

3. Legal Framework of the State of Emergency in Japan

On April 7, 2020 PM Abe declared a state of emergency (“SoE”) in Tokyo and six other prefectures, which will last until May 6, 2020, namely until and including the so-called “Golden Week” holidays in Japan with the possibility of extension if inter-human contacts are not reduced by at least 70%. Nine days later, the SoE was geographically extended to the entire territory of Japan. One day before the expiry date, the SoE was extended until the end of May. In this second phase, the level of economic activities in the 34 prefectures other than in the 13 prefectures where special alert is required (Hokkaido, Ibaraki, Ishikawa, Gifu, Aichi and Kyoto in addition to the seven prefectures where the SoE had been declared from the beginning, namely Tokyo, Saitama, Chiba, Kanagawa, Osaka, Hyogo and Fukuoka), will be gradually raised. The measures that can be taken under the SoE in Japan is very mild from a legal viewpoint. For example, no lock-down of cities like in China or in some Western countries, or transportation blockades, can be conducted under the present legal regime in Japan.

1. Legal Basis of the SoE

Currently there are, among others, two important laws to prevent the pandemic of COVID-19 caused by SARS-Cov-2 virus in Japan, namely the Infectious Diseases Control Law¹ mainly for the medical and epidemic measures, and the Special Measures Law Against Novel Influenza, et al. (“SMLANI”)² mainly for emergency measures at social level, including the declaration of the SoE and measures taken thereunder. If a certain infectious disease has emerged in Japan and has had or is likely to have an enormous impact on the lives of the people and the national economy due to its nationwide and rapid spread, the Head of the National Countermeasures Headquarters (the Prime Minister) shall declare and publicly announce an SoE with its period (up to two years), region and the outline, and report it to the parliament (§32) (All references to statutory articles mentioned in this newsletter refer to SMLANI unless otherwise explicitly mentioned).

2. Main Measures that can be taken under the SoE

2.1 Measures to Prevent from Spreading the Disease

Vis-à-vis the residents: The Governor of the designated prefecture may, if he/she finds it necessary, request residents of the prefecture (i) not to leave their homes or other equivalent places arbitrarily, except when it is necessary for the maintenance of their lives, and (ii) other cooperation necessary for the prevention of infection, during the period and area specified by the Governor (§45 (1)). As opposed to the following category, no “instruction” can be given to residents in case of non-compliance.

Vis-à-vis entities of certain business categories: The Governor of the designated prefecture may, if he/she finds it necessary, request schools, social welfare facilities (limited to facilities for day-use or short-term stay), and administrators of the entertainment facilities (such as cinemas, theaters, sports and spectacles), other facilities used by many people as set forth in the cabinet order and organizers of events using such facilities, to restrict or

suspend the use of the said facility or restrict or suspend the holding of events or take any other measures specified by a cabinet order, during the period specified by the Governor (§45 (2)). If such request is not followed without good reason, the Governor may, if there is a special need for it, give an instruction³ to follow the request (§45 (3)). Such requests and instructions shall be made public without delay (§45 (4)).

2.2 Compulsory Measures to Procure Medical Services or Medical Products

If the Governor of the designated prefecture considers it necessary to use certain building or land to set up a temporary medical facility, but the owner or occupant of the property does not give consent without good reason, or the whereabouts of the owner or occupant are unknown, the Governor may nevertheless use the property without obtaining the consent if he/she finds it particularly necessary (§49 (2)).

The Governor may, if he/she finds it necessary, request the owner to sell necessary products (medicines, food and other goods specified by a cabinet order), which are handled by a person whose business is production, collection, sale, distribution, storage or transportation. If the owner of the products does not follow the request without good reason, the Governor may expropriate the products if he/she finds it particularly necessary. The Governor may, if he/she finds it urgently necessary to secure supplies of certain products, order a person who is engaged in the production, collection, sale, distribution, storage or transportation of the said products that he/she handles, to store them. (§55 (1)-(3)). This method may be effective, for example, to help return of face-covering masks to the market.

§45 –No Legal Sanction

As opposed to the measures mentioned in 2.2 above that can be taken pursuant to §55 (non-compliance of §55 (3) – order to store certain products - is even subject to criminal sanction), there is no legal sanction in case of non-compliance with all measures

¹ Law No. 114 of 1998 – COVID-19 has been covered since January 28

² Law No. 31 of 2012 – COVID-19 has been covered since March 13

³ On May 1, the first instructions within the meaning of §45 (3) have been

issued by the Governor of Hyogo to three pachinko parlors in Hyogo and by the Governor of Kanagawa to one pachinko parlor in Yokohama. Pachinko enjoys the biggest turnover among the gambling business segment in Japan.

(request to residents, request and instruction to entities) as mentioned in 2.1 above under §45. A “request” is no more than a request within the word’s usual meaning, and it does not lead to a question of legality or illegality.

The biggest difference between the “request” and “instruction” is that non-compliance with an instruction is illegal, albeit not punishable. Due to the illegality, it may be easier than in case of a mere request to refer to *force majeure* as the reason why the “instructed” entity cannot fulfill its obligation towards third parties, but the link between §45 and *force majeure* is still unclear⁴ and should be analyzed on a case by case basis.

