



Legal countermeasures against COVID-19 in Japan: effectiveness and limits of non-coercive measures

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Abstract

This paper analyzes the Japanese legal responses to COVID-19. Japan did not declare the state of emergency on the constitutional level. In addition, it did not enact a new law and instead amended existing statutes several times to cope with the situation. The paper first introduces provisions of the Novel Influenza Act and Infectious Diseases Acts provisions before and after the February 2021 amendments. The remarkable feature of the Japanese countermeasures was the focus on non-coercive measures. There is no compulsory scheme to ensure “staying at home” for general residents. Regarding the facility managers, the NIA provided for the public announcement of non-compliance of the “recommendation” to ensure effectiveness. The legal nature of such public announcements is disputed in Japanese administrative law. The February 2021 amendments added the possibility of issuing an order whose effectiveness was guaranteed by administrative fines. This paper analyzes the traditional emphasis of “administrative guidance” in Japan and proposes hypotheses as to why open non-compliance cases of facility managers are observed. Concerning patients, prior to the February 2021 amendment, the IDA provided for the problematic legal figures of “recommendation” and “immediate execution”. The Feb. 2021 amendment, which added administrative fines, made the legal figure more complex. COVID-19 countermeasures have highlighted the difficulty of legal control when public behavior change is a policy goal. We must proceed by trial and error and accumulate knowledge regarding legal regulations or governmental messages that effectively affect public behavior. In the process, we should embrace the basic principles of constitutional democracy, such as the democratic legitimacy and accountability of government decisions and the principle of the rule of law. Simultaneously, we must remember that infectious disease control is a matter of human rights and discrimination, especially considering the unfortunate history of infectious disease control in Japan.

Keywords COVID-19 · Japan · Administrative law · Administrative guidance · Non-coercive measures · Infectious disease control

1 Introduction

The evaluation of Japan's COVID-19 measures is challenging. The cumulative death toll relative to the population is less than one-tenth of that of the US or Europe. However, it was by far the highest among its East Asian neighboring countries (see Table 1). The fifth wave, which began around late June 2021, was relatively severe, with a record number of 25,851 new cases nationwide on August 20.¹ Since then, this number has rapidly declined, with less than 1,000 new cases nationwide since October 7.² However, community transmission of the Omicron variant was confirmed in December 2021. The government requested precautions against the resurgence of infections.³ Vaccines were introduced later than in the United States and Europe. However, the vaccination rate has steadily increased, and the number of fully vaccinated people reached 78.19% by the end of 2021.⁴

At the early stage of the pandemic, Tom Ginsburg and Mila Versteeg provided a comparative overview of the legal bases for COVID-19 measures. They provided the following typology: (1) the declaration of a state of emergency under the constitution, (2) the use of existing legislation addressing public health or national disasters, and (3) the passing of new emergency legislation.⁵ According to this framework, Japan falls somewhere between (2) and (3). Japan did not declare the state of emergency on the level of the Constitution.⁶ In addition, it did not enact a new law and instead amended existing statutes several times to cope with the situation.⁷

The central legal measure against COVID-19 in Japan is the Novel Influenza Act (NIA) (The Act on Special Measures against Novel Influenza etc.). This act was implemented in 2012 in response to the swine flu (H1N1) pandemic of 2009–2010.

Initially, the NIA could not be applied to COVID-19. Prior to the March 2020 amendment, the Act limited its coverage to (1) novel influenza, (2) reemerging influenza, and (3) new infectious diseases. COVID-19 is unmistakably not influenza; therefore, it belongs to neither (1) nor (2). Furthermore, to be considered a “new infectious disease (3),” the infectious disease must be “clearly different from already known infectious diseases regarding its medical condition or outcome of treatment.”

¹ <https://www3.nhk.or.jp/news/special/coronavirus/data-all/> (Accessed 2 Jan 2022).

² The reason for this rapid decline is unspecified (MuCurry 2021), “Experts say that no individual factor can explain the extraordinary turnaround in Japan’ fortunes.”

³ Japan Times (2021). Since January 2022, there has been a clear upward trend in the number of new infections, with 8,480 recorded on January 8. The government has applied priority preventive measures (see Sect. 2.2.3) in three prefectures from January 9 to January 31 (Postscript (Mar. 17,2022) : On Feb. 3, 2022 the number of newly confirmed cases per day reached 104,345, the largest number to date. Priority preventive measures are applied in 18 prefectures as of Mar. 17, but are expected to be lifted on Mar.21).

⁴ Ritchie et al. (2022).

⁵ Ginsburg and Versteeg (2020).

⁶ To begin with, the present Constitution (The Constitution of Japan) does not have an emergency clause. The “state of emergency” declaration under the NIA is a legal scheme under the statutory law and not on the Constitutional level.

⁷ Ginsburg and Versteeg (2020)

Table 1 Cumulative confirmed COVID-19 deaths per million people (as of Dec.31, 2021)

United States	2479.72
Europe	2043.51
Japan	145.89
South Korea	109.64
Taiwan	35.63
China	3.21

Source: Ritchie H et al. (2022) Coronavirus pandemic (COVID-19); <https://ourworldindata.org/coronavirus> (Accessed 2 Jan. 2022)

However, because the COVID-19 pathogen had already been identified, it was not regarded a new infectious disease.⁸

Therefore, the Diet amended the Act in March 2020, with the sole purpose of *temporarily* treating COVID-19 as a “novel influenza and other infectious diseases” (“deemed as”), and thereby applying the NIA. Previously, COVID-19 was designated as a “designated infectious disease” under the act on the Prevention of Infectious Diseases and Medical Care for Patients with Infectious Diseases [the Infectious Diseases Act, (IDA)] by a cabinet order in February 2020. A cabinet order also designated it as a “quarantine infectious disease” and it became the subject of the Quarantine Act. This served as the legal foundation for border control against infectious diseases. Subsequently, in February 2021, significant amendments were made to the NIA, IDA, and Quarantine Act (hereafter “Feb.2021 amendments”).⁹

This paper introduces the provisions of the NIA (2.) and the IDA (3.) before and after the amendment. The Quarantine Act will only be detailed insofar as it relates to the above two acts. Characteristics’ and problems’ analyses of Japan’s legal responses follow, with a special focus on their non-coercive nature (4.). The following is the conclusion (5.)

