

AN ANALYSIS OF JAPANESE RESPONSES TO COVID-19 FROM AN ADMINISTRATIVE LAW PERSPECTIVE

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This article examines the legal basis for the restrictions on the daily lives of citizens and business activities in Japan in light of the spread of COVID-19 from the perspective of administrative law. Japanese citizens were restricted from going out and some businesses were asked to cease activities during the period under the declaration of a state of emergency from 7 May to 25 May 2020. The restrictions in Japan were based on the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response which was enacted in 2012 after Japan's experience with the novel influenza (A/H1N1) pandemic in 2009. The article examines the mechanisms set out in the Act which are available to governments in Japan to implement pandemic responses. The article argues that the

four main measures for restrictions known as requests and instructions are characterized by their non-obligatory or non-compulsive nature. The article argues that these characteristics reflect long-standing approaches in Japanese administrative jurisprudence that are embedded in the Act and thus Japan's COVID-19 response measures.

Introduction: Japanese Responses to COVID-19

On 7 April 2020, the Government of Japan declared a state of emergency in light of the spread of COVID-19. Japan had already reported 3906 COVID-19 cases and 80 deaths from the virus when the Government took various measures under the declaration, including measures designed to restrict citizens from going out and regulate the activities of businesses.¹ The state of emergency was lifted for all of Japan on 25 May 2020 after the number of reported cases per day fell below 50.² This article examines the legal basis for the restrictions on the daily lives of citizens and business activities in Japan during this period from the perspective of administrative law.³ It highlights aspects of the Response Act framework that enabled the Government of Japan and prefectural governors to respond to the COVID-19 pandemic and analyses the gaps in administrative law which may have hindered the efficient functioning of pandemic responses, including the lack of legal obligations and measures to compel individuals and businesses to follow requests and instructions under the legislative framework.

The article is divided into two sections. First, the article examines the restrictions set out in the 'Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response' (Law No 31, 2012) [新型インフルエンザ等特別措置法, Shingata infuruenza tou tokubetsu sochihō] ('Response Act'). The Response

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1 See Kōsei rōdō shō, 2020.

2 See Press Conference by Prime Minister Shinzo Abe. Abe, 2020.

3 For background on the declaration of a state of emergency and the implementation of regulatory measures under the declaration of the state of emergency, see Seifu taisaku honbu, 2020. Seifu taisaku honbu is the 'Government Response Headquarters' [政府対策本部] based on Article 15, which plays an important role under the Response Act, as is discussed below.

Act forms the basis for Japan's response to COVID-19 and was initially enacted after Japan's experience with the novel influenza (A/H1N1) pandemic in 2009.⁴ Secondly, the article analyses Japan's response which is characterized by its non-obligatory or non-compulsive nature. The article argues that these characteristics reflect long-standing approaches in Japanese administrative jurisprudence that are embedded in the Response Act and thus Japan's COVID-19 response measures.

The Regulatory Framework in Japan: Overview of the Response Act and Measures

The Response Act was amended in March 2020 to cover COVID-19 infections. Article 1(2) of the Supplementary Provisions of the Response Act provides that COVID-19 infection shall be regarded as a 'Pandemic Influenza Infection' for the purposes of the Response Act or any order under the Response Act. The provisions cited in this article are from the Response Act unless otherwise stated.

Establishment of 'GRH' and its Formulation of 'the Basic Action Policy'

Under the Response Act, when an outbreak of an infectious disease to which the Response Act applies is reported by the Minister of Health, Labour and Welfare, the Prime Minister shall establish within the Cabinet a group named the 'pandemic influenza and new infectious diseases response headquarters' [新型インフルエンザ等対策本部, Shingata infuluenza tou taisaku honbu] also known as the 'government response headquarters' [政府対策本部, Seifu Taisaku honbu] (Article 15) ('GRH'). The Head of GRH is the Prime Minister (Article 16(1)). All Ministers of State are members of GRH (Article 16(6)). The GRH for the COVID-19 response was established on 26 March 2020 and tilted the 'COVID-19 infections response headquarters' [新型コロナウイルス感染症対策本部, Shingata korona uirusu kansenshō taisaku honbu]. Regional governments play an important role in the implementation of the measures under the Response Act. Japan is divided into 47 administrative regions under the Todōfuken [都道府県] system: 43 'Ken' [県], 2 'Fu' [府] – Osaka and Kyoto, one 'Dō' [道] – Hokkaidō and one 'To' [都] – Tokyo.⁵ When a GRH is established, the Response Act requires each prefectural governor to establish a 'Prefectural response headquarters' 'PRH') [都道府県対策本部, Todōfuken taisaku honbu] in each prefecture. The head of each PRH is the relevant Prefecture's governor (Article 22). For example, in Tokyo, which is one of the prefectures, the 'Tokyo Metropolitan COVID-19 infections response headquarters' [東京都新型コロナウイルス感染症対策本部, Tokyo-to Shingata korona uirusu kansenshō taisaku honbu] was established as a PRH on 26 March 2020, the same day that the national GRH was established.

Article 18(1) requires the GRH to set the 'Basic Action Policy' [基本的対処方針, Kihonteki taisho hōshin] for pandemic influenza based on a 'National Action Plan' [政府行動計画, Seifu kōdō keikaku].⁶ According to the Response Act, the Basic Action Policy sets out the facts concerning an outbreak of pandemic influenza infection, the general policy on the response to the pandemic influenza infection, and important matters concerning the implementation of measures in relation to the pandemic influenza infection (Article 18(2)). Accordingly, the Basic Action Policy plays an important overarching role in the implementation of measures by the prefectures. After the first version was issued on 28 March 2020, the Basic Action Policy was amended when a state of emergency was declared on 7 April 2020, and then modified several times in response to changing circumstances, such as the necessity for changing the designated area subject to the declaration of a state of emergency.⁷

Declaration of a State of emergency [緊急事態宣言, Kinkyū jitai sengen]

Measures in the Response Act are implemented under 'a declaration of a state of emergency'. Article 32(1) provides that the head of GRH (that is, the Prime Minister) shall make a declaration of a state of emergency for pandemic influenza if the head of GRH finds that the requirements specified by the act and the Cabinet Order under the Response Act are satisfied. The declaration of a state of emergency designates the area in which any emergency measures should be implemented. The prefectures in the relevant area become 'designated prefectures' (「特定都道府県」, Tokutei todōfuken) (Article 38), and the head of the PRH (that is, the governor) has the legal authority to set measures for each prefecture under the overall authority of the declaration of a state of emergency.

