefectural governors are allowed to request that (1) residents refrain from going out during certain periods and in certain areas (Paragraph 1) and (2) facility administrator, etc. restrict or suspend the use of their facilities or the holding of events for certain periods (Paragraph 2) under the premise of novel influenza or another such emergency situation. Additionally, if facility administrator, etc. fail to respond to such requests without a justifiable reason, the prefectural governor may, if certain requirements are satisfied, order such facility administrator, etc. to conduct such requests (Paragraph 3). When such a request or order is made, the provisions also state that a public announcement to that effect shall be made (Paragraph 4).

The 2011 Action Plan also includes the “requests” stipulated in Paragraphs 1 and 2, and it allows prefectural governors to issue orders under certain conditions. Based on this provision, the 2013 Action Plan mentioned above also provides for requests and orders.

The difference between a “request” and an “order” is that while a “request” relies on the “expectation that the other party will favorably undertake a certain action,” the person receiving the request is NOT legally obligated to do so. However, an “order” implies “indicating policies, standards, and procedures for a certain action and having the other party implement them.” A person receiving an order is “legally obligated to follow it”.<sup>41</sup> As orders give rise to legal obligations, they are considered a disposition under the Administrative Complaint Review Act (Law No. 68, 2014), and it is possible<sup>42</sup> to take step

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<sup>40</sup> *Ibid.*, p.158.

<sup>41</sup> *Ibid.*, pp.110-111; 第180回国会参議院内閣委員会会議録第7号 平成24年4月17日 (Minutes of the 180<sup>th</sup> Session of the Cabinet Standing Committee, House of Councilors, National Diet, No. 7, April 17, 2012) p.17; 「新型インフルエンザ等対策特別措置法に関する質疑応答集」(新型インフルエンザ等対策特別措置法に関する都道府県担当課長会議 (平成24年6月26日) 資料3) (“Question and Answer Session on the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response,” (Meeting of Prefectural Section Chiefs Concerning the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response (June 26, 2012) Document 3) p.17, 内閣官房 Cabinet Secretariat Website.

<sup>42</sup> Based on this opinion, when the governor of Kanagawa Prefectural Government actually issued the order for the suspension of business, the document announcing it stated that a request for administrative appeal and a lawsuit for revocation of the disposition could be filed. 「新型インフルエンザ等対策特別措置法

to appeal against such orders.<sup>43</sup>

Notably, there are no penalties for failure to comply with a request or an order, as the legislators of the time cited the fact that the existence of a legal basis for such a request or instruction would lead to the expectation of cooperation, and it would be difficult to control in practice.<sup>44</sup>

Further, the Article does not provide for compensation for losses arising from following requests or orders.

#### 4 *Requests for Cooperation under Article 24(9) of the Act on Special Measures*

Article 24(9) of the Act on Special Measures provide for requests to be made as well as Article 45(2). Specifically, although the requirements are considerably less stringent than those provided in the latter, the former stipulates that the head of prefectural headquarters for countermeasures (the prefectural governor) may, if necessary for the proper implementation of novel influenza countermeasures pertaining to the said prefecture, request that public and private organizations and institutions provide necessary cooperation in the implementation of novel influenza countermeasures for the region in question.

During the COVID-19 pandemic in 2020, while all 47 prefectures made requests for cooperation regarding implementing restrictions on holding events based on Article 24(9), 45 prefectures—a lower number in comparison—made requests for cooperation to restrict the use of facilities based on Article 45(2).<sup>45</sup> Compared to requests under Article 45(2), requests for cooperation under Article 24(9) are less effective because there is no mechanism provided for publicizing the request, and there are no provisions for issuing

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に基づく施設の使用停止（休業）について（指示）」（令和2年5月1日安総第1160号）（第7回新型コロナウイルス感染症神奈川県対策本部会議（令和2年5月1日）次第，[p.3]）（“Suspension of Facilities Based on the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response (Order)” (Notice No. 1160 of 1 May 2020) (7<sup>th</sup> Meeting of the Kanagawa Prefectural Emergency Headquarters for Measures Against COVID-19) [p.3]) Kanagawa Website.

<sup>43</sup> 新型インフルエンザ等対策研究会編（Research Group on Countermeasures Against Novel Influenza），*op.cit.*(10), p.112; 第201回国会衆議院内閣委員会議録第3号（Minutes of the 201<sup>st</sup> Session of the Committee on Cabinet, House of Representatives, No. 3），*op.cit.*(12), pp.8, 20. During the Committee’s deliberations, Minister of State NISHIMURA Yasutoshi stated that as the House of Councilors’ supplementary resolution during deliberations on the Act on Special Measures in 2012 stated that a system for appeals would be considered, he would like to consider this issue again after the conclusion of the COVID-19 pandemic.

<sup>44</sup> ITO, *op.cit.*(32), pp.6-7.