2 Novel influenza act (NIA)

2.1 Before the Feb.2021 amendments

The NIA’s provisions distinguish between the periods when the state of emergency (緊急事態宣言, SE) has been declared and periods when it has not been declared.

We begin by reviewing the period’s provisions when the SE has not been declared. When a novel influenza outbreak occurs, the Prime Minister shall establish the national government task force headquarter in the Cabinet (Art. 15). The prefectural governors are responsible for establishing the prefectural task force headquarters (Art. 22). Art. 24 para.7 stipulates that the chief of the prefectural task force headquarters (i.e., the prefectural governors) may “request” (求める) the prefectural police and the boards of education to take necessary

⁸ Ota (2020, pp. 90–91).

⁹ Table 2 shows the overview of the statutory basis of COVID-19 countermeasures in Japan.

Table 2 Overview of the statutory basis of COVID-19 countermeasures in Japan

Targets	Statutory basis
Border control	Quarantine Act (検疫法)
Patients, suspected disease carriers or asymptomatic carriers	Infectious Diseases Act (IDA)(感染症予防・医療法)
The managers of business facilities and managers and the residents at large	Novel Influenza Act (NIA) (新型インフルエンザ等対策特別措置法)

countermeasures against a novel influenza etc.^{10,11} The prefectural governor may also “request” to public or private organizations or individuals for the required cooperation (Art. 24 para.9). These “requests” are not legally binding, and their effectiveness is dependent on the addressee’s voluntary compliance.

The Prime Minister may declare the SE when the requirements specified by a Cabinet Order are met. The said Order stipulates the requirement as “when it is recognized that the infection of a novel influenza etc. is spreading beyond the area of one prefecture, and when it is recognized that there is a prefecture where the provision of medical care is hindered by the spread of said infection”(The Order for Enforcement of the NIA, Art. 6). The Prime Minister shall specify the period, the areas, and the outline of the emergency measures and report them to the Diet (Art. 32 para.1 of the NIA).

Under the SE, the prefectural governor may “request” (要請)¹² the residents to cooperate in the prevention of the spread of novel influenza. Examples include staying in their residences except when it is necessary to maintain their lives (Art.45 para.1). However, the “request” in this case is not legally binding. The effectiveness of “staying home” is entirely dependent upon the residents’ voluntary compliance. *So-called “lockdown” measures have never been introduced in Japan.*

The governor may also “request” that managers of specific types of facilities (schools, social welfare facilities, entertainment halls, or any other facilities used by many people as specified by a Cabinet Order) take the measures specified by a Cabinet Order. These include restricting or suspending the use of facilities, as well as restricting or suspending the holding of events (Art. 45 para.2).

If the facility manager does not conform to the above request, the prefectural governor may “instruct” (指示) the manager to take appropriate actions pertaining to the request. This only applies when they believe it is critically important to prevent the novel influenza’s transmission (Art. 45 para.3). This “instruction” was understood to impose a duty on the addressee,¹³ although the language itself is ambiguous. No penalty was stipulated in the Act.

¹⁰ ,As already mentioned, COVID-19 had been temporarily treated under the “novel influenza etc.” category, under the NIA before the Feb. 2021 amendment.

¹¹ In Feb.27, 2020, the Prime Minister Shinzo Abe requested to close schools nationwide, and the boards of education followed this request. However, as indicated in the main text, the NIA gives prefectural governors, and not the Prime Minister, the responsibility to issue “requests,” hence the legality of the Prime Minister’s request being problematic (Ohashi 2020, p. 50).

¹² Although Art. 24(求める) and Art. 45(要請) use different Japanese words for “request,” the meaning is similar.

¹³ Commentary of the Novel Influenza Act (2013), 161; Isobe (2021, p. 12).

When the prefectural governor has made a request (Art. 45 para. 2) or an order (para.3), they shall make a public announcement to that effect without delay (para. 4). This mechanism of ensuring effectiveness through public announcements is often used in Japanese administrative law (see Sect. 2.2.2).

2.2 The Feb. 2021 amendments

2.2.1 Introduction of an “order” and administrative fine

In February 2021, the Diet amended the NIA to introduce a clear compulsory mechanism to enforce the prefectural governor’s request to facility managers. Art. 45 para. 3 was amended so that the prefectural governor may now “order” (命令) the managers to implement measures rather than the mere provision of “instruction” (指示). In the event of an order’s violation, the violator shall receive a administrative fine of a maximum of 300,000 yen (Art. 79). In addition, the new paragraph 4 was inserted, which obligates the prefectural governors to ask for infectious diseases experts’ and other academic experts’ opinions in advance. The paragraph on public announcements has also been amended. While the former law obligated the governor to announce the request or instruction in all cases, the amended paragraph gives the governor the discretion on whether the request or order will be publicly announced. During the third SE’s period from April 25 to 30 Sep. 2021, 17 prefectures issued restaurant orders to close or restrict their business hours. These prefectures also announced the issuance of orders.¹⁴

2.2.2 Legal nature of the public announcement

Japanese administrative law often uses a legal mechanism to ensure its effectiveness through public announcements. There are two types of public announcements, according to common perception: “the announcement for information provision” and “the announcement for sanction (reputation loss).” The former is possible even without a statutory basis, whereas the latter requires the statutory acts’ legitimation.¹⁵

Prior to the amendment, the public announcement in the NIA was explained as an information provision. It was stated as being “important for the users of the facilities to be widely informed in advance.¹⁶” However, given that the amendment allows the governor’s discretion, interpreting the legal scheme as a tool for an information provision may be difficult. Conversely, the lack of a due process (no hearing process before the announcement) is problematic if the announcement is interpreted as a sanction.

The government continues to view public announcements as an information provision, even after the amendment. On July 8, 2021, the Cabinet Office issued a circular notice on the announcement. It stated that the public announcement of the

¹⁴ Headquarters for the Control of COVID-19 (2021, p. 8).

