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COVID-19 Responses in Japan from an Administrative Law Perspective: Why won't Pachinko Parlours Close Down?

Shusaku Kitajima and Stacey Steele*

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Professor Shusaku KITAJIMA and A/Professor Stacey STEELE discuss Japanese Government responses to COVID-19 from the perspective of administrative law.

Stacey Steele (SS): Kitajima san, it's a pleasure to host you during your visit to Melbourne Law School from Tohoku University in Sendai, Japan. Thank you for taking the time to discuss Japanese Government responses to COVID-19 from the perspective of administrative law.

Shusaku Kitajima (SK): Thank you. I am delighted to be able to share my experience and observations with the Asian Law Centre's readers.

SS: Japan has experienced a severe outbreak of COVID-19 with 820 deaths and 16,550 confirmed cases as between 14 January and 24 May 2020 according to the World Health Organization. The Tokyo Olympics have been postponed and measures have been introduced to deal with the immediate threat posed by COVID-19. Amongst those measures, it seems to me that there are some similarities between the Australian and Japanese governments' responses to COVID-19. The Government of the State of Victoria declared a state of emergency on 16 March 2020, and the Japanese Government declared a state of emergency in Japan on 7 April 2020 in relation to five prefectures plus the Metropolis of Tokyo (Tokyo-to) and the Urban Prefecture of Osaka (Osaka-fu). Although the state of emergency was initially scheduled to end on 6 May 2020, it was extended and finally lifted for 39 prefectures on 14 May 2020, with consideration being given to lifting restrictions for all prefectures on 25 May 2020 as we speak. Have you observed any similarities in our approaches to COVID-19 from your administrative law perspective?

SK: Yes, I think that the division of responsibilities as between the national and local governments is similar to some extent. Japan's unitary system of government is very different to Australia's federal system. Similarly to Australia, however, the administrative law framework in Japan which supports the official response to COVID-19 relies on an intricate balancing between the Government of Japan and the next level of administration. Japan is divided into 47 administrative regions under the Todōfuken (都道府県) system: 43 prefectures (県, ken), two urban prefectures (府, fu) – Osaka and Kyoto – one so-called territory (道, dō) – Hokkaido – and one so-called metropolis (都, to) – Tokyo. There is no difference among these four kinds of administrative regions in terms of the administrative law matters that we will discuss later. So for ease of reference, let's refer to all 47 as "Prefectures".

SS: So, how does the prefectural level of government work together with the national Government in Japan to formulate a response to COVID-19 from an administrative law perspective?

SK: Well, the roles of the various levels of government in Japan are set out in a statute enacted by the national Government or Diet known as the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response (新型インフルエンザ等対策特別措置法, Shingata infuruenza tou tokubetsu sochihō, Law No. 31 of 2012, "Response Act"). The Response Act was enacted in response to the novel influenza pandemic in

2009 and was amended in March 2020 to include COVID-19 infections.

Under the Response Act, when the possibility of an outbreak of an infectious disease to which the Response Act applies is reported by the Minister of Health Labour, the Prime Minister shall establish within the Cabinet "the pandemic influenza and new infectious diseases response headquarters" ("the government response headquarters" (政府対策本部, Seifu taisaku honbu or "GRH"). The Director of GRH is the Prime Minister, and all Ministers of State are members of GRH. The GRH is responsible for setting the "basic action policy" (基本的対処方針, Kihonteki taisho hōshin). In other words, the GRH will set the policy framework and help to coordinate any response. The Prime Minister, as director of the GRH, has the authority to declare a state of emergency. When GRH is established, the prefectural governor shall establish a "Prefectural response headquarters" (都道府県対策本部, Todōfuken taisaku honbu) or "PRH") in each Prefecture and the director of each PRH is the relevant Prefecture's governor. Each governor has the power to take measures to respond to the COVID-19 outbreak in certain circumstances.

The Prime Minister's declaration of a state of emergency under the Response Act must also designate the area in which any emergency measures should be implemented. The Prefectures in the relevant area become "Specified Prefectures". The head of PRH – that is, the prefectural governor – decides the measures to apply in the Specified Prefecture in light of the national basic action policy. As such, Prefectures play an important role in the implementation of measures, as is the case with state and territory governments in Australia.

SS: Thank you for that detailed explanation. We saw tension resulting from conflicts as between the various levels of government in Japan in the wake of other crises such as the Great East Japan Earthquake of 2011. However, the relationship as between the national and prefectural governments in Japan and the potential for conflict as between these different levels of government is often overlooked by scholars of Japanese law outside of Japan. Has there been different approaches from different Prefectures in Japan in response to the COVID-19 outbreak?