<sup>45</sup> Article 24 Paragraph 9 of the Act on Special Measures gives prefectural governors the authority to obtain “necessary cooperation.” However, it should not be interpreted as a provision to make suspension requests, etc. to facility administrator, etc. outside the government—it is not a provision that requires a basis for administrative action but a separate fundamental rule that defines the requirements for making specific requests for cooperation. Therefore, some advocate an interpretation based on the rule of law that prefectural governors cannot make suspension requests, etc. based on the same paragraph. 安田理恵「日本の新型コロナウイルス感染症対策からみた国、都道府県及び住民の関係」『法学セミナー』788号（YASUDA Rie, “The relationship between the national government, prefectures, and residents from the perspective of countermeasures against new coronavirus infections in Japan” *HOUGAKU Seminar* No. 788) 2020.9, p.8.

orders in the case of non-compliance with requests. However, in other respects, there are no significant differences between the two articles.<sup>46</sup>

## 5 Applicability to the COVID-19 Pandemic

Article 2 Item 1 of the Act on Special Measures limits the applicability of this Act to “novel influenza, etc.” Specifically, the three types are described in Table 4.

**Table 4** Types of Novel Influenza, etc. stipulated in Article 2 Item 1 of the I Act on Special Measures

Type	Definition	Underlying provisions
Novel influenza	A type of influenza that involves a virus newly becoming transmissible from one person to another as a pathogen and is deemed to be likely to affect the lives and health of the public seriously in the event of its rapid spread across the country because the public are not immunized against this infectious disease in general	Infectious Diseases Act Article 6(7) Item 1
Reemerging influenza	A type of influenza specified by the Minister of Health, Labour and Welfare as that which once caused a global pandemic but for which a long period has passed since the most recent global pandemic; it is deemed likely to affect the lives and health of the public seriously in the event of its rapid spread across the country because most of the existing public are not immunized against this infectious disease in general	Infectious Diseases Act Article 6 (7) Item 2
New infectious disease	A disease deemed to be transmissible from one person to another, which involves pathological conditions or therapeutic outcomes apparently different from those of any already known infectious disease, and which could cause a serious condition if developing the disease; it is deemed likely to affect the lives and health of the public seriously in the event of the spread of the disease	Infectious Diseases Act Article 6 (9)

(Source) Prepared by the author based on the Act on Special Measures and the Infectious Diseases Act.

In the context of COVID-19, arguments were made for applicability claiming that novel coronavirus disease might fall under “new infectious disease” as described above,<sup>47</sup> but the government consistently maintained that the Act could not be applied.<sup>48</sup> However,

<sup>46</sup> 第 180 回国会参議院内閣委員会会議録第 7 号 (Minutes of the 180<sup>th</sup> Session of the Cabinet Standing Committee, House of Councilors, National Diet No. 7), *op.cit.*(41), p.14.

<sup>47</sup> For example, 第 201 回国会衆議院財務金融委員会会議録第 6 号 令和 2 年 2 月 28 日 p.10 における日吉雄太衆議院議員の発言 (Minutes of the 201<sup>st</sup> Session of the Committee on Financial Affairs, House of Representatives, No. 6, February 28, 2020, Statement by HIYOSHI Yuta, a member of the House of Representatives, on p.10)

<sup>48</sup> 第 201 回国会参議院内閣委員会会議録第 4 号 令和 2 年 3 月 13 日 (Minutes of the 201<sup>st</sup> Session of the Diet, House of Councilors Cabinet Committee Meeting No. 4, March 13, 2020) pp.10-11. Minister of State Nishimura explained that the inapplicability of the new infectious disease designation is because that designation is applicable to cases in which the pathogen is unknown. The new coronavirus infection was confirmed to be caused by a known virus when the WHO announced on January 9, 2020, that it is caused by a coronavirus. After consultation with and a report from the Infectious Disease Subcommittee of the Health Sciences Council, on January 28, 2020, the Cabinet Order Designating the Novel Coronavirus Disease as a Designated Infectious Disease (Cabinet Order No. 11 of 2020) was promulgated, designating COVID-19 as a designated infectious disease under Article 6(8) of the Infectious Diseases Act. Additionally, Minister of State Nishimura also stated that as the Act on Special Measures entails major restrictions on the rights of private individuals, it is important to be cautious about considering it a new infectious disease based on a

the importance of preparing measures to be taken in the event of a rapid spread of infection in advance was recognized. In March 2020, the Act on Temporary Measures Against COVID-19 was enacted to amend the law, deeming the novel coronavirus to be an infection equivalent to novel influenza, as prescribed in the Act on Special Measures, and enabling the use of the mechanism provided in the said law as required.<sup>49</sup>

Specifically, Article 1-2 was added after Article 1 of the Supplementary Provisions of the Act on Special Measures, stipulating that the novel coronavirus infection is to be temporarily regarded as an infection equivalent to novel influenza and that the provisions of the Act shall be applicable until January 31, 2021.<sup>50</sup>

As mentioned above, the Act on Temporary Measures Against COVID-19 was passed and promulgated on March 13, 2020, and came into effect on the following day. As the Act on Special Measures can be applied to COVID-19, prefectural governors can request cooperation, as stipulated in Article 24(9), regarding measures for prevention of the spread of COVID-19. They can also issue requests and orders as provided in Article 45(2) and (3), respectively, of the same Act in the case of novel influenza or other emergency situations.