¹⁵ Nakahara (2018, p. 47). Recent academic articles cast doubt on this dichotomy. Cf. Nakagawa (2017); Amamoto (2019); Doi (2020); Nakano (2020); Nakano (2020a).

¹⁶ Commentary (2013, p. 161).

	SE	PPMs
Area	Prefectural basis	Municipalities designated by prefectural governors
Measures	Request/Order to shortening operation hours/closure of facilities	Request/Order to shortening operation hours only
Sanction	Non penal fine of less than 300 thousand yen	Non penal fine of less than 200 thousand yen

Fig. 1 Comparison of the State of Emergency (SE) and Priority Preventive Measures (PPMs) *Source:* <https://www.nikkei.com/article/DGXZQODE31C3W0R30C21A3000000/> (Accessed 2 Jan. 2022)

facility's name is permitted only during the order's effective period. The announcement shall not be allowed after the period's expiration because "publicizing the fact that a violation of the order has been notified would not lead to ensuring reasonable actions of the facility users."¹⁷ However, in some cases, the announcements were made directly before an effective period's end.¹⁸ It is debatable whether such announcements provide adequate information. Rather, we may infer that there is a hidden sanction purpose behind these announcements (Fig. 1).

2.2.3 Introduction of priority preventive measures (PPM)

The Feb. 2021 amendments also introduced the new legal scheme of priority preventive measures (まん延防止等重点措置 PPM). The PPM is an interim regulation between "normal times" and the SE (see Fig. 2). While the SE is declared at the prefecture level, the PPM is declared at the municipality level. The activity restrictions' content is also limited. According to the "basic policy for countermeasures against new coronavirus infections" by the government, the PPM aims for the "flexible implementation of measures that focus on a specific period, area, and type of business; according to the infection situation in the region."

2.3 Interim summary

The NIA empowers the Prime Minister to declare the SE; however, the declaration's effectiveness had relied almost entirely on voluntary compliance before the February 2021 amendments. For facility managers, the act had the legal mechanism of public announcements to ensure its effectiveness. The Feb. 2021 amendments added the

¹⁷ https://corona.go.jp/news/pdf/jimurenraku_tokuso_20210708.pdf (Accessed 2 Jan 2022).

¹⁸ For example, Aichi Prefecture has requested restaurants and other facilities to close from 12 May to 20 Jun. 2021, based on the NIA's Art. 45 para. 2. Forty-eight facilities that did not comply with the requests were ordered to close under Art. 45 para.3. The orders were issued on 10 June (30 facilities), 16 June (nine facilities), 17 June (seven facilities), and 18 June (two facilities). They were publicly announced on the same or following day. The last case was only two days before the end of the effective period. [author date, page number]. <https://www.pref.aichi.jp/site/covid19-aichi/> (Accessed 2 Jan. 2022).

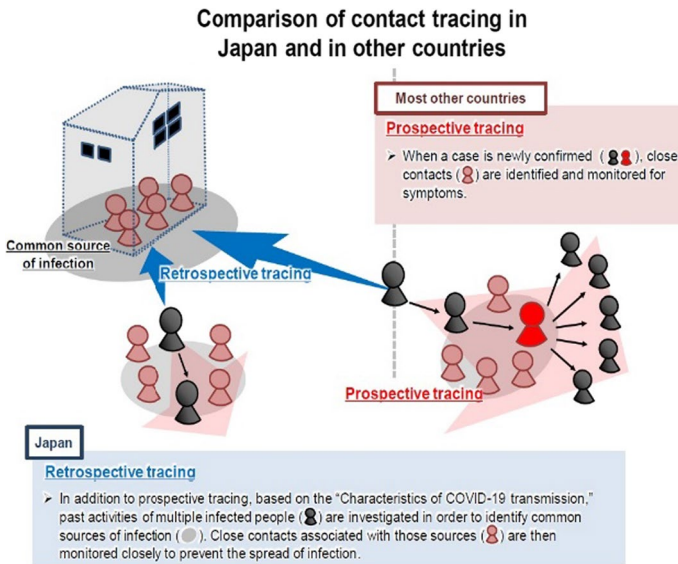


Fig. 2 Retrospective tracing. *Source:* The Prime Minister’s Office https://japan.kantei.go.jp/ongoingtopics/_00030.html (Accessed 3 Jan. 2022)

possibility of issuing an order, whose effectiveness was guaranteed by administrative fines. Even after the amendment, the request to residents to stay home depended upon their voluntary compliance.

3 Act on the prevention of infectious diseases and medical care for patients with infectious diseases (IDA)

3.1 Proactive epidemiological investigation

3.1.1 Before the Feb. 2021 amendments

During early stages of the COVID-19 outbreak, the government focused on “cluster control.” On February 25, 2020, “small patient clusters (groups) were identified in some areas. However, as of now, there are no areas where a large-scale spread of the infection has been observed.” The government task force headquarters issued a basic guideline that stated:

To end the epidemic as soon as possible, it is extremely important to prevent clusters (populations) from giving birth to the next clusters (populations), and thorough measures should be taken to prevent this. In addition, curbing the speed of the increase in the number of patients as much as possible through such measures to prevent the spread of infection will be crucial in controlling future epidemics in Japan.¹⁹

¹⁹ <https://corona.go.jp/expert-meeting/pdf/kihonhousin.pdf>. (Accessed 2 Jan. 2022).

3.1.2 After the Feb. 2021 amendments

In February 2021, the IDA was simultaneously amended with the NIA. With this amendment, COVID-19 is now officially classified as a “novel influenza and other infectious diseases” subcategory, rather than as a temporary treatment (Art. 6 para.7).²⁰ According to the amended Art. 15 para.8, if a patient (or a person with findings) of Class I infectious diseases, Class II infectious diseases, novel influenza, and other infectious diseases, or a new infectious disease (“specified patients, etc.”)²¹ does not cooperate with the necessary investigations without justifiable grounds, the prefectural governor or the Minister of Health, Labor and Welfare may *order* (命ずる) the specified patients, etc., to respond to said questions or necessary investigations. This is when necessary to prevent the outbreak or spread of the infectious disease. Non-compliance to the order may result in administrative fines (Art. 81).

