

Japan's Proposed Legislation Regarding COVID-19 Measures Must Respect Human Rights and Include Safeguards and a Guarantee of Due Process

Human Rights Now (HRN), a Tokyo-based international human rights NGO, is concerned about the potential for abuses or unintended negative consequences for human rights of COVID-19 related measures, particularly those punishing violations and lacking concrete safeguards to prevent abuses. This includes recent legislation proposed by the government of Japan as discussed below. We are also concerned that the government of Japan is not doing enough to provide free PCR testing to everyone and economic support to people and businesses.

1. OHCHR Guidance for COVID-19 Related Emergency Measures

The Office of the High Commissioner for Human Rights (OHCHR) has given specific guidance to states on ways in which COVID-19 emergency measures should respect human rights standards.¹ These include the requirements that:

- Any restriction on rights (with the exception of non-derogable rights) must be necessary and proportionate to addressing the health risk at issue;
- Measures must be implemented without discrimination and in the least intrusive way possible;
- The aim of the measures must only be for the legitimate purpose of public health, not to silence or punish criticism or dissent by human rights defenders, journalists, or anyone else; nor to take any other steps unnecessary for public health;
- Non-derogable rights must never be restricted, such as prohibitions on non-refoulement, collective expulsion, torture/ill-treatment, and the guarantee of the fundamental requirements of fair trial, etc.;
- The government must inform the public about the measures and how long they will be in effect; and
- The government must ensure a return to normal life without emergency powers as soon as feasible.

2. Examples of Reported Abuses or Unintended Consequences of COVID-19 Related Measures

Numerous examples of negative human rights consequences of COVID-19 related measures around the world illustrate the necessity for safeguards to prevent abuses and negative consequences for rights. These include:

- Restrictions, harassment, and punishment of doctors, activists, and journalists speaking about COVID-19, which silences critical voices on governments' handling of the pandemic. Such cases have been reported in Bangladesh,² China,³ Kenya,⁴ the Philippines,⁵ Iran, Egypt, Turkey, Azerbaijan, Hungary, Honduras,⁶ and many other countries;
- Suppression of social media users, such as has been reported in the Philippines⁷ and Thailand;⁸
- Use of excessive force and arbitrary arrests to enforce curfews, such as has been reported in Kenya,⁹ Angola, El Salvador, Dominican Republic,¹⁰ and crackdowns on public demonstrations under the pretext of COVID-19 in Ethiopia,¹¹ Hong Kong,¹² and many other countries; and
- Last November, HRN released a joint-statement with a Hong Kong-based rights group criticizing the cancellation of a government hearing on ICCPR rights under the pretext of COVID-19 protection, which had the effect of silencing civil society.¹³

¹ https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf

² <https://netra.news/2020/crackdown-against-critical-voices-1056>

³ <https://www.straitstimes.com/asia/east-asia/chinese-probe-finds-coronavirus-whistleblower-doctor-was-punished-inappropriately>

⁴ <https://theconversation.com/how-covid-19-has-worsened-attacks-against-journalists-in-kenya-149296>

⁵ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25850>

⁶ <https://www.cjr.org/analysis/coronavirus-press-freedom-crackdown.php>

⁷ <http://humanitariannews.org/20200423/philippine-activists-charged-sedition-fake-news/>

<https://www.rappler.com/nation/sanctions-fake-news-bayanihan-act-most-dangerous>

⁸ <https://indianexpress.com/article/world/rights-group-slams-thailand-repressive-laws-to-intensify-crackdown-on-covid-19-critics-6377567/>

⁹ <https://theconversation.com/how-covid-19-has-worsened-attacks-against-journalists-in-kenya-149296>

¹⁰ <https://www.amnesty.org/en/latest/news/2020/12/governments-and-police-must-stop-using-pandemic-as-pretext-for-abuse/>

¹¹ *Id.*

¹² <https://www.nytimes.com/2020/04/21/world/asia/coronavirus-hong-kong-protests.html>

¹³ <https://hrn.or.jp/eng/news/2020/11/30/joint-statement-on-hong-kong-since-ns/>

Altogether, an OHCHR official said about 80 countries have declared emergencies due to the pandemic, which included 15 countries of concern, with another official adding “there are probably several dozen more we could have highlighted.”¹⁴

3. Japan’s Proposed Legislation Regarding COVID-19 Measures Must Also Respect Rights

HRN released a statement in April 2020¹⁵ warning the government of Japan against COVID-19-related measures and misuses of authority that intentionally or unintentionally negatively affect people’s rights, and calling for effective safeguards, followed by several later statements and joint statements emphasizing the same points.¹⁶