## II Restrictions on Property Rights and Compensation for Losses Under the Constitution of Japan

This section examines specific legislative examples and judicial precedents of the (a) protection of and (b) constraint imposed on the rights of minors as mentioned under Section I.<sup>51</sup> However, the classification is relative.<sup>52</sup> There are many cases in which both aspects are recognized. Cases that are mainly thought to relate to protection or constraint can be classified as those in which new special protections or constraints (that differ from those of

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flexible interpretation, and action through legal amendment is more appropriate. 第201回国会衆議院内閣委員会議録第3号 (Minutes of the 201<sup>st</sup> Session of the Committee on Cabinet, House of Representatives, No. 3), *op.cit.*(12), p.3.

<sup>49</sup> 第201回国会衆議院内閣委員会議録第3号 (Minutes of the 201<sup>st</sup> Session of the Committee on Cabinet, House of Representatives, No. 3) *Ibid.*, p.3.

<sup>50</sup> According to Article 1-2(1) of the Supplementary Provisions of the Act on Special Measures, after revision through the Act on Temporary Measures Against COVID-19, the Act on Temporary Measures Against COVID-19 “shall remain in effect for a period until the date specified by the Cabinet Order within a period not exceeding two years from the date of enforcement,” and “the Cabinet Order as stipulated in Article 1-2(1) of the Supplementary Provisions of the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response” (Cabinet Order No. 45 of 2020) set January 31, 2021 as the date.

<sup>51</sup> 堀口悟郎「子どもの人権」横大道聡編著『憲法判例の射程 第2版』弘文堂, 2020, pp.41-45 (HORIGUCHI Goro, “Rights of the Child,” YOKODAI DO Satoshi ed., *Range of Constitutional Precedent: Second Edition*, Kobundo Publishers, 2020, pp.41-45) stated that precedents could be organized by the classification between “human rights with low degree of guarantees to children” (e.g., freedom of knowledge) and “human rights with high degree of guarantees” (e.g., right to learn).

<sup>52</sup> See 赤坂 前掲注(7), p.315 (AKASAKA, *op.cit.*(7), p.315); 内野 前掲注(34), p.40 (UCHINO, *op.cit.*(34), p.40).

adults) were found necessary and in which existing special protections or constraints became a problem.

## 1 *Two Categories of General Restrictions on Property Rights*

Article 29(2) of the Constitution of Japan provides for general legal restriction on property rights. In other words, property rights are subject to “negative purpose regulations” (also known as “intrinsic restrictions”) derived from the public welfare of the night watching state, which aims to guarantee rights fairly, and “positive purpose regulations” (also known as “policy regulations”) derived from the public welfare of a welfare state aiming to ensure human existence.<sup>53</sup> Examples of negative purpose restrictions (intrinsic restrictions) include regulations to prevent infectious diseases (Articles 29 and 32 of the Infectious Diseases Act) and avoid and extinguish fires (Articles 5 and 29 of the Fire Service Act (Act No. 186 of 1948)). Examples of positive purpose restrictions (policy regulations) include regulations to stabilize the status of cultivators and promote agricultural productivity (Article 3 of the Cropland Act (Act No. 229 of 1952)) and those to protect historical sites, places of scenic beauty, and natural monuments (Article 125 of the Law for the Protection of Cultural Properties (Act No. 214 of 1950)).<sup>54</sup>

## 2 *Framework for Determining the Constitutionality of Property Rights Restrictions*

However, this does not mean that any restrictions are permissible if they are stipulated in the form of such a law. The Supreme Court has provided a framework for the limits of such restrictions in its previous decisions,<sup>55</sup> which are summarized as follows. The

<sup>53</sup> 中村睦男「第29条〔財産権〕」樋口陽一ほか『憲法II〔第21条～第40条〕』（注解法律学全集 2）（NAKAMURA Mutsuo “Article 29: Property Rights” HIGUCHI Yoichi et al., “Constitutional Law II [Article 21-Article 40]” (Commentary on Jurisprudence Complete Works 2) Seirin Shoin, 1997) pp.239, 243; 矢島基美「財産権の制限と補償の要否」大石眞・石川健治編『憲法の争点』（Jurist 増刊 新・法律学の争点シリーズ 3）, (YAJIMA Motomi, “Restrictions on property rights and necessity of compensation” OHISHI Makoto and ISHIKAWA Kenji eds., *Issues on the Constitution* (Jurist Supplement, Issues in Jurisprudence Series 3)) Yuhikaku Publishing, 2008, p.154; 高見勝利「第9章 経済的自由」野中俊彦ほか『憲法I 第5版』（TAKAMI Katsutoshi, “Chapter 9 Economic Freedom,” NONAKA Toshihiko et al., *Constitution I, 5th ed.*) Yuhikaku Publishing, 2012, p.486.