The initial governmental amendment bill stipulated criminal penalties, but after negotiations between the ruling and opposition parties, it was changed to administrative fines. According to the classical doctrine of Japanese administrative law, criminal penalties are imposed against “anti-social activities.” Conversely, administrative fines are imposed against violations that only indirectly interfere with administrative regulations, comparable to the German concept of *Geldbuße* against *Ordnungswidrigkeit*.²²

3.2 Hospitalization

3.2.1 Before the Feb. 2021 amendments

There are more complex issues regarding the provisions for hospitalization in the IDA before the February 2021 amendments. According to Art. 19 para.1 of the IDA, a prefectural governor may “recommend” (勧告) a patient with Class I infectious diseases who is hospitalized to designated medical institutions. This applies when the governor deems it necessary to prevent the spread of the disease. The initial recommendation for hospitalization occurs within 72 h. The prefectural governor may extend the period by up to 10 days after consulting with the Prefectural Council for Infectious Disease Surveillance (Art. 20 para.1). The legal nature of these “recommendations” is problematic. *The language itself (“recommend”) strongly suggests that they do not have legally binding force; in other words, they cannot create a*

²⁰ As mentioned earlier, COVID-19 had been designated by a cabinet order as a “designated infectious disease” in Feb. 2020 under the IDA. After the Mar. 2020 amendment of the NIA, COVID-19 had been temporarily “deemed as” “novel influenza and other diseases”.

²¹ The possible order’s target is more limited than the target of the active epidemiological investigation in general (Art. 15 para.1). The latter includes all the infectious diseases stipulated in the IDA.

²² Jiro Tanaka, who greatly influenced postwar Japanese administrative jurisprudence, explains the statutory concept of *Karyo* (過料, administrative fines) by the academic concept of *Chitsujobatsu* (秩序罰), which is the translation of the German term *Ordnungsstrafe* (Tanaka 1974, pp. 194–195). However, there are considerable differences regarding the concept between Germany and Japan, both in statutory laws and in academic discussion. (Cf. Nishizu 2012, Tanaka Y 2017, Suto 2018).

legal duty to comply. However, when the patient does not comply with the recommendation, the prefectural governor may compulsorily hospitalize the patient in a designated institution (Art.19 para. 3, Art. 20 para.2). This physical enforcement of hospitalization is not an enforcement of legal duty, but rather a legal category of “immediate execution” (comparable to “*sofortiger Vollzug*” in German law). Art. 19 and 20 are applied *mutatis mutandis* to COVID-19 as a designated infectious disease.²³

The physical enforcement of “recommendation” without placing a clear legal duty by “order” is problematic from the law’s perspective. By using the scheme of “immediate execution” here, the governor’s accountability and the possibility for legal relief will be unclear.²⁴ Conversely, there has not been an actual case of compulsory hospitalization for infectious diseases since the enactment of the present IDA. Therefore, this was merely a theoretical issue.

3.2.2 After the Feb. 2021 amendments

The National Governors’ Association’s urgent proposal (Jan.9, 2021) recommended introducing penalties against non-compliance with hospitalization recommendations. The Ministry of Health, Labor and Welfare proposed a legislative amendment. This amendment stated that because there have been cases of patients prematurely leaving medical institutions during hospitalization, it is necessary to ensure the hospitalization measures’ effectiveness. The Ministry also proposed the legal status of residential and home treatment.²⁵

The amendment provided penalties against non-compliance with hospitalization recommendations. As in the case of proactive epidemiological investigations, the original bill provided for the introduction of criminal penalties. However, due to the negotiations between the political parties, it was changed to administrative fines (IDA Art.80). The amended Art. 26 para. 2 now explicitly applies Art. 19 and 20 *mutatis mutandis* to COVID-19. It is currently categorized as “novel influenza and other infectious diseases.” Since COVID-19 is no longer a “designated disease, there is no time limitation for this *mutatis mutandis* application.

The amendment, however, did not alter the scheme in which there is no hospitalization “order.” As previously mentioned, the “recommendation” may be physically enforced by the governor (“immediate execution”). The amendment added a penalty (administrative fine) to this system. This was an anomaly to the traditional Japanese

²³ Art. 7 para.1 of the IDA and the Cabinet Order 2020 No.11 (<https://elaws.e-gov.go.jp/document?lawid=502CO0000000011> (abolished)).

²⁴ The present IDA was enacted in 1998, with the old statutes’ abolishment. The report of the Subcommittee for Examination of Basic Issues of the Infectious Disease Prevention Committee of the Public Health Council stated, “Countermeasures against Infectious Diseases in the New Era” (Dec.8, 1997) had a great influence on the present statute’s drafting. The report anticipates the hospitalization order’s legislation. It indicates that an imposition of such orders should be limited and should be “enforced through required administrative procedures based on clear criteria for enacting such measures.” However, the governmental bill did not introduce the hospitalization order scheme. The commentary simply explains that “establishing an order mechanism is a roundabout way of preventing the spread of infectious diseases” (Commentary 2013, p. 119).

²⁵ <https://www.mhlw.go.jp/content/10906000/000720886.pdf>.

administrative law doctrine. If we are to be loyal to the traditional implicit understanding, the immediate execution will not be accompanied by penalties.²⁶ Contrary to governmental understanding, one may interpret this “recommendation” as an administrative act, which imposes a legal duty to the addressee.²⁷

The amended IDA Art.44–3 also provides for residential and home treatments. The prefectural governor may request patients or suspected caregivers to “report” their body temperature or other health conditions. The governor may also request their “cooperation” in staying home (para. 1&2). These patients and others must comply with the request for a report and “endeavor to comply” with the request for cooperation (para.3). The amendment also provides for delivering meals or other daily necessities (para.4).