4 For details on the background of the enactment of the Response Act, see Shingata infuruenza tou taisaku kenkyūkai, 2013: 3-6. Materials relating to meetings held by the Cabinet Secretariat to discuss the issues necessary for preparation of the draft of the Response Act are available the website of the Cabinet Secretariat < <https://www.cas.go.jp/jp/seisaku/ful/housei.html>>.

5 This article refers to these four kinds of administrative regions as 'prefectures'. There is no difference between them in terms of the application of the Response Act for the purposes of this article.

6 Article 6(1) provides, the government shall set a plan for the implementation of measures for pandemic influenza (hereinafter referred as to 'National Action Plan' [政府行動計画, Seifu kōdō keikaku]). The National Action plan (Cabinet decision, 7 June 2013) and other relevant materials are available on the website of the Cabinet Secretariat (<https://www.cas.go.jp/jp/seisaku/ful/keikaku.html>).

7 The Basic Action Policy was amended on 11 April 2020, 16 April 2020, 4 May 2020, 14 May 2020, 21 May 2020, and 25 May 2020, which was the date that the Declaration of Emergency ended for all prefectures. Each edition of the Basic Action Policy is available on the GRH website. See <https://www.kantei.go.jp/jp/singi/novel_coronavirus/taisaku_honbu.html>.

The Prime Minister, as the head of GRH, declared a state of emergency in respect of COVID-19 on 7 April 2020. Although the period was initially scheduled to end on 6 May 2020, the period for the emergency was extended. The state of emergency was lifted for some prefectures earlier than others, and finally lifted for all prefectures on 25 May 2020.⁸ The designated area included, at first, Tokyo, Osaka and another five prefectures.⁹ On 16 April 2020, the area was enlarged to all 47 prefectures. As case numbers subsided, the area was reduced to eight prefectures on 14 May 2020¹⁰ and to five prefectures on 21 May 2020.¹¹ The Prime Minister declared an end to the state of emergency based on Article 32(5) of the Response Act on 25 May 2020.¹²

There are four main regulatory measures under the Response Act which may be used by prefectures under the Response Act.

First, the PRH may issue a ‘request’ [要請, Yōsei] for cooperation in accordance with Article 24(9) (‘Article 24(9) request’). These requests involve the governor, as the head of PRH, requesting public and private bodies and individuals to provide necessary cooperation for the implementation of measures in relation to a pandemic influenza.¹³ Article 24(9) is not a special measure available only under the declaration of a state of emergency. A governor may make an Article 24(9) request even if no declaration of a state of emergency has been made. An article 24(9) request does not impose a legal obligation on public and private bodies to comply.

Secondly, the PRH may issue a request [要請, Yōsei] in accordance with Article 45(1) of the Response Act (‘Article 45(1) request’). An Article 45(1) request is made by a governor, as the head of PRH, for residents not to leave home except in cases where it is necessary to maintain their lives such as going shopping to buy food or to provide any other cooperation necessary for the prevention of infection.¹⁴ An article 45(1) request may be made to residents in a designated prefecture by a governor of the designated prefecture only under the declaration of a state of emergency. An article 45(1) request asks residents to voluntarily comply and does not impose a legal obligation.

Thirdly, the PRH may issue a request in accordance with Article 45(2) (‘Article 45(2) request’). An Article 45(2) request is made by a governor, as the head of PRH, to persons who manage the types of facilities specified by the applicable Cabinet Order as facilities where a large number of people gather and persons who hold events using the facilities (‘facility managers’) to take measures such as suspending the use of the facilities.¹⁵ There are a number of types of facilities specified in the Cabinet Order (Article 11(1) of the Order for Enforcement of the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response Act). These types of Cabinet Orders are made under Article 45(2) of the Response Act. The facilities under the Cabinet Order included ‘schools (Article 11(1)1), nursery schools or the similar social welfare facilities ((Article 11(1)2)), universities or similar educational facilities (Article 11(1)3), theatres (Article 11(1)4, halls (Article 11(1)5), exhibition halls (Article 11(1)6, retail stores (except the sale of daily necessities) (Article 11(1)7), hotels (Article 11(1)8), sports facilities or amusement places (Article 11(1)9), museums (Article 11(1)10), entertainment facilities (Article 11(1)11), service businesses (Article 11(1)12), study support facilities (Article 11(1)13). A facility which falls into one of the items in Article 11(1)1-13 of the Order only becomes a specified facility under the Cabinet Order if the facility has a floor area of 1000 square meters or more. However, Article 11(1)14 of the Order provides that the Minister of Health, Labour and Welfare may, by means of a public notice, remove the limitation about a floor area for some categories of facilities. On 7 April 2020, the Minister removed the limitation on theatres, halls, exhibit halls, sports facilities, amusement places and

8 Which prefectures were specified as the subject area was determined based on the criteria included in the Basic Action Policy. See, Each edition (14 May, 21 May, and 25 May) of the Basic Action Policy.

9 Saitama, Chiba, Tokyo, Kanagawa, Osaka, Hyogo, Fukuoka.

10 Hokkaidō, Saitama, Chiba, Tokyo, Kanagawa, Kyoto, Osaka, Hyogo.

11 Hokkaidō, Saitama, Chiba, Tokyo, Kanagawa.

12 Regarding the circumstances under a state of emergency, see Seifu taisaku honbu, 2020.

13 Article 24(9) provides ‘When the head of prefectural response headquarters deems it necessary for the purpose of implementing measures for pandemic influenza appropriately and promptly in each prefectural area, the head may request public and private bodies and individuals to provide the necessary cooperation on the implementation of measures in relation to pandemic influenza in the area.’