<sup>54</sup> 穴戸常寿「第29条【財産権】」長谷部恭男編『注釈日本国憲法3 国民の権利及び義務(2)・国会 §§25～64』（SHISHIDO George, “Article 29 [Property Rights]” HASEBE Yasuo ed., *Annotated Constitution of Japan 3 Rights and Duties of the People (2) National Diet §§25 - 64*) Yuhikaku Publishing, 2020, pp.127-128.

<sup>55</sup> TAKAMI, *op.cit.*(51), p.490 cites this framework presented in 最高裁判所昭和62年4月22日大法廷判決（最高裁判所民事判例集 41 卷 3 号 408 頁）（森林法事件）（Supreme Court’s April 22, 1987 decision (Supreme Court Reports (Civil Cases), Vol. 41, No. 3, p.408) (Forest Act Case)) and seems to have been established in 最高裁判所平成14年2月13日大法廷判決（最高裁判所民事判例集 56 卷 2 号 331 頁）（証券取引法事件）（Supreme Court’s February 13, 2002 decision (Supreme Court Reports (Civil Cases), Vol. 56, No. 2, p.331) (Securities and Exchange Act Case)) and evaluated as follows.



Supreme Court has acknowledged the difficulty of blanket discussions because of the variety of purpose, content, means, and methods of imposing such regulations. It has stated that it is necessary to compare and consider the purpose, necessity, and contents of regulations and the type, nature, and degree of the property right being restricted to determine whether the regulation is within a reasonable scope to achieve the objective. In such cases, the legitimacy of purpose and necessity and the reasonableness of the means used to achieve the purpose are considered to be the decisive factors.<sup>56</sup>

### 3 *Necessity of Compensation for Losses per the Constitution of Japan*

#### (1) Restrictions on Property Rights and Compensation for Losses

Article 29 (3) of the Constitution of Japan stipulates that “Private property may be taken for public use upon just compensation,” clearly indicating that private property may be expropriated or restricted for public purposes and that “just compensation” should be made in such cases.<sup>57</sup> This compensation for losses can be defined as compensation for special losses inflicted directly upon the property of a specific person for public works or other public use at the expense of society as a whole and is said to be a corollary (logical consequence) derived from the guarantee of property rights and the rule of equality.<sup>58</sup>

In the past, the dominant view held that the restriction of property rights under Article 29 (2) of the Constitution of Japan is a general restriction of property rights and that compensation as provided under Paragraph 3 is not required, partly due to the lack of explicit text on compensation. Conversely, the meaning of the term “for the public” in Paragraph 3 of the same Article has been extended from the original context of the eminent domain to “for the public good in general.” Even the word “use” has come to be understood to include a restriction on the exercise of property rights. Even in the case of restriction of property rights under Paragraph 2 of the same Article, compensation would be expected in cases where “restriction of property is so severe as to deprive each person of their guaranteed rights or cause them to substantively lose their rights” even if it is a general restriction on property rights. The prevailing view today is that even in the case of restriction of property rights under Paragraph 2 of the same Article, compensation under Paragraph 3 might be required.<sup>59</sup>

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<sup>56</sup> *Ibid.*, p.490.

<sup>57</sup> 芦部信喜, 高橋和之補訂『憲法 第7版』(ASHIBE Nobuyoshi, TAKAHASHI Kazuyuki “Constitution (7<sup>th</sup> ed.)”) Iwanami Shoten, 2019, pp. 246-247; *Ibid.*, pp.492-493.

<sup>58</sup> 原田尚彦『行政法要論 全訂第7版補訂2版』(HARADA Naohiko, “Essence of Administrative Law 7<sup>th</sup> Edition Supplement 2”) Gakuyo Shobo, 2012, p.269.

<sup>59</sup> SHISHIDO, *op.cit.*(52), pp.138-139; YAJIMA, *op.cit.*(51), p.154; 長谷部恭男『憲法 第7版』(新法学ライブラリ 2) (HASEBE Yasuo, “Constitution 7<sup>th</sup> Edition” (Shinbogaku Library 2) Shinsei-Sha, 2018, p.248.

## (2) Extraordinary Sacrifice

Additionally, it is generally understood that compensation is required in cases where “extraordinary sacrifice” is imposed on a specific person beyond the social and natural restrictions inherent in their property rights.<sup>60</sup> For example, compensation is not required in cases where a burden is imposed broadly and generally (imposition of taxes, etc.) or where a special burden is imposed due to reasons attributable to the person themselves (fines, burden charges, etc.).<sup>61</sup>

The conventional common view on “extraordinary sacrifice” is based on the following two criteria: (1) whether the act of infringement targets the general public at large or a specific category of persons (formal requirement) and (2) whether the act of infringement is within the limit of acceptance as a restriction inherent in the property right or is so severe to infringe the essential content of the property right (substantive requirement) (formal and substantive requirements theory).