This amendment made the legal status of residential treatment and home treatment clear, which is undoubtedly a progress from the viewpoint of the principle of the rule of law. However, the amendment ironically demonstrates that those measures affect the constitutional right to free movement and had operated without any legal basis preceding it.²⁸

4 Analyses and remarks

4.1 Administrative guidance

As indicated, legal measures against COVID-19 in Japan have focused on optimally avoiding coercive measures and relying instead on voluntary cooperation from residents, companies, and patients. However, the Feb. 2021 amendments somewhat modified this point.

This emphasis on non-coercive measures is not limited to the COVID-19 measures. Both Japanese administrative jurisprudence and foreign observers have long paid strong attention to the fact that administrative guidance (行政指導) is an essential component of the Japanese administrative style. Administrative guidance relates to administrative agencies requesting voluntary cooperation from private citizens.

Chalmers Johnson described Japan as a “developmental state” in his influential book “MITI and the Japanese Miracle.” He emphasized the role of administrative guidance in Japanese industrial policy. According to Johnson, Japan has a (1) small and inexpensive, but elite bureaucracy. This is where the (2) bureaucrats’ political initiative is influential, and (3) administrative activities are regulated by short and highly generalized laws. Therefore, the bureaucrats have a wide discretion.²⁹

²⁶ Suto (2021, p. 116) is critical of this traditional doctrine. Meanwhile, she criticizes introducing penalties regarding infectious disease.” It is futile to impose penalties on infectious diseases as a means of social defense. Would it be effective for social defense to require an infected person who refuses to be hospitalized to appear before a court?” (Suto 2021, p. 122).

²⁷ If so, the enforcement mechanism would have changed from its immediate execution (*sofortiger Vollzug*) measures to an enforcement of a legal obligation under the administrative act (direct coercion, *unmittelbarer Zwang*) (See Isobe 2021b, p. 63; Harada 2021, p. 1).

²⁸ Isobe (2021a, p. 90).

²⁹ Johnson (1982, 315–319).

*The Japanese political economy is strikingly free of lawyers. Many of the functions performed by lawyers in other societies are performed in Japan by bureaucrats using administrative guidance.*³⁰

Johnson's analysis on administrative guidance may suggest that the Japanese government embodies the "strong state" via the administrative bureaucrats' leadership. Still, there are other aspects of this administrative style. This style embraces consensus rather than authoritative top-down decision-making. Michael K. Young emphasizes that the "administrative organs in Japan often seek to enshrine bargaining and negotiation between parties as the principal device for allocating regulatory burdens."

In analyzing "outline guidance," the systematized guidance on housing development by municipalities, Young comments:

*(N)owhere is the Japanese emphasis on negotiation and private ordering more evident than in municipalities' Outline Guidance. In promulgating Outline Guidance, municipalities never attempted to establish the permissible degree of intrusion on the ventilation and sunlight of the surrounding residents. Rather, they simply indicated an unwillingness to cooperate with developers. The precise allocation of this regulatory burden thus depended almost entirely on negotiations directly between the developers and surrounding residents. These negotiations do not proceed through the medium of a government agency, and the government does not represent any particular interest in the dispute or even take sides—except when parties are acting unreasonably. Indeed, except in an indirect way, the government does not even serve as the final arbiter of these disputes. Rather, the municipalities restructure the balance of power between the interested parties to ensure that each takes the other seriously and deals with the other in good faith. The municipalities then step out of the picture, reentering only when the parties have resolved the matter among themselves. Thus, in its ideal application, administrative guidance operates through bargaining and negotiation outside the realm of state enforcement mechanisms.*³¹

Similarly, Frank Upham identifies the Japanese style of administrative regulation as "privatized regulation." He has the coordination process in the Large-Scale Retail Stores Act, broadcasting station licenses, and transportation licenses, in mind:

In fields as distinct as land use planning and broadcast licensing, Japanese bureaucrats delegate their public power to private parties and function not as direct implementers of regulatory policy, but, at most, as overseers of its private implementation. This pattern frequently extends to the formation of policy as well as its implementation, and the bureaucratic role diminishes to intervention at moments of political crisis. At other times, the agency plays an

³⁰ Johnson (1982, 319).

³¹ Young (1984, pp. 941–942). For a further and more nuanced analysis, see Nakagawa (2000, pp. 199–200). ("As a matter of fact, the negotiation of the administrative guidance at issue is not a genuine conflict mediation or a conflict management for several reasons. It is realistic to expect that municipalities would interfere with such private conflicts that attract their policy concerns.").

*active monitoring and enforcement role, but seldom does a Japanese agency play the role that one would expect from the classic models of economic regulation. This Article proposes a model of this style of Japanese economic regulation. It argues that Japanese regulators delegate part or most of their power to private parties to a degree and in a manner unanticipated in the literature on either Japan or regulation in general.*³²

To avoid misunderstandings, I have added the following: Infectious disease control, the subject of this paper, is a very different administrative area from the economic or land use regulation that Young and Upham are concerned with. The role of voluntary compliance is significant for infected people and residents in general. However, the role of negotiated standard setting is minimal. To be sure, there may be more flexibility for negotiated rulemaking for facility managers.

However, there are some similarities between the economic regulation and infectious disease fields: (1) governments can reduce the cost of establishing norms by using administrative guidance; (2) governments can reduce the cost of enforcement by expecting private citizens to voluntarily comply; and (3) from the private citizens' perspectives, the absence of penalties is often welcome.

Conversely, the use of administrative guidance creates challenges for the principle of the rule of law: (1) Who is democratically responsible for the norm's content remains unclear. It thus creates the problem of dysfunctional accountability; and (2) It makes it difficult for private citizens to challenge in court the validity of the norm's content, as well as the appropriateness of its specific enforcement.

Administrative guidance may lose its effectiveness unless it is voluntarily complied with. This feature first raises the issue of the degree of compliance and second, the question of why people comply with administrative guidance.

Therefore, we consider the following issues in the context of COVID-19 measures: (1) To what extent have people complied with each measure? Did the degree of compliance change with the presence or absence of coercion? (2) Are there issues with each measure from the perspective of democratic accountability or the rule of law? We will separately examine these points and the measures toward: (1) the residents in general, (2) facility managers, and (3) infected people. However, for question (1), we include speculative answers without empirical evidence.