On 15 January 2021, it was reported that the prime minister’s administration was preparing legislation which included punishments for people refusing to comply with government-mandated COVID-19 measures.¹⁷ Two ideas floated were a maximum fine of ¥1 million or a prison sentence of up to one year for persons refusing hospitalization, and a maximum fine of ¥500,000 or a 6-month prison sentence for giving false information to health authorities tracing infection routes. Businesses could also be fined up to ¥500,000 for violations in areas under emergency orders, and up to ¥300,000 in areas under “preventative measures”. Already in early discussions, concerns were raised about disproportionate punishments and the potential for unjustified restrictions on personal freedoms.¹⁸

The Japan Federation of Bar Associations (JFBA) released a statement criticizing the proposed amendments as handing down criminal punishments while lacking basic human rights safeguards and the guarantee of due process.¹⁹ The scope of the law was also considered unclear, which could invite unjustified, unequal, or arbitrary punishments. The statement also criticized the punishment of infected persons without fully appreciating their vulnerability or actual situation. Infected persons should be given assistance and made to feel welcome going to the government for help, not threatened with punishment and driven away from assistance, which only creates worse problems for both them and for public health.

On January 28, it was reported that the ruling and opposition parties came to an agreement to remove the criminal punishments and change the criminal fines into administrative fines which are lower and do not give a person a criminal record.²⁰ While this is a welcome development, many of the JFBAs criticisms remain issues of concern, including the lack of concrete human rights safeguards, such as protections against discrimination and prejudice, a guarantee of due process, a clear and narrowly tailored scope of application in particular respecting the standard of necessity and proportionality, and provisions which do not punish infected persons but rather provide them with unconditional assistance.

4. The Government of Japan Must Also Increase Access to Free PCR Tests and Economic Support

In its April 2020 statement,²¹ HRN pointed out the need for the government of Japan to increase access to PCR testing for COVID-19 given studies indicating that testing in Japan was much lower than other developed states. Almost a year later, as the number of cases in Japan has greatly increased, the government has still not significantly increased PCR testing, with only limited plans such as random mass testing in major cities to begin from March.²² This is still insufficient given the increasing numbers of cases, and the government should provide easy access to free PCR testing for everyone to respect the right to health. The

¹⁴ <https://www.aljazeera.com/news/2020/4/28/un-raises-alarm-about-police-brutality-in-covid-19-lockdowns>. The countries were Nigeria, Kenya, South Africa, the Philippines, Sri Lanka, El Salvador, the Dominican Republic, Peru, Honduras, Jordan, Morocco, Cambodia, Uzbekistan, Iran and Hungary.

¹⁵ <https://hrn.or.jp/eng/news/2020/04/24/coronavirus-statement/> (in Japanese: <https://hrn.or.jp/activity/17513/>).

¹⁶ <https://hrn.or.jp/activity/project/covid19/>, in particular: <https://hrn.or.jp/wpHN/wp-content/uploads/2020/05/13f73eaaa0b499da9a0d9fb07f31374a.pdf> (in Japanese).

¹⁷ <https://www.japantimes.co.jp/news/2021/01/15/national/covid-19-rules-punishments/>

¹⁸ *Id.*

¹⁹ https://www.nichibenren.or.jp/document/statement/year/2021/210122_2.html (in Japanese).

²⁰ <https://mainichi.jp/articles/20210128/k00/00m/010/058000c> (in Japanese).

²¹ <https://hrn.or.jp/eng/news/2020/04/24/coronavirus-statement/>

²² <https://www.japantimes.co.jp/news/2021/01/26/national/science-health/japan-start-random-pcr-testing/>

government should also actively encourage people to get tested when they have even the slightest symptoms so that it has better information on the spread and movement of the infection and on the effectiveness and shortcomings of its measures.

The government must also provide greater financial support for people and businesses that are suffering economically, particularly among the most vulnerable groups—such as migrant workers, part-time workers, the self-employed and independent contractors, people on short-term contracts, the unemployed, etc.—not focusing primarily on support through large corporations.²³ Finally, the government must be careful to avoid measures that may make the pandemic worse, such as the “Go to Travel” campaign which encourages people to travel, intending to boost the economy, when travel and personal contact actually spread the virus and should be limited.

5. Recommendations

In drafting new legislation regarding COVID-19 measures, HRN calls on the government of Japan to include the following protections and recommendations:

- Concrete safeguards ensuring respect of protected rights and that all restrictions actually benefit public health and are strictly necessary and proportional to that end;
- A guarantee of due process, allowing persons to challenge unjustified applications of the measures;
- Clear and narrowly tailored language defining the scope of the measures and their implementation to prevent arbitrary or unequal applications;
- The elimination of any provisions which might punish infected persons and/or deter them from seeking government assistance.

HRN also calls on the government of Japan to provide:

- Increased access to free PCR testing for everyone;
- Greater financial support to people and businesses, particularly among the most vulnerable groups.

²³ <https://hm.or.jp/eng/news/2020/11/12/statement-covid19-and-migrants/>