Conversely, the current view (substantive requirement theory) holds that as legal regulations are always general in form, the determination should be made based on the substantive requirement (2) rather than the formal requirement (1). First, in the case of deprivation of a property right or infringement that prevents the exercise of the original utility of the property right, compensation is naturally required unless there is a reason on the part of the right holder to accept the infringement. Second, in the case of regulations that do not result in the above situation, the prevailing view is as follows: (i) when restrictions on property rights are necessary to maintain harmony with social cohabitation, no compensation is required as an expression of the social restraint inherent in the property rights (e.g., restrictions on building construction under the Building Standard Law); (ii) compensation is required when the restrictions incidentally imposed are for other specific public interest purposes unrelated to the original social utility of the property right (e.g., restrictions for preserving important cultural properties or maintaining natural features in a national park based on the Nature Park Law).<sup>62</sup>

## (3) Negative Purpose Regulations and Compensation for Losses

Section 1 mentioned the two types of general restrictions on property rights: positive and negative purpose regulations. The common view is that compensation for loss is usually necessary when the loss caused due to regulations for positive purposes constitutes an extraordinary sacrifice and that regulations for negative purposes, in principle, do not constitute an extraordinary sacrifice and do not require compensation under the Constitution. This is because they are often a manifestation of social restrictions on property rights. Relevant judicially Precedents are also understood to be based on this

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<sup>60</sup> ASHIBE, TAKAHASHI, Supplement, *op.cit.*(55), p.493; YAJIMA, *Ibid.*, pp.154-155; HASEBE, *Ibid.*, p.249; TAKAMI, *op.cit.*(51), p.493.

<sup>61</sup> YAJIMA, *Ibid.*, p.155.

<sup>62</sup> ASHIBE, TAKAHASHI, Supplement, *op.cit.*(55), pp.247-248; YAJIMA, *Ibid.*, p.155; SHISHIDO, *op.cit.*(52), p.140; TAKAMI, *op.cit.*(51), p.494.

opinion.<sup>63</sup> However, in the modern era of diversified administration, the question of compensation should not depend on whether the regulation is for a negative or positive purpose. Moreover, there is a prevailing view that compensation is required even for negative regulations if the limit of tolerance has been exceeded.<sup>64</sup>

#### 4 *Compensation Claims Directly Based on the Constitution of Japan*

If the above discussion leads to the conclusion that compensation is required per the Constitution, can a claim for compensation be filed if the relevant regulatory law lacks provisions regarding compensation? The Supreme Court has recognized this issue and has held that it is not completely impossible to make a claim for compensation based directly on Article 29(3) of the Constitution.<sup>65</sup> It was previously theorized that this provision was a program provision (legislative guideline theory) or that official expropriation laws and regulations that lacked provisions for compensation were constitutionally invalid (constitutional invalidity theory). However, after the Supreme Court expressed the abovementioned view through the referenced judgment, the theory that it is possible to claim compensation directly based on Article 29(3) of the Constitution (direct claim theory) is generally supported.<sup>66</sup>

#### 5 *Policy-Based Compensation*

The analysis presented up to Section 3 revealed that even if no compensation is required per the Constitution of Japan, there are cases where compensation is provided due to policy reasons. Such compensation is referred to as “policy-based compensation.”

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<sup>63</sup> 最高裁判所大法廷昭和 38 年 6 月 26 日判決（最高裁判所刑事判例集 17 卷 5 号 521 頁）（奈良ため池条例事件判決）及び最高裁判所大法廷昭和 43 年 11 月 27 日判決（最高裁判所刑事判例集 22 卷 12 号 1402 頁）（河川附近地制限令事件判決）Supreme Court, Grand Bench, June 26, 1963 (Supreme Court Report (Criminal Cases), Vol. 17, No. 5, p.521) (Nara Reservoir Ordinance Case Judgment) and Supreme Court, Grand Bench, November 27, 1968 (Supreme Court Report (Criminal Cases), Vol. 22, No. 12, p.1402) (River Fringe Land Restriction Order Case Judgment). However, in the latter case, regarding the losses incurred by the gravel company, which had invested considerable capital in the project, as a result of requiring permissions under Article 4 Item 2 of the Ordinance for Land-Use Restriction in River Zones (Imperial Ordinance No. 300 of 1905; repealed through Cabinet Order No. 14 of 1965), the Court stated that the restrictions stipulated in the same item are general restrictions for public welfare, which, in principle, should be accepted by everyone. It also stated that the loss of property can be regarded as an “extraordinary sacrifice” that goes beyond the scope of restrictions to be accepted as a matter of course. Therefore, compensation for losses could be claimed.