14 Article 45(1) provides ‘When the governor of the designated prefecture deems it necessary for preventing the spread of a pandemic influenza infection, protecting the lives and health of the public, and avoiding the disruption for national life and economy under the state of emergency pandemic influenza, that governor may request the residents in the designated prefecture not to leave their residences or other equivalent places except in cases where it is necessary to maintain their lives, or to provide any other cooperation necessary for the prevention of infection,...’

15 Article 45(2) provides ‘When the governor of designated prefecture deems it necessary for preventing the spread of a pandemic influenza infection, protecting the lives and health of the public, and avoiding the disruption for national life and economy under the state of emergency pandemic influenza, that governor may request persons who manage, schools, social welfare facilities..., or any other types of facilities specified by the Cabinet Order as facilities where a large number of people gather and persons who hold events using the facilities (“facility managers” in the next section) to restrict, suspend the use of the facilities, the holding of events, or to take any other measure specified by the Cabinet Order.’

entertainment facilities by way of public notice.¹⁶ An article 45(2) request may be made to facility managers in a designated prefecture by a governor of a designated prefecture under the declaration of a state of emergency. Once an Article 45(2) request is issued by a governor of a designated prefecture, he or she shall make the fact that he or she issued the request public (Article 45(4)). An article 45(2) request asks facility managers to voluntarily comply and does not impose a legal obligation.

Finally, if facility managers refuse to comply with an Article 45(2) request without justifiable grounds, then a governor of a designated prefecture may issue an ‘instruction’ [指示 Shiji] that facility managers take measures concerning the request under Article 45(3) (‘Article 45(3) instruction’).¹⁷ Unlike the other three measures which may be taken under Article 24(9), Article 45(1) or Article 45(2), an Article 45(3) instruction imposes an obligation to comply on facility managers. Once an Article 45(3) instruction is issued by a governor of a designated prefecture, he or she shall make the fact that the governor issued the instruction public (Article 45(4)).

The legal effect of restricting businesses under an Article 24(9) request and an Article 45(2) request may be similar, but there are some important distinctions. An Article 45(2) request may only be issued during the period when a declaration of a state of emergency has been made, while an Article 24(9) request may be issued whether the prefecture is under a declaration of a state of emergency or not. The other key difference between an Article 24(9) request and an Article 45(2) request, both of which could be used to regulate the business activities of facility managers, is found in the text of the provisions.

Article 24(9) states:

When the head of prefectural response headquarters deems it necessary for the purpose of implementing measures for pandemic influenza appropriately and promptly in each prefectural area, the head may request public and private bodies and individuals to provide the necessary cooperation on the implementation of measures in relation to pandemic influenza in the area (emphasis added).

Article 45(2) states:

When the governor of designated prefecture deems it necessary for preventing the spread of a pandemic influenza infection, protecting the lives and health of the public, and avoiding the disruption for national life and economy under the state of emergency pandemic influenza, that governor may request persons who manage, schools, social welfare facilities..., or any other types of facilities specified by the Cabinet Order as facilities where a large number of people gather and persons who hold events using the facilities (‘facility managers’ in the next section) to restrict, suspend the use of the facilities, the holding of events, or to take any other measure specified by the Cabinet Order’ (emphasis added).

An Article 45(2) request may be made when the head of PRH deems it necessary for the purpose of preventing the spread of pandemic influenza for protecting the lives and health of the public and avoiding the disruption for the national life and economy. This requirement is more stringent than the criteria for an Article 24(9) request, which is when the head of PRH deems it necessary for the purpose of implementing measures for pandemic influenza appropriately and promptly. Furthermore, an Article 45(2) request may be made only to facility managers of the types of facilities specified by the Cabinet Order. Once an Article 45(2) request is issued, Article 45(4) requires that the information relating to the request shall be publicized. Another difference between these requests is that a refusal to comply with an Article 45(2) request could lead to an Article 45(3) instruction, because non-compliance with an Article 45(2) request is one of the requirements for issuing an Article 45(3) request (see Article 45(3)).

Initially, there was some potential confusion about how Article 24(9) and Article 45(2) requests interact despite these textual differences because the content and effect of these two requests are similar: requesting businesses to restrict their activities. The Response Act does not provide detailed guidance on how each type of request should be used. The Government of Japan published its interpretation of the relationship between an Article 24(9) request and an Article 45(2) request in the Basic Action Policy and two documents for guidance addressed to governors in April 2020.¹⁸ The GRH provided for the use of the provisions in the revised Basic Action Policy. According to the Basic Action Policy (7 April 2020 edition), a governor may issue an Article 24(9) as a first step. If a facility manager does not comply with an Article 24(9) request without justifiable grounds, the governor may issue an Article 45(2) request

16 The public notice of the Department of Health, Labour, and Welfare [厚生労働省告示, Kōsei rōdō shō kokujī] (No 175 of 2020).

17 Article 45(3) provides ‘When the facility managers will not comply with the request under the preceding paragraph without justifiable grounds, the governor of designated prefecture may instruct the facility managers to take the measures pertaining to the request only when the governor deems it necessary for preventing the spread of a pandemic influenza infection, protecting the lives and health of the public, and avoiding the disruption for national life and economy.’

18 The Basic Action Policy (7 April edition), Naikaku kanbō shingata korona uirusu kansenshō taisaku suishin shitsutyō, 2020a and Naikaku kanbō shingata korona uirusu kansenshō taisaku suishin shitsutyō, 2020b.

against the facility manager as a second step.¹⁹ This view in the Basic Action Policy indicates the Government's intention that an Article 24(9) request should precede an Article 45(2) request.²⁰ The two guidance documents addressed to governors were published by the Cabinet Secretariat in charge of affairs under the Response Act and provide a further interpretation of the relationship between an Article 24(9) request and an Article 45(2) request. The document published on 10 April 2020 states that an Article 24(9) request should precede an Article 45(2) request which is consistent with the view presented in the Basic Action Policy.²¹ The second document published on 23 April 2020 indicates the Government's interpretation that an Article 45(2) request and an Article 45(3) instruction are to be issued to facility managers individually, whereas an Article 24(9) request is to be issued for each type of facility.²²

Furthermore, unlike Article 45(2), Article 24(9) does not limit the types of facilities subject to the request, at least in the provisions. However, the document published on 10 April 2020 expresses the interpretation of the Government that the types of facilities covered by an Article 24(9) request should be the same as the types of facilities covered by an Article 45(2) request.²³ Therefore, an Article 24(9) request may not be used for facilities not covered by Article 45(2) and the Cabinet Order, such as facilities of 1000 square meters or less, or restaurants, either. For facilities not covered by Article 24(9) requests and 45(2) requests, each prefecture, if necessary, may request voluntary measures without those measures being based on the Response Act.²⁴ This type of informal request is outside of the Response Act, but may be categorized as another measure for restricting businesses.