4.2 Toward the residents in general

Thus far, Japan has declared the SE based on the NIA four times as per Table 3 below:

As explained in Sect. 2.3, the NIA does not stipulate any coercive measures against residents in general. Japan has never enforced a "lockdown" and the effectiveness of the "stay-home" request is entirely dependent on voluntary compliance.

³² Upham (1996, p. 399).

Table 3 Declaration of the State of Emergency (SE)

1 st	7 Apr. 2020–25 May 2020 (16 Apr.–13 May nationwide)
2 nd	8 Jan. 2021–21 Mar. 2021 (max. 11 prefectures)
3 rd	25 Apr. 2021–20 Jun. 2021 (max. ten prefectures. Okinawa–11 Jul.)
4 th	12 Jul. 2021–30 Sep. 2021

From administrators' perspectives, this significantly reduces the *norm-setting* and *enforcement costs*. To attempt to enforce the lockdown, the government must clearly define, for example, how far could people be away from their respective homes or the essential and/or emergency circumstances for which they must go out. The cost of negotiating within the government and the public to reach a consensus on this issue may be substantial. Moreover, once a legally binding rule on a lockdown is established, the government's reputation will be at stake if it cannot repress violators. Encouraging people to stay at home and relying on the public's independent judgment and compliance is thus more beneficial.

The policy goal of the "stay-home" request is to reduce peoples' mobility. The indicators of this goal's achievement are quantitative. Even if there are sporadic violators, if the human flow quantitatively reduces, it does not adversely impact a policy goal's realization if its quantity is significantly reduced. Therefore, if voluntary compliance and enforcement are similar regarding their quantitative effects, it is more reasonable for government officials and less costly for private citizens to rely on voluntary compliance.

The question of effectiveness in the actual case of the SEs remains unanswered. Robust statistical data is unavailable to address this issue because it may be too early. However, according to a study, there was a considerable difference between the effects of the first SE and those of the second and third:

*Comparing the changes in human mobility due to the declaration of an SE, the first had the greatest impact. The second and third have caused some changes, but not as much as the first. This may be because some people canceled or postponed their plans to go to university, find a job, or change jobs in the Tokyo metropolitan area in the first SE.(...)The first, second, and third SE all had in common that as the SE prolonged, the flow of people tended to gradually return to normal. However, the change is not significant enough to say that people are letting their guard down too much.*³³

The study does not explain why this difference exists, so it must be based on conjecture. People may become more complacent regarding the SE after the second or third time. Alternatively, it may be caused by the following: The first declaration of SE resulted in the closure of most schools, transition of many companies

³³ "Declaring a State of Emergency Doesn't Have Much of a Suppressive Effect After the Second Time" and "Bashing Young People is Wrong," Human Flow Data Analysis Reveals. 8 August 2021. <https://ledge.ai/covid-19-special-feature-5/> (Accessed 3 Jan 2022).

to telecommuting, the closure of entertainment facilities, and the cancellation of numerous events. People may have simply had nowhere to go. However, the second and third SE had an entirely different context, as the regulations focused almost exclusively on restaurants.

As mentioned above, concerning residents, it is reasonable to rely on voluntary compliance if the non-binding request can consequently reduce the human flow. However, the issue remains: *One of the motivations for people to self-restrain is the social pressure to fear the blame of others.* The phenomenon of such pressure turning into excessive accusations and threats against people who do not comply with governmental requests is sometimes derogatively called the “*self-restraint police*” in Japan. A prominent legal philosopher Tatsuo Inoue labelled this as “social tyranny.” He asserts that if the government had implemented resolute crisis management measures instead of relying on requests, anxious people running wild with the social tyranny would have been more controlled.³⁴

4.3 Toward the facility managers

As stated above, the NIA Art. 45 gives the governor the power to “request” managers of certain facilities to take measures. These include the restriction or suspension of the use of the facilities. In the first SE period from April to May 2020, almost all entertainment facilities and restaurants were closed. However, as mentioned in Sect. 2.1, there were no provisions of compulsory measures to enforce the request in the NIA. However, managers generally appeared to have complied with the request. As a result, the following questions arise: Why does the government choose regulation without enforcement? What motivates managers to comply with this request? Conversely, there appear to be some open non-compliance cases reported in mass media. Although rare, why do these open non-compliance cases occur?

4.3.1 Why do they follow?

Why people follow administrative guidance is one of the classic questions, or an enigma, for Japanese law observers. Until the 1960s, there was a paradigm that sought answers in the history of pre-war Japan and in Japanese people’s mindsets.³⁵ However, at least as of now, this is far from plausible. We can easily offer some more reasonable hypotheses.

³⁴ Inoue (2020a, pp. 64–65). See also Inoue (2020, p. 38).

³⁵ “(W)here, like pre-war Germany and like Japan under the old Constitution, bureaucratic power and the spirit of ‘respect the officials and downgrade the people’ were strong, and where a capitalistic economy had developed in an indivisibly close relationship along with National Authority (*kokka kenryoku*) measures, which correspond to today’s administrative guidance seem to have been, in practice, widely conducted for a long time in both economic and other areas because administration held unlimited power in areas in which it was not restricted by law, even though administrative authority, according to constitutional thinking, was restricted by the limits and binding power of the law”. (Narita 1968/1976, p 359).

Let us consider an example of municipal administrative guidance on residential development. From the late 1960s to the 1980s, securing financial resources to cover the extensive costs of constructing public facilities; such as roads, parks, schools, water, and sewage systems has become a serious issue. This occurred while municipalities experienced rapid population growth due to rapid urban expansion. The construction of new condominiums has also caused conflict with the neighborhood residents. Since the existing laws and regulations were insufficient to address these issues, many local governments responded with administrative guidance. They set standards in the form of “outlines” (要綱), asked residential developers for donations to be used as financial resources for schools, and so on. They required them to obtain the surrounding residents’ consent when constructing the condominiums.

The system worked until the beginning of the 1990s. Most developers voluntarily followed the administrative guidance and paid their donations. They negotiated with the neighborhood residents and often made compromises, such as reducing the condominium’s height. Why did developers comply when there was no legal obligation?