<sup>64</sup> SHISHIDO, *op.cit.*(52), pp.140-141; TAKAMI, *op.cit.*(51), p.495. Additionally, the judgment in the case of the order restricting the use of land near the river mentioned in *op.cit.*(61) above held that there is no scope to consider any “extraordinary sacrifices” beyond the restrictions generally accepted as a matter of course and that it is possible to conclude that compensation for such losses can be claimed.

<sup>65</sup> This is based on the judgment in the case of the order regarding the restriction of use of land adjacent to a river as stated in *op.cit.*(61).

<sup>66</sup> NAKAMURA, *op.cit.*(51), pp.254-255; ASHIBE, TAKAHASHI, *op.cit.*(55), p.248; YAJIMA, *op.cit.*(51), p.155; SHISHIDO, *op.cit.*(52), p.145; TAKAMI, *op.cit.*(51), p.499.

Examples include the following: “allowances” for livestock “slaughter or slaughter disposition” due to the contraction of infectious disease (Article 58 of the Act on the Prevention of Infectious Diseases in Livestock (Act No. 166 of 1951)) and “subsidies for the discontinuation of regular passenger route operation,” which were granted when the scale of operations was reduced in accordance with the implementation plan prepared by a party intending to reduce the scale of their operations during the construction of the Honshu-Shikoku Bridge, approved by the Minister of Land, Infrastructure, Transport and Tourism (Act on Special Measures Concerning Regular Ferry Line Service for General Passengers Incidental to Construction of Connection Bridge Between Honshu and Shikoku (Act No. 72 of 1981)).<sup>67</sup>

Nevertheless, there is also a view that such compensation is constitutional, and there is no agreement on the kind of compensation considered to be policy-based. This is because policy-based compensation is believed to be a theoretical concept. There exists no law explicitly stating whether the compensation provided for is constitutional or policy-based; rather, this is left solely to interpretation.<sup>68</sup>

The practical benefit of distinguishing whether a given compensation is constitutional or policy-based is that in the former case, even if it has no basis in law or budget, a compensation claim can be filed directly under Article 29(3) of the Constitution, as discussed in Section 4. In the latter case, as long as there is no basis, no compensation claim can be filed. Additionally, in the latter case, if there exists a basis, should that be repealed, compensation could be withdrawn. However, in the latter case, it would mean that compensation could be made even without meeting constitutional criteria such as “extraordinary sacrifice.”<sup>69</sup>

### III Relationship Between Suspension Requests, etc. Under the Act on Special Measures and Restrictions on Property Rights

As mentioned in Section II-2, to determine the permissibility of property rights restriction, the purpose, necessity, and contents of the regulation and the type, nature, and degree of the property right(s) under restriction are compared and considered to determine whether the restriction is within a reasonable scope to achieve the said purpose. In such

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<sup>67</sup> 橋本公旦「憲法上の補償と政策上の補償」成田頼明編『ジュリスト増刊 行政法の争点』（法律学の争点シリーズ 9）（HASHIMOTO Kiminobu, “Constitutional Compensation and Policy Compensation,” NARITA Yoriaki, “Jurist Supplement, Issues in Administrative Law (Issues in Jurisprudence Series 9), Yuhikaku, 1980, p.177; 渡邊互「いわゆる「政策上の補償」をめぐる法的問題」(WATANABE Wataru, “Legal Issues Concerning ‘Policy-Based Compensation’”) Hakuoh Hogaku, Vol. 16 No. 2, 2009.12, pp.111-112.

<sup>68</sup> HASHIMOTO, *Ibid.*; WATANABE, *Ibid.*

<sup>69</sup> WATANABE, *Ibid.*, pp.115-116.

cases, the justifiability of the purpose and necessity and the reasonableness of the means to achieve the purpose are the decisive factors in making such a judgment.<sup>70</sup>

Therefore, this chapter examines the relationship between suspension requests, etc. under the Act on Special Measures and restrictions on property rights regarding the legitimacy of the nature and purpose of the restriction, the necessity and reasonableness of the means to achieve the purpose, and the necessity of compensation for losses under the Constitution. This is achieved with reference to the views of the government at the time of legislation of the Act and the Act on Temporary Measures Against COVID-19.

### **1 Justification of the Nature and Purpose of Suspension Requests, etc. as Restrictions on Property Rights**

As mentioned in Section I-1, novel influenza is characterized by the possibility of a global pandemic, which may cause serious associated health problems and social consequences. In the event of an actual pandemic, the medical and public health measures to suppress the source of infection under the Infectious Diseases Act may be insufficient to prevent the spread of infection. As mentioned in Section I-2, suspension requests, etc. were first introduced in the WHO 2005 Plan as part of the measures to reduce contact among adults to prevent the spread of novel influenza. In Japan, these measures were introduced via the 2005 Action Plan and were subsequently legally enshrined in the Act on Special Measures.