A governor has the legal authority to implement each of these four measures in light of the situation in each prefecture.²⁵ After the declaration of a state of emergency, for example, the Governor of the Tokyo Metropolitan Government issued an Article 45(1) request to residents to stay home and an Article 24(9) request to facility managers of some types of facilities specified by the Cabinet Order to suspend their businesses. Those facilities included entertainment facilities, universities or similar educational facilities, study support facilities, sports facilities or amusement places, theatres, halls, exhibit halls, museums, retail stores (except the sale of daily necessities), service businesses and schools (educational facilities, study support facilities, museums, retail stores and service businesses limited to those whose floor areas are 1000 square meters or more).²⁶ The Governor also requested some types of facility managers not covered by the Cabinet Order to cooperate in the appropriate response to prevent infection, such as avoidance of the three Cs (closed spaces, crowded places, close-contact settings) without reference to the Response Act. These facilities included medical facilities, retail stores for daily necessities, facilities for serving food, housing facilities, transportation, factories, financial institutions and public offices.²⁷ According to a report published by the GRH on the implementation of the measures under the declaration of a state of emergency, an Article 24(9) request (cooperation to restrict the use of facilities) was issued in 45 prefectures; only the Governors of Okayama prefecture and Tokushima prefecture did not make such requests.²⁸ Further, an Article 45(1) request was issued in all prefectures, and an Article 45(2) request was issued in 21 prefectures. These Article 45(2) requests were all related to pachinko parlours except for a request made in Shimane prefecture in relation to one internet cafe.²⁹ An Article 45(3) instruction was issued in five prefectures (Hyogo, Kanagawa, Chiba, Niigata, and Fukuoka).³⁰

19 See the Basic Action Policy (7 April edition): 11.

20 See the Basic Action Policy (7 April edition): 11.

21 See Naikaku kanbō shingata korona uirusu kansenshō taisaku suishin shitsutyō, 2020a.

22 See Naikaku kanbō shingata korona uirusu kansenshō taisaku suishin shitsutyō, 2020b.

23 See Naikaku kanbō shingata korona uirusu kansenshō taisaku suishin shitsutyō, 2020a.

24 For facility managers other than those specified by the Cabinet Order, the Government of Japan informed governors of prefectures that they might request them to take general infection prevention measures, maintain contact information of the facilities, and shorten their business hours outside the Response Act, therefore they should actively work to prevent the spread of infection. See, Naikaku kanbō shingata korona uirusu kansenshō taisaku suishin shitsutyō, 2020a. As will be discussed below, requests which are not legally binding have been described as 'administrative guidance' and do not necessarily have a specific legal foundation in a statute. Therefore, governors should be able to issue such a request outside the Response Act without restriction in theory. Nevertheless, guidance published by the Government of Japan restricts the content of the requests that the Governor may issue. Otherwise the issuance of informal requests is likely to diminish the role of formal requests issued based on the legal restrictions under the Response Act.

25 For the status of implementation in each of the prefectures, see Seifu taisaku honbu, 2020: 2-4.

26 See Tokyo-to, 2020a.

27 See Tokyo-to, 2020a.

28 See Seifu taisaku honbu, 2020: 2-4.

29 See Mainichi Shimbun, 2020. A Pachinko parlour, which is a place where customers can play pinballs or slot machines, is categorised as 'amusement places' under Article 11(1)9 of the Order for Enforcement of the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response Act. Internet cafés are categorised as 'entertainment facilities' in Article 11(1)11 of the Order. 'Amusement places' and 'entertainment facilities' were originally a specified facility under the Order if they had a floor area of 1000 square meters or more. As noted above, the Minister of Health, Labour and Welfare removed the limitation about floor area for 'amusement places' and 'entertainment facilities'. See, footnote 16 above and the corresponding text.

30 See Seifu taisaku honbu, 2020: 2-4.

The Relationship between the Government of Japan and Prefectures when Implementing Measures under the Response Act

Although the relevant governor has the legal authority to implement the measures under the Response Act, the Government of Japan has power under the Response Act to be involved in the exercise of these authorities by the governor. The Prime Minister, as the head of GRH, has the authority to undertake overall coordination of the implementation of any pandemic influenza response by prefectures based on the Basic Action Policy (Article 20(1)) and has the authority to give necessary instructions to governors in cases where the governors of prefectures do not implement the measures relating to the overall coordination by the Prime Minister under a state of emergency (Article 33(1)). Local governments including prefectures also have the responsibility to promote pandemic influenza responses in their area in an integrated manner based on the Basic Action Policy (Article 3(4)).³¹

The Basic Action Policy describes in detail how governors of prefectures may exercise their authority in relation to the measures. The 7 April 2020 edition of the Basic Action Policy, as amended after the declaration of a state of emergency, stipulated that governors shall issue an Article 45(1) request to their residents and an Article 24(9) request to facility managers, and that they shall consult with the Government of Japan in advance if they intend to issue any Article 45(2) requests or Article 45(3) instructions. The Basic Action Policy specifically described the businesses necessary for ‘ensuring a stable life for the public’ and for ‘maintaining social stability’. These businesses were to be excluded from any business suspension requests by governors according to the Basic Action Policy. In this way, the Basic Action Policy determined the framework for the exercise of authority by governors.