Another difference is the social pressure. Both “request” and “instruction” to business entities are made public. Since the “instruction” is made only to those who ignored the “request”, once the public announcement of an “instruction” is made to specified business entities, it is thereby publicly known that these entities ignored the “request” by the Governor.

Measures under §45 presupposes the belief (and hope) that human nature is fundamentally good, and majority of the people/entities will follow the request of the Governor without compulsion. This presupposition has apparently turned out to be correct to a large extent. According to the news coverage⁵, based on the location information of mobile phones analyzed by NTT DoCoMo, the turnouts at major places between 15:00 and 16:00 on May 4 during the Golden Week holidays were approximately 80% less than the same time on the same day last year.

Locations	Less from 2019
Sapporo Station (Hokkaido)	- 80.6%
Shinjuku Station (Tokyo)	- 84.8%
Nagoya Station (Aichi)	- 83.0%
Umeda Station (Osaka)	- 87.7%
Tenjin Station (Fukuoka)	- 79.8%

No Need for Compensation

§62 ff. provides for compensation, but these items concern matters of course, such as compensation for products purchased, compensation for medical professionals who have fallen ill or died in the course of the fight against the epidemic, etc.










Regarding the measures taken under §45, no rules on compensation are provided for. In the Constitution of Japan there is no clause on a state of emergency or martial law. Accordingly, if private rights are restricted for public welfare, normal rule on this topic, namely §29 (3) of the Constitution will apply, which reads: “*Private property may be taken for public use upon just compensation therefor*”. When interpreting this article, various elements such as the nature, degree and purpose of restriction on the private right must be weighed in judging whether the restriction can be considered as unfair sacrifice which shall be borne by the public. According to “*Commentary to the Special Measures Law Against Novel Influenza, et al.*”⁶, the restriction of rights caused by the measures under §45 shall be considered as “intrinsic constraints” because (i) continuing business using

certain facilities under the special situation will give rise to the risk of infection, (ii) risky business shall be refrained from as a matter of course, (iii) the restricted period is limited, (iv) the degree of limitation of private right is limited because there is no sanction in case of non-compliance, (v) majority of the people are affected in one way or another. Accordingly, financial support is rather a political agenda rather than a legal issue. In other words, if the public announcement system is too strongly used as a *de facto* punishment for non-compliance, it may give rise to a problem of compensation as a legal issue (see (iv) above).

Provisional Evaluation of the Soft Control Approach

As compared with other affected industrialized countries, declaration of SoE in Japan was later in terms of timing and much softer in terms of contents. Curiously, however, the damage Japan has suffered so far has not been very serious. Since the PCR-testing policy is different from country to country, reference is made to the death-related statistic.

Confirmed Deaths due to COVID-19⁷

		Per Million Population	In Number
	E	553.2	25,857
	I	484.1	29,315
	GB	435.8	29,427
	USA	216.2	71,130
	D	83.6	6,981
	ROK	5.0	255
	J	4.7	590
	PRC	3.2	4,633
	TW	0.3	6

It is too early to explain the reason for the limited death-tolls in Japan without speculating, such as it may be due to the medical system (e.g. universal health insurance, mandatory Bacillus Calmette-Guérin (BCG) vaccination, more beds in hospitals, etc.), social customs (e.g. no handshaking, eating with chopsticks rather than grabbing bread with bare hands, many people wear masks during winter, taking off shoes at the entrance of the residence, etc.), Confucian culture to follow the leaders regardless of whether the instruction is binding or not, or harmony-oriented social pressure to conform. If Japan is indeed luckily protected from the virus thanks to all or part of such non-legal “social walls”, but if the situation worsens beyond a certain point after which such social walls cannot resist any more (The trend pattern in the semi-logarithmic graph pasted on the following page indeed shows that Japan has not yet reached the deceleration period like in other countries), Japan will face a serious challenge as long as the present legal regime without legally binding effective preventive measures remains unchanged. On May 3 (Constitution Day), PM Abe pointed out that the Constitution lacks a provision to effectively cope with a state of emergency.

Mikio Tanaka, Partner
City-Yuwa Partners, Tokyo

4 For example, Ministry of Land, Infrastructure and Transport issued a notice on March 16 (i.e. after COVID-19 has been covered by SMLANI) that it considers that difficulties caused by COVID-19 in procuring materials or machines, or COVID-19-infection shall be considered as *force majeure* within the meaning of the Standard General Terms and Conditions of Construction Work Contract, unless the contractor conducted willfully or negligently, without