First, compliance may promote *more economic profit (or less economic loss)* than non-compliance. Residential land development is often time-constrained. Paying donations or slightly reducing the height may be an economically rational action if it avoids conflicts and decreases the time it takes to build and sell condominiums.

Second, developers may focus on *the long-term benefits*. Maintaining good relationships with municipalities and neighbors and avoiding reputational risks may contribute to long-term profits. This applies if they are to develop further projects in the area. There may even be cases where the developer is convinced of the administrative guidance’s rationality. This is unlikely in the case of donations. However, suppose a situation where a successful townscape is already formed and that keeping buildings below a certain height is an important element of the successful townscape. The developer may then be persuaded that building in collaboration with the townscape will lead to their own long-term profit.

Third, the developer may choose “*exit*” over “*voice*.”³⁶ Suppose municipality P has a stricter administrative guidance than municipality Q and that the guidance is made public in the form of an outline. In this case, it is economically rational to develop in municipality Q, rather than in municipality P. Even a developer who had initially planned development in P and received strict administrative guidance may simply move to Q instead of combatting the guidance.

4.3.2 COVID-19 and the facility managers

We speculated in the preceding discussion as to why developers followed administrative guidance. Therefore, would these suggestions be sufficient reasons for facility managers to comply with a request under the NIA Art.45?

Consider the first of these reasons: Managers will comply if it promotes more economic profit or less economic loss. Under the SE, prefectures and municipalities

³⁶ Hirschman (1972), p.[insert page number here].

provided “cooperation money”³⁷ to companies that cooperated in decreasing business hours and refraining from serving alcoholic beverages.³⁸ If this amount roughly covers the loss, the company will comply.³⁹ If not, it is natural for facility managers to be tempted to rebel.

Overall, there is good compliance with restaurants. However, as already suggested, there have been cases of open non-compliance. A newspaper article depicts some typical cases:

An izakaya (Japanese style pub) in an office district of Chiba City, which was temporarily closed under the emergency declaration that began on August 2, decided to reopen on August 11 and serve alcoholic beverages. Under the amended NIA, if a business is ordered to close or shorten its hours and does not comply with the order, it can be fined up to 300,000 yen as an administrative penalty. Still, the owner, a man in his 60 s, confided, “If I don’t serve alcohol and open my store, I will go bankrupt.

Another tavern in the prefecture has continued to serve alcoholic beverages, even after the declaration. On August 11, several young people drank during the day. The male manager, who is 40 years old, insisted, ‘I have to protect my life and the employment of my employees. Is it only the restaurants that are at fault?’ He questioned whether there were underlying causes in society, such as crowded commuter trains. After the issuance of the SE, a prefectural government-commissioned patrol officer appeared at the entrance of the restaurant only once to check if it was open for business.⁴⁰

I now consider the second and third reasons for adhering to the administrative guidance. Second, avoiding reputational risk is an important concern from the perspective of long-term benefits; however, this may not function in this context. The second and third SE’s targets focused on restaurants. For them, preserving the reputation of regular customers who expect them to be open may be more important than preserving the reputation of the public at large. This point also applies to the third reason. It is difficult or even impossible for a restaurant with strong local ties to choose to “exit” to another area, unlike a new residential developer looking to expand into a new area.

Let me return to the second reason. It is unclear whether the decision to open the restaurant, despite the closure request, will put the restaurant’s reputation at risk.

³⁷ With land expropriation in mind, Art. 29 para.3 of the Constitution stipulates that “private property may be taken for public use upon just compensation therefor.” However, the government’s position is that “cooperation money” does not fall under such constitutionally required loss compensation. They believe that it is money spent to realize policy objectives.

³⁸ Until the Feb.2021 amendment, there was no legal ground for this cooperation money. The amendment established that the national government and local governments shall “effectively take the necessary financial and other necessary measures to support the business operators” affected by the counter measures against novel influenza and other diseases (Art.63–3).

³⁹ It depends on the various factors as to whether this amount is adequate. First, it must be considered that customers’ willingness to spend may be reduced due to COVID-19 and a resultant decrease in revenue may occur. This may occur despite stores being open.

⁴⁰ Tokyo Shimbun (Tokyo Newspaper) 12 Aug 2021. <https://www.tokyo-np.co.jp/article/123667> (Accessed 3 Jan 2022).

The public's attitude towards such restaurants may be divided. While some firmly blame the restaurants, others sympathize with them given their difficult situation and the overwhelming disadvantage they face as a result of the SE.

As previously stated, the NIA did not specify a closure order or penalties prior to February 2021. Public announcements were the only means of enforcing the law (2.2.2). However, even under the first SE, this did not always function successfully. An epidemiologist who participated in the expert committee of the Tochigi prefecture experienced a case where the prefecture publicly announced the names of non-compliant facilities. He writes:

I opposed it at the expert meeting, saying that the announcement would attract even more customers and have the opposite effect. The measure was nevertheless implemented, and the results were just as I had predicted. As a result, taxpayers' money was used to advertise the facility, creating only "Three Cs (closed spaces, crowded places, and close-contact settings)".⁴¹

The Feb. 2021 amendments introduced the system of "order" and the penalty system. It appeared to have only a minor impact on the situation. On July 8, 2021, Yasutoshi Nishimura, the minister in charge of COVID-19 countermeasures made a suggestion in a press conference. He stated that the government may ask financial institutions to urge the restaurants they finance to comply with requests and orders based on the NIA. It will also request that alcohol beverage companies stop doing business with restaurants that do not comply.⁴² The legality of providing administrative guidance through a private third party is highly questionable. If a financial institution pressures a restaurant to comply, it may be considered an abuse of a dominant position, which is illegal under the Antimonopoly Act. The next day, Nishimura withdrew his announcement. The fact that such improper use of extralegal measures was considered indicates the government's frustration following the amendment's noncompliance.