The subordinate position of the governors under the Response Act vis-à-vis the Government of Japan was also demonstrated in practice. In fact, the measures implemented by governors were very faithful to the contents of the Basic Action Policy established by the Government of Japan. It was reported at the time that the Government of Japan influenced the policymaking process for the measures issued by the Governor of Tokyo. There was a conflict between the Government of Japan and the Governor, who wanted to exercise the legal authority she had at her disposal, but the Governor was eventually persuaded to comply with the national policy.³²

Further Analysis of the Characteristics of the COVID-19 response in Japan

No Legal Obligation or Compulsion

A distinctive characteristic of the measures under the Response Act is that they are not legally binding or enforceable. Article 24(9) requests, Article 45(1) requests and Article 45(2) requests do not impose legal obligations on individuals or businesses. Moreover, the informal requests made outside of the Response Act have no legal effect and impose no obligation. Secondly, an Article 45(3) instruction creates an obligation, but lacks compulsion in the sense that it is not able to be directly or indirectly enforced by any legal means to actually realise its implementation, even if businesses refuse to comply with the Article 45(3) instruction.³³ The approach adopted in the Response Act is indicative of long-standing issues highlighted in administrative law scholarship in Japan, especially in the area of the regulation of businesses.

‘Administrative Guidance’ [行政指導, Gyōsei shidō] and ‘Publication’ [公表, kōhyō]

The use of measures that do not have the legal effect of imposing obligations, such as the requests under the Response Act, in achieving certain regulatory goals has been recognized by Japanese and non-Japanese scholars for a long time.³⁴ Such measures have been described as ‘administrative guidance’ and do not necessarily have a specific legal foundation in a statute.³⁵ ‘Administrative guidance’ has been frequently used in administrative activities

31 Article 74 of the Response Act states that the functions to be handled by local governments pursuant to the provisions of the Act are classified as statutory entrusted functions in accordance with Article 2(9)1 of the Local Autonomy Act (Law No 67, 1947) (地方自治法, Chihō jichi hō). Article 2(9)1 of the Local Autonomy Act defines statutory entrusted functions [法定受託事務, Hōtei jutaku jimū] in Article 2(9)1 as ‘Among the functions to be handled by prefectures, municipalities, and special wards pursuant to this Act and the Cabinet Order under the Act, those functions specified by statutes or Cabinet Orders under statutes, which are related to the role that the Government of Japan should play inherently, and which the Government of Japan shall ensure local governments handle properly’. The Government of Japan may interfere with the handlings of statutory entrusted functions by local governments more strongly than in the case of local autonomy functions [自治事務, jichi jimū], which is another type of functions under the Local Autonomy Act and all functions to be handled by local governments other than statutory entrusted functions. If a dispute arises between the Government of Japan and local governments concerning the handling of statutory entrusted functions, it will be handled through the dispute resolution procedure prescribed in the Local Autonomy Act (Chapter 11). For further information about the local government system in Japan, see, Council of Local Authorities for International Relations (2019).

32 See Nihon Keizai Shimbun, 2020a.

33 As Repeta points out, this lack of compulsion is not due to the limits of the Constitution of Japan. See, Repeta, 2020.

34 For an overview of Administrative Procedure Act in Japan and related articles written in English, see Uga, 2007.

35 Uga introduces many articles about administrative guidance written by non-Japanese scholars. See, Uga, 2007: 302.

in Japan and many individuals and businesses have actually complied with requests even though they do not have a formal statutory basis. Governments in Japan have an expectation that individuals and businesses will comply with requests, even if they are not legally binding. There are several reasons why people follow administrative guidance. Ginsburg argued that the Japanese state has operated primarily through case-by-case ad hoc determinations, made on the basis of flexible ‘guidance’ rather than preannounced rules, and in such circumstances, without legislative clarity or clear rules, private actors have no choice but to cultivate relationships with the bureaucrats who will in fact be making distributive decisions on a discretionary basis.³⁶ In this way, the state, acting through its bureaucrats, is able to achieve administrative objectives without imposing legal obligations. According to this line of argument, for example, where the government has legal authority to grant a license necessary for a business, compliance may be achieved by the unspoken threat of revoking that license.³⁷ Preventing abuse of administrative guidance was one of the objectives of the enactment of the Administrative Procedure Act (Law No 88 of 1993) [行政手続法, Gyōsei tetsuduki hō]. However, this line of argument does not apply to the present discussion.

Requests and instructions issued under the Response Act do have a legislative basis, unlike the administrative guidance criticized by Ginsburg. However, the lack of legal obligations and consequences for failure to comply is still a distinctive feature of the framework established by the Response Act. Moreover, the framework did function practically as a means of getting facility managers to comply with the measures set out in the Basic Action Policy. One way to encourage compliance is publication.

An Article 45(2) request involves the publication of ‘related information’ without delay. Article 45(4) of the Response Act does not provide the details of the related information of the request and the means of publication. However, according to the guidance document from the Cabinet Secretariat addressed to governors,³⁸ the publication shall include the name of the facility pertaining to the request, its address, the contents of the request, and the reason for the request, and shall be publicized on the website of each prefecture. In a case from Aichi prefecture, the main content of the publication stated that the governor of the prefecture requested a certain company (which is named) with a facility at a certain address (which is specified) to suspend activities at its facility based on Article 45(2) because he found that the requirements specified in Article 45(2) were satisfied (that is, it is necessary for preventing the spread of a pandemic influenza infection, protecting the lives and health of the public, and avoiding the disruption for national life and economy under the state of emergency pandemic influenza).³⁹ If the facility manager continues to operate its facility despite the publication, people would recognize the facility manager was operating in spite of the request of the governor and the reputation of the business could be damaged by this public announcement. Moreover, because an Article 45(2) request follows an Article 24(9) request under the Basic Action Policy in accordance with the document for guidance from the Cabinet Secretariat addressed to governors, it’s clear that the facility operator must have already ignored that prior notice before an Article 45(2) request was made.⁴⁰ The media and the public have been watching for such cases, and publications based on Article 45(4) in Tokyo demonstrate the fact that at least some facility managers had not complied with Article 24(9) requests.⁴¹ In that case, it might be considered that the facility manager had not complied with an Article 24(9) request and was criticized, leading to reputational damage. Facility managers fearing reputational damage are likely to comply with requests before and after the Article 45(2) request is issued. The implementation of the system in the prefectures suggests that the system has been somewhat effective in getting businesses to suspend their activities, although it has its limits, as discussed below.⁴²