SK: Yes. Because the measures are implemented by governors in each Specified Prefecture, the current regulatory situation varies from prefecture to prefecture. It's similar to the situation in Victoria and New South Wales when they each took different approaches to activities such as playing golf, returning to school or catching up with friends. Similarly to Australia, the localised approach under the Response Act allows for local considerations to be accounted for within the national basic action plan framework, but it can lead to some strange outcomes.

SS: Interesting. So, we have the examples of golf, schools and fishing in Australia… In Japan, many people enjoy going to pachinko parlours which are places where customers can play slot machines. Is the focus on pachinko parlours in Japan an example of Prefectures taking different approaches in Japan based on local considerations?

SK: Yes, I believe so. The Tokyo Metropolitan Government and many other prefectures issued requests to businesses to close down pachinko parlours. However, Tokushima Prefecture, where the number of infected people is very small, has not issued requests to pachinko parlours to close down. As a result, Tokushima Prefecture feared that people would come from other prefectures to enjoy pachinko and spread the infection, so in the end the Prefecture had to come up with a countermeasure. In Tokushima Prefecture, pachinko parlours were asked to check the residential address of prospective customers and refuse entry to customers from other prefectures.

SS: The similar need to take local considerations into account is interesting, even if the actual legal framework operates differently in Australia and Japan. On that point, what do you see as the biggest difference between the various Australian governments' responses to COVID-19 and the Japanese governments' responses?

SK: The biggest difference which I have observed is that Japanese governors do not have the power to force individuals or businesses to stay home or close down, even if a state of emergency is declared by the Prime Minister. The Prefectural governors' efforts to contain the spread of COVID-19 have been focused on a series of what we call "requests" (要請, Yōsei) made by governors of Specified Prefectures under the Response Act and in accordance with the national basic action policy established by Prime Minister Abe and his Cabinet. These requests themselves are not "orders" and do not come with a legally binding obligation or consequences for failure to comply such as financial or criminal penalties.

SS: Please tell us more about the different types of "requests" which can be made under the Response Act that are not legally binding.

SK: Sure. Under the Response Act, Governors of Specified Prefectures may make three types of non-binding legal "requests".

First, whether or not there has been a declaration of a state of emergency, a governor of a prefecture may make a "request" to individuals and businesses as a general matter to co-operate with authorities under Article 24(9) ("Article 24(9) Request"). Making an Article 24(9) Request is the first step that a governor should take according to the

Japanese Government's interpretation of the Response Act and guidance it has provided to governors. The Japanese Government interprets an Article 24(9) Request as only being able to be made in relation to facilities specified in the relevant Cabinet Order which we can discuss further.

Secondly, a request to individuals may be made by the governor of the Specified Prefecture under Article 45(1) ("Article 45(1) Request"). This request is made to residents of the specified prefecture to refrain from going out unless necessary, such as going shopping to buy food.

Thirdly, a request to specific businesses may be made under Article 45(2) by the governor of the relevant Prefecture if businesses have failed to comply with a general Article 24(9) Request ("Article 45(2) Request"). If an Article 45(2) Request is made, the Prefectural Governor shall publish the information relating to the request, including the name of the business without delay. Under an Article 45(2) Request, the Governor may ask businesses to refrain from holding events or other activities or suspend the use of the types of facilities specified in the Cabinet Order where those facilities are utilized by a large number of people. There are a number of types of facilities specified in the Cabinet Order (Article 11 of Order for Enforcement of the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response Act). Such facilities may include schools, nursery schools, universities, cinemas, merchandising businesses, hotels, sports facilities or amusement places, and museums etc, some of which are limited only to those with a floor area of 1,000 square meters or more. Under this categorisation, Pachinko parlours are considered to be "amusement places".

An Article 45(1) Request and Article 45(2) Request may only be made if a state of emergency has been declared.

SS: If the types of facilities to which these requests may apply are limited to those set out in the Cabinet Order, what type of facilities fall outside of the Response Act?

SK: Restaurants, for example, are not covered by the Cabinet Order and thus governors may not make an Article 24(9) Request or Article 45(2) Request in relation to restaurants, or in relation to facilities with a floor area of 1,000 square meters or less. In these cases, governors may still make requests, but they are not supported by the statutory provisions of the Response Act and compliance is completely voluntary. Hence, we've seen restaurants voluntarily comply with the Tokyo Metropolitan Government's request to close at 8pm with last drink orders at 7pm to reduce the risk of the spread of COVID-19, but they have not been asked to close in the same way as bars and restaurants have been told to do so in Australia.

