



Emergency Powers and COVID-19: Japan as a case study

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What were the main mechanisms used to handle the COVID 19 challenges, both health and economic, in your country? How well did they work for the purpose?

From the issue of people's health, as of 1 February 2020, COVID-19 was designated as an infectious disease under the *Act on the Prevention of Infectious Diseases and Medical Care for Patients with Infectious Diseases* (the "Infectious Diseases Control Act"). Based on this designation, municipal governments can recommend infected people to be hospitalized and, if people do not comply with such a recommendation, the government (national and/or municipal) can force them to be hospitalized. Please note, however, that partly because the pandemic situation of COVID-19 caused hospitals to face a potential shortage of capacities and partly because there are many people who do not have symptoms of the disease, there are many people who are infected, but who stayed home, not being hospitalized or isolated.

On 13 March 2020, the *Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response* (the "amending Act") was enacted through the usual Diet procedure, but without objections from any opposition party, and was immediately enforced as of 14 March onwards. The Act amended the existing Infectious Diseases Control Act in order for the Government to implement and strengthen measures against the COVID19 pandemic. The amending Act sets forth roles and powers of both the National Government and municipal governments.

Article 32 of the amending Act allows the National Government to declare an emergency situation regarding pandemic influenza and/or new infectious diseases ("Declaration of Emergency Situation") if the infectious disease – in the current case, COVID-19 – was designated by the Government as a pandemic expanding nationwide and in a rapid speed, and has caused significant effects on people's lives and/or the economy or if there is a probability of the aforementioned level of pandemic. The basis for declaring a pandemic was to be guided by criteria designated in a Cabinet Ordinance. Such a declaration is to specify the term of its application and can be limited to certain geographical areas. It also needs to designate the types of measures to be implemented. The term can be up to two years with a possibility to extend for up to one year. All of the above must be reported to the Diet (legislature), though there is no timeline stipulated in the amending Act.

According to the amending Act, a Declaration of Emergency Situation can include the following measures:

- (i) requesting people to refrain from going out;

¹ These are my personal comments and do not represent my organisation.

- (ii) requesting and issuing an order to restrict use of facilities including schools;
- (iii) requesting and issuing an order to restrict the holding of events;
- (iv) emergency permission for use of temporary medical facilities;
- (v) requesting and issuing an order to transport emergency supplies;
- (vi) requesting the sale and the seizure of specified goods;
- (vii) extending expiration of date of driver license and other administrative licenses;
- (viii) provision of loans by public financial institutions; and
- (ix) other measures.

The aforementioned measures can be implemented by both or either of a national government and municipal governments, in accordance with stipulations under the Act.

Even under the amended Act, the Government is not allowed to issue a lockdown order, a violation of which will be punishable under any law. If the Government requests people not to go out from home, it is totally on a request basis, not an order with a punishment.

If the National Government issues a Declaration of Emergency Situation, municipal governments need to set up emergency headquarters pursuant to their own action plans against infectious diseases. In such a case, municipal governments can request people to stay home or not to go out; again however, the municipal government cannot punish violations of such requests. The municipal government can also request businesses where many people tend to get together, to restrict or temporarily close their operations in order to prevent the disease from expanding further and to protect people's lives and the economy. If businesses do not follow such a request, a municipal government can issue an order to do so. Again however, there is no monetary or other punishment set forth under the amending Act and the only measure which the governments can do is to announce the names of non-compliant businesses to the public (see Article 45 of the Act).

The Government announced a Declaration of Emergency Situation on 6 April and implementation of measures started from 8 April, with respect to seven prefectures including Tokyo and Osaka. That declaration was for one month, dated to last until 6 May. On 16 April, the declaration was expanded nationwide and was extended until 31 May. However, it was eventually terminated earlier in 39 prefectures and on 31 May it was terminated in all prefectures.

It is too early to evaluate if the measures carried on by the Government have worked well to prevent COVID-19 from prevailing further while also sustaining the national economy. The number of infections, however, has increased again during the summertime.