Disclosure to the public of the fact that administrative guidance was not followed has been a feature of regulation in Japan historically.⁴³ However, at least in contemporary Japan, the prevailing scholarly view is that a statutory foundation is needed for public disclosure, or it is at least preferable, where such publication may be perceived as having the purpose of ‘sanctioning’ certain behavior.⁴⁴ Kobayakawa argues that the requirement to have a statutory basis for any regulatory publication is consistent with the purport of the traditional legal principle in Japan that

36 See Ginsburg, 2007: 306.

37 In contemporary Japan that kind of exercise of authority is likely to be illegal. The Supreme Court of Japan has recognised the limits of administrative guidance. Supreme Court [最高裁判所, Saikō saibansho], 16 July 1985, 39(5) Saikō saibansho minji hanrei shū [最高裁判所民事判例集] 989. Supreme Court [最高裁判所, Saikō saibansho], 18 February 1990, 47(2) Saikō saibansho minji hanrei shū [最高裁判所民事判例集] 574.

38 See Naikaku kanbō shingata korona uirusu kansenshō taisaku suishin shitsutyō, 2020b.

39 See the publication by Aichi prefecture on its website (Aichi-ken, 2020). The name of the facility has already been removed because the facility manager had responded to the request.

40 See Naikaku kanbō shingata korona uirusu kansenshō taisaku suishin shitsutyō, 2020b.

41 See Tokyo-to, 2020b.

42 Nihon Keizai Shimbun, 2020b.

43 As a recent and useful article regarding the publication, see Kemmochi, 2020.

44 As a recent research book on publication for sanctions, see Amamoto, 2019.

there must be a statutory foundation when a government acts in violation of the people's rights and freedoms.⁴⁵ On the other hand, the prevailing scholarly view is that a statutory foundation is not necessarily required if the purpose of the publication is not to sanction but, rather, information disclosure. There is a lower court case that provides support for this proposition.⁴⁶ In the case of Japan's COVID-19 response, whether or not publication under Article 45(4) is for the purpose of sanctioning action is irrelevant in practice at first glance because it is based on the provisions of the Response Act. However, the issue of whether the publication is for the purpose of sanctioning actions may be relevant if the publication is found to relate to a failure to comply with a requested act which is not a legal obligation; any such publication would be inconsistent with the fact that the request is not a legal obligation.⁴⁷

The commentary on the Response Act suggests that the publication under Article 45(4) is not intended as a sanction but information disclosure.⁴⁸ The commentary argues that publication is needed because it is important to make the information widely known in advance for the convenience of facility users. The Government of Japan document providing guidance to governors also suggests that publication is needed in order to enable the public to take reasonable action to avoid going to the relevant facilities by widely disseminating the names of individually identifiable facilities.⁴⁹ Further, the publication is to make the public aware of 'the fact that an Article 45(2) request has been made', and is not made as a result of non-compliance with an obligation. As such, the official explanation for the publication under the Response Act is that it is not intended as a sanction.

In practice, however, the publication requirement in Article 45(4) could be said to function as a sanction for non-compliance with an Article 24(9) request despite the lack of legal obligation, because an Article 45(2) request should only be issued after a refusal to comply with an Article 24(9) request, as set out in the Basic Response Policy and the government guidance documents. The publication also indirectly compels a facility manager to comply with an Article 45(2) request because the failure to comply with the request after the publication means that the manager has disregarded a request from the authorities and the publication may lead to reputational damage.

The Means for Enforcing Obligations in Administrative Law

Because Article 24(9) and Article 45(2) requests precede an Article 45(3) instruction, Article 45(3) instructions are the last resort in the system established under the Response Act. Unlike the requests, the instruction has a legally binding effect and refusal to comply with the instruction is unlawful. However, even if a facility manager refuses to comply with the instruction, a governor who issues the Article 45(3) instruction does not have any formal methods to enforce the instruction, whether directly or indirectly in law. This situation reflects the fact that there are very limited methods in which the national and local governments can enforce compliance with legal obligations under administrative law in Japan. This section of the article considers the lack of formal methods which local governments can use to enforce an Article 45(3) instruction, and then examines the possibility of introducing enforcement methods by amending the Response Act.

There is no provision in the Response Act to enforce, directly or indirectly, the performance of an obligation if an Article 45(3) instruction is not complied with other than publication. When an Article 45(3) instruction is given, the publication must be made without delay as in the case of Article 45(2). As noted above, the publication, while formally a means of information disclosure, may in effect function as a means of sanction or indirect enforcement. However, although the implementation of the system in the prefectures suggests that the system has been somewhat effective in getting businesses to suspend, it has its limits. In fact, some facility managers continued their business despite the publication after an Article 45(2) request and an Article 45(3) instruction were issued.⁵⁰ Moreover, the substantive effect of the publication after an Article 45(3) instruction would be weak because an Article 45(3) instruction is issued after Article 45(2) request has been issued and the fact thereof has been already publicized.

Whilst the Response Act itself may not include a means for enforcing the legal obligations created under it, it is necessary to also review the availability of enforcement measures under general administrative law. National and

45 See Kobayakawa, 1999: 253, 317.

46 Tokyo District Court [東京地方裁判所, Tokyo chihō saibansho], 30 May 2001, 1762 Hanrei jihō [判例時報] 6.

47 But Kobayakawa said this mechanism may be possible, see Kobayakawa, 1999: 317.

48 See, Shingata infuruenza tou taisaku kenkyūkai, 2013: 161. In Japan, new legislation is often accompanied by a book which is categorised as 'a commentary' written by public officials who were involved in the drafting the bill. The book includes detailed comments on every provision of the statute and is highly influential in practice as an indication of the legislative intention. In some cases, the authors are clearly identified. However, the author(s) of this commentary, which was published just after the enactment of the Response Act, is anonymous; authorship is attributed to the 'Shingata infuruenza tou taisaku kenkyūkai [the Research Group on Preparedness and Response for Pandemic Influenza and New Infectious Diseases]'. This commentary's publisher Chūō hōki has published many commentaries written by public officials and it is likely that this book was written by the public officials involved in drafting the Response Act.