SS: The media has reported that many pachinko parlours ignored Prefectures' requests to stay closed. Many Japanese people are concerned about these pachinko parlours, because it is difficult to social distance and customers spend a long time in the same space together touching the slot machines. Can governors make a request legally binding?

SK: Yes, in some cases. If a specific business fails to comply with an Article 45(2) Request, then the governor may issue an "Instruction"(指示, Shiji) under Article 45(3) of the Response Act. An Instruction is legally binding and the name of the business will be published. Governors of some prefectures, such as Hyogo and Kanagawa issued Instructions to pachinko parlours to remain closed when certain pachinko parlours continuously failed to comply with an Article 24(9) Request and the subsequent Article 45(2) Request to Specific Businesses.

SS: What can happen to a business which then fails to comply with an "Instruction"?

SK: An Instruction under Article 45(3) of the Response Act imposes an obligation on the business and failure to comply with the instruction is unlawful. However, the Response Act does not provide for penalties for a breach of an Instruction.

SS: What is the situation in relation to consequences for individuals who fail to comply?

SK: In the case of individuals where an Article 24(9) Request or 45(1) Request has been made, there is no further option to issue an Instruction if those requests aren't complied with. As such, it is difficult, if not impossible, to force individuals or businesses to comply with any requests.

SS: Your observation that the Government provided guidance to Prefectural Governors that they should only issue Instructions as a last resort is interesting. Why does the Japanese Government seem reluctant to issue more Instructions to businesses?

SK: Indeed, it may seem strange to Australians that requests which aren't legally binding play such a central role under the Response Act. I suspect that a key reason has to do with what is known as "compensation for loss"(損失補償, Sonshitsu hoshō). Article 29(3) of the Constitution of Japan provides that "Private property may be taken for public use upon just compensation therefor". As such, the possibility of the need for compensation for loss must be considered when the government acts to restrict private property rights. In many cases, a statute, which is

accompanied by restrictions on private property rights, has some clauses stipulating compensation for loss, as in the case of Expropriation of Land Act (土地収用法, Tochi Shuyō hō, Law No. 219, 1951), for example. The Response Act has also a provision in relation to some actions under the legislation (Article 62). But the provision does not cover the requests and Instruction we've been discussing. Even if the statute does not provide for compensation for loss, a claim for compensation may be made directly under Article 29(3) of the Constitution if private property rights are restricted.

SS: Are there any limitations on the application of the right to compensation?

SK: Yes. Not all property loss caused by government action must be compensated. Compensation for loss is required only if the loss can be assessed as what I will describe in English as an "extraordinary sacrifice"(特別の犠牲, Tokubetsu no gisei). There have been many disputes about what loss should be considered an "extraordinary sacrifice". It is not clear whether a request or Instruction under the Response Act in relation to business activities constitutes an "extraordinary sacrifice". However, at the very least, it seems less likely that compensation for loss will be required if the restrictions are *not* legally binding, which is the case for Article 24 (9) Requests or Article 45(2) Requests under the Response Act.

SS: Has any government agreed to pay compensation as a result of measures taken in response to COVID-19?

SK: Now, the Tokyo Metropolitan Government has announced that it will pay "cooperation money for the prevention of the spread of infection" (感染拡大防止協力金, Kansen kakudai bōshi kyōryokukin) to businesses that cooperate with the Tokyo Metropolitan Government to prevent the spread of the infection and accept its requests and close their facilities. If suspending facilities becomes a legal obligation and compensation for loss becomes necessary, however, there may also be a dispute as to how to calculate the amount of compensation. In Tokyo, the Government has specified that the amounts are from ¥500,000 (about A$7,100) to a maximum of \1,000,000 (about A$14,200), which is far less than the amount of loss actually incurred in many cases. In my opinion, using a request – which is not mandatory – instead of an Instruction, may mean that the Government will avoid a constitutionally-mandated payment of a large amount of compensation – or at least decrease the possibility of having to make such a payment.

SS: As you know, the fines levied by the Police in Victoria against individuals and businesses have been controversial in some cases. According to the Government, the fines help to reinforce the Government's policies and the state of emergency to protect the community. How can the Prime Minister and Governors expect compliance with these requests in Japan under the Response Act and protect the community if there is no legal obligation to comply and no fines to back up any perceived ethical and social obligation to comply?

SK: These types of requests have long been recognized and utilized as effective methods of enforcing Japanese administrative activities even where the obligations are not legally binding. This phenomena is sometimes referred to as complying with "administrative guidance" (行政指導, Gyōsei shidō). In this respect, in Japan, there is an expectation that many businesses would comply if the government makes a request, even if there is strictly no underlying legal obligation.