2. Was a constitutional emergency power available? If so, was it used? If not, why not?

The Japanese Constitution does not grant an emergency power to the Government. When COVID-19 infections increased, there was a discussion within the Diet (legislature) that amendment of the Constitution could be necessary to incorporate an emergency power to deal with the pandemic situation properly and swiftly. However, this suggestion was criticized by the opposition parties and the media, who argued against the amendment to the Constitution on the basis that such constitutional measures could grant an unlimited power to the Government and abuse of such power may cause unrecoverable damages against people's interest in the future. The Government eventually decided not to move on to such action. Instead, the Government took the measure described above,

to amend the Infectious Diseases Control Act to include COVID-19 to be among the designated infectious diseases and to reinforce measures relating to addressing a pandemic situation.

3. Were other forms of emergency power used? If so, what were they? Were they consistent with the Constitution?

As mentioned above, the Government acted to amend the Infectious Diseases Control Act, which does not grant enforceable powers to lockdown cities or towns. It is believed that a lockdown is against human rights endowed under the Constitution and, therefore, that the Act cannot provide for such an emergency measure. During discussions in the Diet, the governing party explained that lockdown is against the Constitution which protect freedom of movement and freedom of business operation.

Article 29 of the Constitution specifically sets forth that:

1. The right to own or to hold property is inviolable.
2. Property rights shall be defined by law, in conformity with the public welfare.
3. Private property may be taken for public use upon just compensation therefor.

Accordingly, the Government believed that, even if they requested businesses to limit their opening times or close their operations under the Act, they would need offer some form of compensation measure. The Government, therefore, implemented a special payment to businesses which complied with a constraint/lockdown request from the Government. Although the amount of the special payment was not sufficient to sustain those businesses, the impacts on the National Government and municipal governments finances was extensive; therefore, they are likely to be reluctant to issue a Declaration of Emergency Situation again.

4. In either case, was the legislature involved in the approval or scrutiny of the measures taken? How effective was legislative involvement?

The amending Act provided that measures taken by the Government should be reported to the Diet (legislature), though no timeline was stipulated in the law. This was in response to concern that if measures had been subject to pre-approval of the Diet, it would have taken time and timely measures could not have been implemented. Thus far, it seems to have worked, partly because there have been discussions between the national government and municipal governments and governors eloquently discussed with the national government how to implement measures, which has ensured transparency regarding the arguments for and against different measures, to a large extent.

5. Were there other forms of oversight of the responses to the pandemic; for example, through courts?

In Japan, the court has not been involved in oversight of the measures taken by the different levels of government. Instead, as set forth in the amending Act, an emergency declaration is made by the national government, specifying areas to be covered by the declaration and municipal governments then implement measures. In this mechanism, both the national government and municipal governments need discussion and negotiations on the designation of such areas as well as the measures to be implemented after designation. This contributes to transparency to some extent.

6. What do you expect to be the longer term consequences of this experience with emergency power on representative government in your country?

I personally think that a constitutional measure enabling emergency powers is not necessary in Japan. If the situation become worse, we may need to further amend the Infections Diseases Control Act to incorporate stronger measures to be taken by the governments at national and municipal levels. The most important issue for consideration based on recent experiences would be how to compensate people or businesses for damages caused by the governmental orders.

7. What positive or negative lessons can be taken from this experience in your country for the use of emergency procedures and the role that representation plays?

As I mentioned above, my overall analysis on Japan's approach to deal with the COVID-19 pandemic is positive, even though the measures taken were not as strong as those which other countries took, in particular, the use of lockdown orders. In any event, supervision by the Diet or other constituents is necessary. In Japan, local governments have taken such role to a large extent. I think, however, that the reporting requirements set forth in the amending Act should be provided for in more detail and the role of the judiciary should be clearly stated in the amending Act, if any measure taken by the governments impedes the rights and freedoms of the people.

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