49 See Naikaku kanbō shingata korona uirusu kansenshō taisaku suishin shitsutyō. 2020b.

50 Nihon Keizai Shimbun, 2020c.

local governments are not permitted to require that an individual to perform an administrative law obligation that they order and impose on people through judicial proceedings. Accordingly, the government cannot resort to the civil execution procedure pursuant the Civil execution Act (Law No 4, 1994) [民事執行法, Minji shikkō hō] in Japan. The Supreme Court of Japan held that such action is unlawful because an action by executive governments, solely as the subject of administrative power, which requires an individual to perform an obligation in the area of public administration is not a legal dispute as provided for by Article 3(1) of the Court Act Law No 59, 1947) [裁判所法, Saibansho hō].⁵¹

Because civil execution is not available to enforce an administrative law obligation due to the decision of the Supreme Court, administrative enforcement plays a central role in this area of law. The general law for administrative enforcement in Japan is ‘the Act on Administrative Substitute Execution by Administration’ (Law No 43, 1948) [行政代執行法, Gyōsei daishikkō hō] (‘Substitute Execution Act’). Article 1 of this Act provides:

except for the matters provided by other statutes, the fulfilment of performance of duty in the area of public administration is to be covered by this act.

Article 1 means the Substitute Execution Act is a general law in the area of administrative enforcement, and only provides for ‘substitute execution’ [代執行, Daishikkō]. Under substitute execution, the government performs an individual’s obligation on behalf of that individual. The method of substitute execution and its procedure in the Act is the only common system for administrative enforcement which may be applied across individual statutes in various administrative areas. However, substitute execution pursuant to the Substitute Execution Act is not an appropriate method for enforcement of an obligation in accordance with an Article 45(3) instruction, because substitute execution is not available for obligations if the government cannot perform the act on behalf of the individual on whom the obligation is imposed.

In the case of COVID-19, the obligation imposed by an Article 45(3) instruction requires that a facility manager suspend the use of the facility for the manager’s benefit. This obligation may only be performed by facility managers themselves and, for that reason, the government cannot perform the activities instead. Accordingly, the substitute execution method is not available in a case where a facility manager fails to comply with an instruction. Therefore, an Article 45(3) instruction is no different from an Article 45(2) request in terms of its practical effect. Any amendment to the Response Act to introduce an effective method for enforcing the legal obligations created by an instruction will be difficult considering the current situation of the Japanese law system for administrative enforcement.

A further method to compel compliance would involve forcing individuals to perform their obligations through the use of physical power (known as ‘direct compulsion’ [直接強制, Chokusetsu kyōsei] in Japan). This method is available only based on a specific provision in a statute in accordance with Article 1 of the Substitute Execution Act. There are few statutes which employ this method in Japan today.⁵² Shiono explains that this method of direct compulsion is considered undesirable from the perspective of human rights.⁵³ For that reason, it would be very difficult to introduce a provision in the Response Act which provides for direct compulsion.

Administrative penalties for a violation of statutory obligation may also indirectly force an individual to perform an obligation through the threat of a penalty, instead of using direct compulsion.⁵⁴ There are two types of administrative penalties: ‘criminal penalty in the administration’ [行政刑罰, Gyōsei keibatsu], which imposes a criminal punishment; and a ‘non-criminal fine’ [過料, karyō]. Criminal penalties in administration have been used for in many statutes.⁵⁵ While the current publication system is working reasonably effectively, facility managers may still disregard an instruction. The Government of Japan is now considering adding a provision to the Response Act which imposes a criminal penalty in administration on a facility manager who refuses an Article 45(3) instruction.⁵⁶ However, in order to amend the Response Act and impose a penalty, a national consensus will be necessary as to whether the refusal of an Article 45(3) instruction deserves criminal punishment.

Moreover, critics have pointed out that criminal penalties in administrative law have not worked well.⁵⁷ Even where

51 Supreme Court [最高裁判所, Saikō saibansho], 9 July 2002, 56(6) Saikō saibansho minji hanrei shū [最高裁判所民事判例集] 1134.

52 One very rare example is Article 3 of the Act on Emergency Measures concerning Security Control of the New Tokyo International Airport (Law No 42, 1978) [新東京国際空港の安全確保に関する緊急措置法, Shin Tokyo kokusai kūkō no anzenkakuho ni kansuru kinkyū sochihō].

53 See Shiono, 2015: 260.

54 See Shiono, 2015: 261.

55 See Uga, 2020: 269.

56 Japan Times 2020.

57 Non-criminal fines have not worked well either, because the amount of fines are limited based on proportionality principle. See, Uga, 2020: 275.

a statute provides for a criminal penalty, the actual application of that provision and the imposition of the penalty has been rare.⁵⁸ A criminal penalty in administrative law must be imposed through a criminal suit starting with a prosecution being filed by a public prosecutor in accordance with the Code of Criminal Procedure (Law No 131, 1948) [刑事訴訟法, Keiji Soshō hō] in Japan.⁵⁹ Critics of the using criminal penalties in administrative law point out that the criminal justice system in Japan is extremely time-consuming, costly and labour-intensive, and that the police and public prosecutors prioritise serious crimes, such as murder, considering their limited resources, rather than administrative law violations.⁶⁰ As such, even if criminal penalties were introduced for failure to comply with an instruction under the Response Act, it's unlikely that many cases would be brought in practice. However, on the assumption that Covid-19 pandemic is a serious problem in society, the police and public prosecutors might prioritise a few cases as examples to encourage compliance. From that perspective, adding a criminal penalty to the Response Act might be useful in terms of an effective threat for facility managers.