As suspension requests, etc. under the Act on Special Measures were made for such purposes, they can be positioned as negative purpose regulations, such as regulations for the prevention of infectious diseases (Articles 29 and 32 of the Infectious Diseases Act). It can be concluded that this type of regulation is justifiable for restricting property rights.<sup>71</sup> However, as there appears to be a lack of consensus on the permissibility of restrictions on fundamental human rights based on the precautionary principle,<sup>72</sup> some contend that there

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<sup>70</sup> Regarding the relationship between suspension requests, etc. and restrictions for public welfare, the government (Masaharu Kondo, Commissioner of the Cabinet Legislation Bureau) replied in the Diet that “it is necessary to make specific judgments from the perspective of necessity and rationality according to the purpose of individual legislation.” 第201回国会衆議院会議録第19号 令和2年4月16日 p.7. (201<sup>st</sup> Session of the Diet, Minutes of the Meeting of the House of Representatives, No. 19, April 16, 2020, p.7.)

<sup>71</sup> For the perspective that if it is particularly necessary to prevent danger to human life or body, such as in the case of imminent danger of disaster, even in the case of infectious diseases, the interpretation that there is no constitutional impediment to taking largescale action restrictions, such as those in the Basic Act on Disaster Management (Act No. 223, 1961), see ETO Shohei, 江藤祥平「匿名の権力—感染症と憲法」『法律時報』92巻9号, “Anonymous power: Infectious diseases and the constitution” *The Houritsu Jiho* Vol. 93 No. 9) 2020.8, p.73.

<sup>72</sup> The legal principle states that “even if scientific knowledge is not fully developed, once a problem arises, when serious and irreversible damage occurs, it is preferable to take necessary measures rather than doing nothing.” 松本和彦「公法解釈における諸原理・原則の対抗—憲法学から見た比例原則・予防原則・平等原則」『公法研究』81号 (MATSUMOTO Kazuhiko, “Opposing principles and principles in the interpretation of public law: The proportionality principle, the precautionary principle, and the equality principle from the perspective of constitutional law,” *Public Law Review* No. 81) 2019.2, p.67.

is still room for debate as to whether this type of regulation is permissible under the Constitution.<sup>73</sup>

## 2 *Necessity and Reasonableness of the Means to Achieve the Purpose*

As mentioned in Section III-1, suspension requests, etc. are measures to prevent the spread of novel influenza and are necessary to “protect the lives and health of the people and avoid disruptions to peoples’ lives and the national economy” (Article 45(2) and (3) of the Act on Special Measures) by preventing the spread of novel influenza through the limitation of opportunities for contact. Hence, these measures were adopted in the WHO 2005 Plan and are included in Japan’s National Action Plan.

WHO cited the case of Hong Kong in 2003 to demonstrate the effectiveness of measures involving suspension, as mentioned in Section I-2(1). At the Diet session when the Act on Special Measures was enacted in Japan, the then minister in charge responded by comparing the US case of the Spanish flu epidemic of 1918–1920. He referenced St. Louis, which ordered the closure of popular facilities, and Philadelphia, which did not implement any measures, and noted that the peak mortality rate in St. Louis was one-fourth that of Philadelphia.<sup>74</sup> Additionally, experts pointed out in their replies to the Diet that minimizing opportunities for numerous people to gather in one place would effectually shift the peak into the future, significantly preventing the spread of infection and reducing the number of patients during the peak period.<sup>75</sup>

Furthermore, in terms of the degree of restriction, Article 5 of the Act on Special Measures stipulates that the use of facilities is to be minimized as much as possible to implement novel influenza countermeasures<sup>76</sup> and that the period of restriction is to be one to two weeks. However, the scope is limited because those ordered to restrict use are legally obligated to do so but are not forced to discontinue use through penalties or other security.<sup>77</sup>

Considering the above, one can conclude that the necessity and reasonableness of the means to achieve the objective are satisfied.

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<sup>73</sup> 尾形健「「新型コロナウイルス禍」の福祉国家——憲法研究者からみた「新型コロナと法」——（特別企画 新型コロナと法【リレー連載】第5回）『法学セミナー』790号, (OGATA Takeshi, “The welfare state in the COVID-19 disaster – Law and COVID-19 from the perspective of a constitutional law researcher” (Special Issue: COVID-19 and the Law [Relay Serialization] No. 5)) No. 790, 2020.11, p.60.

<sup>74</sup> 第180回国会参議院内閣委員会会議録第7号 (Minutes of the 180<sup>th</sup> Session of the Cabinet Standing Committee, House of Councilors, National Diet No. 7), *op.cit.*(41), p.12.

<sup>75</sup> *Ibid.*

<sup>76</sup> 新型インフルエンザ等対策研究会編 (Research Group on Countermeasures Against Novel Influenza), *op.cit.*(10), pp.41-42; 第201回国会参議院内閣委員会会議録第4号 令和2年3月13日 (Minutes of the 201<sup>st</sup> Session of the Diet, House of Councilors Cabinet Committee Meeting No. 4, March 13, 2020) p.13.

<sup>77</sup> 第180回国会参議院内閣委員会会議録第7号 (Minutes of the 180<sup>th</sup> Session of the Cabinet Standing Committee, House of Councilors, National Diet No. 7), *op.cit.*(41), p.24.