4.4 Toward the patients

Finally, let me consider the meaning of the February 2021 amendments of the IDA concerning patients and suspected infected people: The IDA has a preamble, which says:

The human race has experienced tremendous hardships due to diseases, especially infectious diseases. Epidemics of infectious diseases, such as plague[s], pox, cholera, etc., have sometimes pushed civilization to the brink of extinction, and eradicating infectious diseases is genuinely a long-cherished wish of mankind.

⁴¹ Nakamura (2021, p. 38). Avoiding "Three Cs" is one of the Japanese government's slogan to combat COVID-19. See Japan Gov News (2020).

⁴² Kyodo News (2021).

Many infectious diseases have been conquered, due to medical advances and significant improvements in hygiene standards. However, with the emergence of new infectious diseases and the reemergence of known infectious diseases, and the progress of international exchange; infectious diseases still pose newly formed threats to humanity.

On the other hand, in Japan, it is necessary to seriously acknowledge the fact that in the past, there was unjustified discrimination and prejudice against patients with infectious diseases, such as Hansen's disease and AIDS, and to apply these lessons to the future.

In light of these changes in the situation surrounding infectious diseases and the circumstances in which patients with infectious diseases have been placed, it is necessary to ensure the provision of high-quality and appropriate medical care to patients with infectious diseases, while respecting their human rights and responding to infectious diseases promptly and properly. (underlined by this author)

Discrimination and stigma against infectious disease patients is a serious global challenge. The somewhat unusual statement in the preamble is, however, a reflection of the tragic history of Japan's treatment of Hansen's disease, AIDS, and other infectious diseases patients. Over a long period, Japan maintained a policy of compulsory segregation for patients with Hansen's disease, despite the medical rationale long since being nullified.⁴³ The Leprosy Prevention Act (1953), which served as the legal foundation for the isolation policy, was not repealed until 1996. According to a report by a subcommittee of the Ministry of Health and Welfare's Public Health Council, which served as the foundation for the IDA, states:

It is necessary to deeply reflect on the fact that discrimination and prejudice against people with leprosy and other infectious diseases were practiced in the past, and that the continued existence of the Leprosy Prevention Law has resulted in a great deal of suffering and damage to the dignity of patients, residents, and their families.

Based on this recognition, the report emphasizes that, in the new era of infectious disease control, it is essential to shift the focus from regulatory measures for the public at the time of the spread of diseases to the prevention of diseases for society. This should occur through *the accumulation of measures for the prevention and treatment of infectious diseases by everyone* (emphasis by this author). Following this report, the gist of the IDA is to restrict coercive and compulsory measures to a necessary minimum. It is also to emphasize the voluntary prevention of infectious diseases by citizens.

⁴³ The Judgment of Kumamoto District Court on May 11, 2001, found the government liable for damages to Hansen disease patients. This was due to the inaction of Diet members in not amending the Leprosy Prevention Law. The court ruled that the necessity for the isolation of leprosy patients had been lost since 1960, at the latest.

However, the February 2021 amendments introduced penalties against the non-compliance of the hospitalization recommendation (Sect. 3.2.2). Penalties may certainly increase the compliance to the recommendation. However, they may simultaneously provide a disincentive to undergo an examination and thus have counterproductive effects. More importantly, it may alter the IDA's aim. Tetsu Isobe argues that by stipulating penalties, "the nature of the recommendation, which had been based on trust, respect for patients' self-determination and mutual understanding, could be reverted to the old days of segregation... The consistency with the principle of the act is being questioned."⁴⁴

At the beginning of this paper, I introduced the typology of COVID-19 countermeasures by Ginsburg and Versteeg: (1) the declaration of a SE under the constitution, (2) the use of existing legislation addressing public health or national disasters, and (3) the passing of new emergency legislation. In the second part of their analysis, they contended that:

*Third, and in some ways, the most important principle to prevent the long-term deterioration of civil liberties is that the measures should be limited to the duration of the outbreak. Here, the drafting of new legislation may be the most dangerous approach. The sense of crisis in some countries has led to legislative delegations that are overly broad, do not include a repeal mechanism, and have no sunset provisions. In contrast, while the measures taken during a constitutional state of emergency might be draconian, the state of emergency is temporary. Likewise, under the model in which existing legislation is the main basis of the response, the COVID-19 response might certainly exceed what the drafters intended to delegate, but no overly broad and hastily crafted new laws will stay on the books.*⁴⁵

The IDA's amendment is not new legislation; however, the discussion should have been adequately serious, considering the risk that the fundamental principle of the act will change. Was the discussion enough? We should rethink our overall legal approach to COVID-19 outbreaks once again.

5 Conclusion

This paper analyzed the Japanese legal responses to COVID-19. It first introduced the NIA's and the IDA's provisions before and after the February 2021 amendments. The remarkable feature of the Japanese countermeasures was the focus on non-coercive measures. There is no compulsory scheme to ensure "staying at home" for general residents. Regarding the facility managers, the NIA provided for the public announcement of non-compliance of the "recommendation" to ensure effectiveness. The legal nature of such public announcements is

⁴⁴ Isobe (2021, p. 486) and Kawashima (2021, p. 81) also note that the legislator altered the very institutional design of the act by introducing penalties.

⁴⁵ Ginsburg and Versteeg (2020a).

disputed in Japanese administrative law. The Feb. 2021 amendments added the possibility of issuing an order whose effectiveness was guaranteed by administrative fines. This paper analyzed the traditional emphasis of “administrative guidance” in Japan and proposed hypotheses as to why open non-compliance cases of facility managers are observed.

Concerning patients, prior to the February 2021 amendment, the IDA provided for the problematic legal figures of “recommendation” and “immediate execution.” The Feb. 2021 amendment, which added administrative fines, made the legal figure more complex.

COVID-19 countermeasures have highlighted the difficulty of legal control when public behavior change is a policy goal. We must proceed by trial and error and accumulate knowledge regarding legal regulations or governmental messages that effectively affect public behavior.

In the process, we should embrace the basic principles of constitutional democracy, such as the democratic legitimacy and accountability of government decisions and the principle of the rule of law. Simultaneously, we must remember that infectious disease control is a matter of human rights and discrimination, especially considering the unfortunate history of infectious disease control in Japan.

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