The Issue of Compensation for Loss

The issue of the lack of measures to compel compliance with requests and instructions under the Response Act is linked to the possible necessity for compensation for loss to facility managers under the Constitution of Japan [日本国憲法, Nihonkoku Kenpō]. Article 29(3) of the Constitution of Japan provides that 'private property may be taken for public use upon just compensation thereof'.⁶¹ Because of this provision, the possibility of the need for compensation for loss must be considered when any government in Japan makes a decision or undertakes conduct that restricts a private property right, such as imposing an obligation to suspend business. In many cases, a statute providing for decisions or conduct accompanied by restrictions on private property rights has provisions stipulating compensation for loss for that kind of decision or conduct.⁶² The Response Act has a provision for compensation for loss in relation to some actions, such as the use of land for establishing a temporary medical facility and the acquisition of the goods necessary for emergency measures.⁶³ The provision does not cover loss as a result of complying with an Article 45(3) instruction, but that does not mean that compensation for loss is not required where an Article 45(3) instruction has been made in accordance with the Constitution. One view is that a statute which does not provide for compensation where it is constitutionally required would be invalid. The prevailing view and comments from the Supreme Court suggest that a private person whose property rights are infringed may bring an action claiming for compensation for loss directly based on Article 29(3) of the Constitution.⁶⁴ It is possible that Japanese businesses could attempt to bring an action claiming compensation for loss in future directly based on Article 29(3) of the Constitution.⁶⁵

Property loss caused by government action will be compensated under Article 29(3) of the Constitution only if the loss can be assessed as a 'special sacrifice' (特別の犠牲, Tokubetsu no gisei).⁶⁶ In determining whether or not the loss constitutes a special sacrifice, commentators and precedents point out that the following three factors about the alleged infringing act by the government must be considered: (a) the particularity of the infringing act [侵害行為の特殊性, Shingai kōi no tokushusei]; (b) the intensity of the infringing act [侵害行為の強度, Shingai kōi no kyōdo]; and (c) the purpose of the infringing act [侵害行為の目的, Shingai kōi no mokuteki].⁶⁷ According to the commentary on the Response Act, the reason that the Response Act does not include a provision for compensation for loss for an Article 45(3) instruction is because: (1) the instruction is issued because the facilities might be sources of the spread of pandemic influenza; (2) the businesses with an inherent risk of infection should be self-restrained; (3) the period is temporary; (4) an Article 45(3) instruction, which is not enforced by a penalty provision, does not have an effect to compulsorily suspend the business; and (5) the general public would be expected to be subject to some practical restrictions for their actions under the state of emergency.⁶⁸ This explanation from the commentary takes into account the factors (a), (b) and (c) noted above. The first two reasons set out in (1) and (2) take into account factor (c); (3) and (4) take into account factor (b), and (5) takes into account factor (a). In particular, the commentary

58 See Ohashi, 2019: 317.

59 See Shiono 2015: 273.

60 See Ohashi, 2019: 317.

61 Regarding Article 29 in the Constitution of Japan, see Matsui, 2011: 219-221.

62 For example, Article 29(3) of the Fire Service Act (Law No 186, 1948) [消防法, Shōbō hō] provides compensation for a person who has suffered any loss from the fire defence measures.

63 Article 62 of the Response Act.

64 See Shiono, 2019: 383. Supreme Court [最高裁判所, Saikō saibansho], 27 November 1968, 22(12) Saikō saibansho keiji hanrei shū [最高裁判所刑事判例集] 1402.

65 The author is not aware of such a claim being brought at the time of writing.

66 See Uga, 2018: 500.

67 See Uga, 2018: 505.

68 See Shingata infuruenza tou taisaku kenkyūkai, 2013: 161-162.

notes that an Article 45(3) instruction is not enforceable by a penalty provision (see item (4)). This approach may be interpreted as meaning that the lack of a penalty to enforce an Article 45(3) instruction helps to lower the intensity of the infringement act (that is, factor (b)) and reduces the need for compensation for loss. If a plan to add a penalty provision to the Response Act gains momentum, it may be that the introduction of a penalty provision might give rise to governmental liability to compensate for loss. On this issue, Hasebe, a prominent constitutional scholar in Japan, commented in a newspaper article that even if penalties were introduced, compensation for loss would not be necessary due to item (2) above; that is, the use of facility subject to an Article 45(3) instruction is an obviously dangerous action for society and the public.⁶⁹ According to this view, the penalty provision would not necessarily lead to government liability to compensate for loss.

If compensation for loss becomes necessary, there is also a dispute as to how to calculate the amount of compensation.⁷⁰ Article 29(3) of the Constitution requires ‘just compensation’. The Tokyo Metropolitan Government paid a one-time payment called ‘cooperation money for the prevention of the spread of infection’ [感染拡大防止協力金, *kansen kakudai bōshi kyōryoku kin*] to businesses that accepted its request and closed their facilities.⁷¹ This payment was made without reference to its liability of compensation under the Constitution. The amounts were from 500,000 yen to a maximum 1,000,000 yen, which would be far less than the amount of loss actually incurred as a result of closures in many cases. If ‘just compensation’ means compensation for all damage caused to a business, the amount involved in the COVID-19 response could be quite high. Moreover, compensation for loss would need to be paid by the prefecture that imposes a restriction. Apart from Tokyo, many prefectures would not have sufficient financial resources to pay large amounts of compensation and the Government of Japan would need to provide financial support for such payments.

Conclusion

This article analysed the measures taken in response to COVID-19 under the declaration of a state of emergency in Japan from an administrative law perspective. These measures are characterized as lacking compulsion. This article examined the impact of the performance of administrative guidance as a regulatory measure, the effectiveness of publication, the lack of means to enforce obligations in Japan, and the possibility of compensation for loss. The declaration of a state of emergency was lifted on 25 May 2020, but Japan has seen increasing COVID-19 cases at the time of writing and future pandemics are not out of the question. This article highlights aspects of the Response Act framework that worked well based on existing administrative law mechanisms and offers explanations for gaps in administrative law which hinder the efficient functioning of pandemic responses and should be debated and addressed to improve the system in anticipation of future emergencies.

69 See Asahi Shimbun, 2020.

70 See Nakamura, 1990: 10.

71 Cooperation money was paid twice. For details, see, the website of Tokyo-to (Tokyo-to, 2020c).

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