### 3 *Necessity of Compensation for Losses per the Constitution of Japan*

As mentioned in Section II-3, the common view and relevant judicial precedents state that negative purpose regulations such as measures to prevent the spread of novel influenza are not subject to compensation for losses under Article 29(3) of the Constitution of Japan. Therefore, there is no provision regarding the compensation for losses related to suspension requests, etc. under Article 45 of the Act on Special Measures. This is based on the justification that the purpose of the regulation is a measure for the prevention of the spread of novel influenza, necessitating self-restraint from conducting inherently dangerous activities.<sup>78</sup> Another reason for the lack of provisions on compensation, as mentioned in Section III-2, is that the regulation is temporary—with a defined duration—and it is not a compulsory measure based on penalties or security, limiting the degree of the restriction of rights.<sup>79</sup> Therefore, the position established according to the common view and relevant judicial precedents is likely to lead to the conclusion that compensation for loss is disallowed.

Nevertheless, if one takes the view that even regulations for negative purposes require compensation in cases where the limit of tolerance is exceeded, the mere fact that they are regulations for negative purposes does not exclude them from compensation. However, some consideration might be necessary if the amount of loss becomes high due to a prolonged period of suspension or if, as described below, there are calls requesting the establishment of penalties.

Further, it can be considered to be a restriction of property rights because businesses have suffered severe economic loss due to suspension, and the types of businesses that faced suspension requests, etc. were specified. The businesses were deprived of a substantial part of their property rights due to the complete inability to operate. For some, this fulfills the condition of “extraordinary sacrifice,” making the loss subject to compensation.<sup>80</sup>

Additionally, as discussed in Section II-5, even if compensation for loss is disallowed under the Constitution, it may be adopted as a policy option, as it is possible to provide compensation for loss as a matter of policy.

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<sup>78</sup> 新型インフルエンザ等対策研究会編 (Research Group on Countermeasures Against Novel Influenza, etc.), *op.cit.*(10), p.161; 第 201 回国会衆議院内閣委員会議録第 3 号 (Minutes of the 201<sup>st</sup> Session of the Committee on Cabinet, House of Representatives, No. 3), *op.cit.*(12), p.5.

<sup>79</sup> 第 180 回国会参議院内閣委員会議録第 7 号 (Minutes of the 180<sup>th</sup> Session of the Cabinet Standing Committee, House of Councilors, National Diet No. 7), *op.cit.*(41), p.24.

<sup>80</sup> 植田統「「自粛と補償はセット」議論に必要な 3 つの要点 政府が固執する「自粛と補償は別」は正しいか」 (UEDA Osamu, “Three key points essential to the ‘self-restraint and compensation set’ debate: Is the government’s insistence that self-restraint and compensation are distinct correct?”) 2020.5.11 *Toyo Keizai Online* However, the government is of the opinion that a request to shorten business hours is within the acceptable limits, as such a modification is tolerable.

## Conclusion

For the first time since the enforcement of the Act on Special Measures, declaration of a novel influenza-related or other emergency situation and requests for suspension based on Article 24(9) and Article 45 of the Act were conducted nationwide for a duration exceeding a month. Consequently, many businesses experienced considerable declines in sales, incurred losses, and were forced into closure or bankruptcy, and some have demanded compensation from the government for their losses. Further, as some business operators refused to comply with these requests, there have been calls to impose penalties.<sup>81</sup>

In the Diet deliberations on the Act on Temporary Measures Against COVID-19, the minister in charge indicated the desire to conduct an extensive review of the Act after the end of the pandemic.<sup>82</sup> If the revision of the Act on Special Measures is part of this process, the constitutional issues presented in this report may be considered. We hope that this report will serve as a reference for future consideration of the status of the Act on Special Measures.

MINAMI Ryoichi, *An Essay on Restrictions on Property Rights under Article 29 of the Constitution of Japan due to Requests and Instructions for Suspension of Business under the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response* (Research Materials), 2023e-1, Tokyo: Research and Legislative Reference Bureau, National Diet Library, 2023 (Translated from *The Reference*, No. 838, 2020.11, pp. 31-48.).

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<sup>81</sup> 「新型コロナ特措法 34 知事「改正必要」 本社アンケート」『朝日新聞』(“COVID-19 Act on Special Measures: 34 governors respond ‘revision is required’ to Head Office questionnaire,” *The Asahi Shimbun*) 2020.6.22; 「新型コロナウイルス感染症に関する緊急提言」(令和 2 年 7 月 19 日) (“Urgent proposal on COVID-19” (July 19, 2020)) National Governors’ Association Website.

<sup>82</sup> 第 201 回国会参議院内閣委員会会議録第 4 号 (Minutes of the 201<sup>st</sup> Session of the Cabinet Standing Committee, House of Councilors, National Diet No. 4), *op.cit.*(48), p.24.