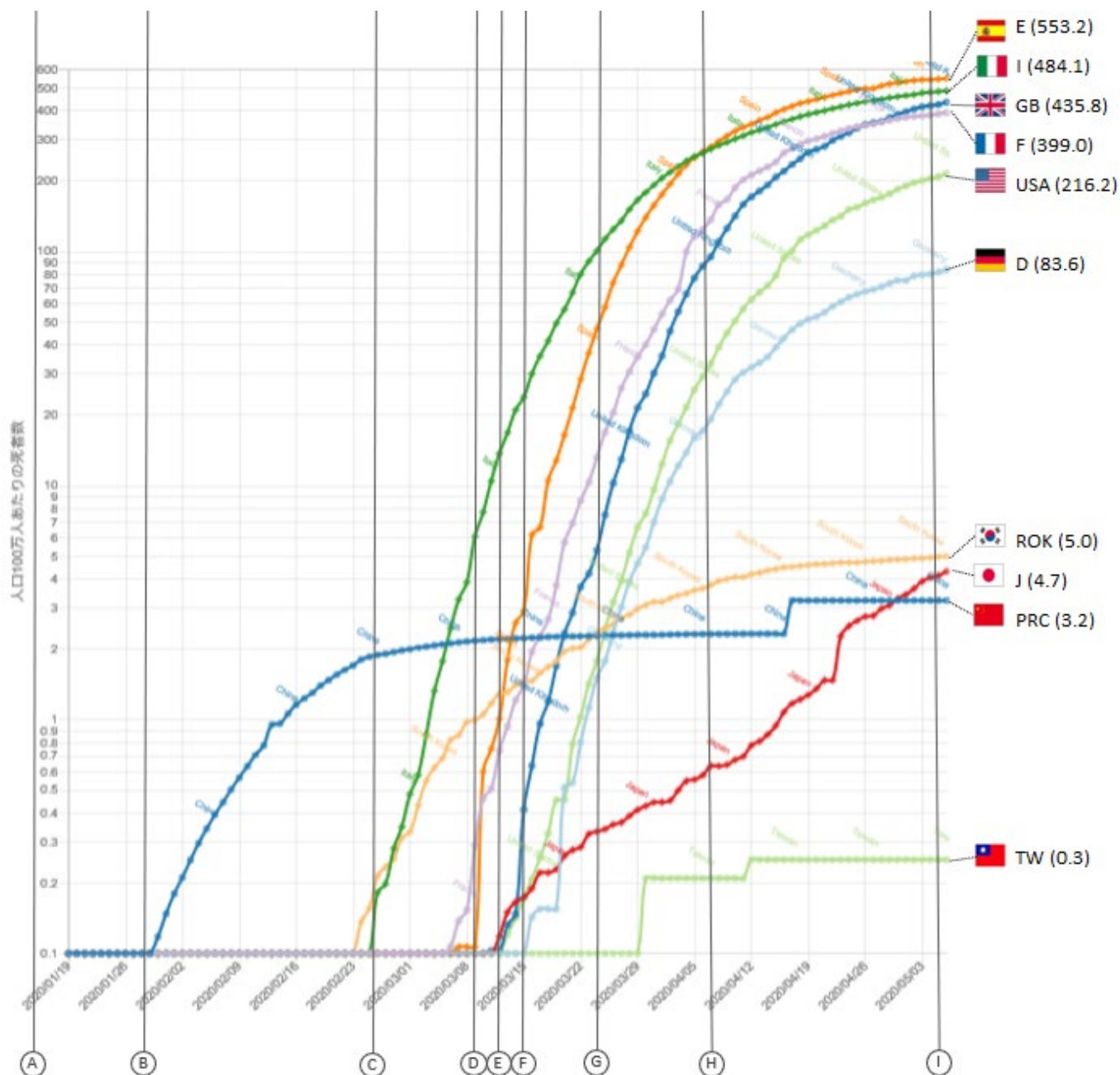
explicitly referring to the request or the instruction under §45 SMLANI.

⁵ <https://www.asahi.com/articles/ASN55636JN55UBQU003.html>

⁶ Chūō Hōki (2013), P161

⁷ Source: <https://graphics.reuters.com/CHINA-HEALTH-MAP-LJA/0100B5FZ3S1/index.html> (as of 23:00 on May 6, 2020)

Deaths per One Million Population



Source of the semi-logarithmic plot (excl. the chronology): Sapporo Medical University <<https://web.sapmed.ac.jp/canmol/coronavirus/death.html>> as of May 6, 2020

- A) First diagnosis of COVID-19 in Japan (1/16)
- B) COVID-19 was designated as an "infectious disease" under the Infectious Diseases Control Law (1/28)
- C) Government requested to close all elementary, junior high, and high schools in Japan until early April (2/27)
- D) Amendment of Enforcement Order to the Act on Emergency Measures for Stabilizing Living Conditions of the Public (3/10)
- E) WHO declared that the spread of COVID-19 has reached the stage of pandemic (3/11)
- F) Amendment to the Special Measures Law Against Novel Influenza, et al. so that it also covers COVID-19 (3/13)
- G) Announcement of Postponement of the Tokyo Olympic / Paralympic Games (3/24)
- H) Declaration of the State of Emergency in Seven Prefectures in Japan (4/7)
- I) Extension of the State of Emergency in Japan (5/5)

Although the number of fatalities in Japan itself is significantly lower than in Western countries on this table, the different shape in trend patterns show that Japan has not yet reached the deceleration stage.