SS: As an administrative law scholar of Japan, why do you think that Japanese businesses, in particular, comply with such administrative guidance when it is not a legal obligation to do so?

SK: Such compliance is often attributed by commentators to the national character of Japanese people. These commentators perceive Japanese people as cooperative and obedient to their government. Perhaps this observation is true at least when compared to other societies, but it's not the whole answer. Commentators have also suggested that businesses accept the request in some cases out of fear that the government may use its separate legal authority that is irrelevant to the request to retaliate against the non-compliant business, such as being refused a license necessary for their business or having a license revoked. It seems that such retaliatory action is likely to be illegal as an abuse of discretion. It has been suggested that this outcome comes from broad discretionary powers governments hold and the deficit of transparency in administrative activities in Japan. This issue led to the enactment of Administrative Procedure Act in Japan (行政手続法, Gyōsei tetsuduki hō, Law No. 88, 1993). As such, my view is that fear of retaliation is not what causes businesses to comply with requests. I think that the key to compliance with requests and Instructions under the Response Act is the "publication" of information which will be made when an Article 45(2) Request or an Instruction under Article 45(3) is issued in accordance with Article 45(4) of the Response Act. Prefectural officials will usually try to persuade a business to comply with an Article 24(9) Request before making an Article 45(2) Request. This dialogue is akin to a prior warning and may involve numerous informal requests. This persuasive dialogue itself is a type of administrative guidance not based on a statute. If the officers fail to secure compliance despite repeated requests, they will move to make an Article 45(2) Request and publish the information on an ongoing basis in accordance with the Response Act.

SS: Why do you think that this publication of information about an Article 45(2) Request will achieve compliance by

Japanese businesses?

SK: If the public perceives the business as anti-government or a troublemaker as a result of such a publication, it is generally thought in Japan that the reputation of the business will be damaged. However, it's also possible that businesses who would fear such reputational damage are likely to comply with requests even before an 45(2) Request is issued just based on the idea of publication. The pachinko parlour example demonstrates this concern. In other words, pachinko parlours were no doubt warned and asked to close, and some did. However, not all pachinko parlours chose to follow the Governors' requests to do so. As I mentioned, in the end, some Prefectures decided to issue 45(2) Requests to pachinko parlours to close and publish their names at the same time.

SS: From your administrative law perspective, does the idea of publication essentially turn a non-mandatory request into a mandatory request? After all, the request is not a legal obligation, but publication could severely impact the financial situation of the business.

SK: Indeed, this issue is controversial in Japan. In my opinion, if the publication is not intended as a sanction against the non-compliant business, the publication seems to be consistent with the fact that the requested act is not a legal obligation. According to a government paper addressed to prefectural governors, the publicization is intended to ensure people's reasonable action to avoid going to the facilities by publicizing the names of them. However, even if the publication in the Response Act is formally intended to provide information, the publication may in practice be used, or at least function, as a sanction in the present case. As such, there is still some doubt as to whether the use of publication is appropriate to the extent its practical effect is to sanction.

SS: In the case of the pachinko parlours, do you think that the publication acted as a sanction?

SK: It is difficult to say. Clearly, some pachinko parlours were not concerned about the potential for reputational damage as a result of publication. Interestingly, in this case, the pachinko parlours whose names were made public as part of an Article 45(2) Request had rather more customers than other pachinko parlours, which brought the matter to the public's attention. While many pachinko parlours closed, the publication resulted in people knowing which pachinko parlours were still open and attracted people who wanted to play pachinko.

SS: Do you think that the Government may seek to create penalties for failing to comply with an Instruction under the Response Act in future?

SK: Certainly, the issue of pachinko parlours refusing to close caused the Government concern at the time and there were some suggestions that penalties should be introduced. Some commentators question whether failure to comply with an obligation to close pachinko parlours in accordance with an Instruction deserves to be enforced by punishment such as fines or imprisonment. Moreover, enforcement through the system of criminal justice in Japan will take a lot of time and money.

SS: Professor Kitajima, thank you for your time to discuss Japan's response to COVID-19 from an administrative law perspective. It has been fascinating to hear about the similarities and differences facing Australia and Japan as our respective communities seek solutions to this global pandemic.

SK: My pleasure. I am looking forward to continuing to learn about Australia's response to COVID-19 in the future.

This interview reflects the personal opinions of the participants. Statements do not represent the views or policies of their employers, past or present, or any other organisation with which either of them are affiliated.

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