NOTE TO NYU STUDENTS

Professors Alvarez and Upham kindly invited me to share the early draft of a paper with you. Here it is. Many so-called 'works-in-progress' are finished products awaiting publication. Not this one. This is a very early draft, indeed the first draft, of what I eventually hope will be a publishable piece. As you will see, it reads a bit like a set of notes, not a tight argument aimed at answering a central question. That is because I have not yet figured out what the question is that the paper is meant to answer. For that reason, I look forward to all of your comments and suggestions, both those that take a stab at articulating a thesis, or a question, and more specific comments about the various sections of the paper. Thank you in advance for the time you spend on this. I look forward to meeting you.

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Covid-19 in Japan: A Preliminary Socio-Legal Analysis

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As the coronavirus continues to surge through various countries around the world, a great deal of attention is being paid to whether there are particular policies and practices that are more or less likely to stop the spread of this dangerous and fickle virus. Scientists, public health experts, politicians, and scholars are scanning the globe for transplantable practices, just as they have done with tobacco consumption, drug use, crime, and more. What might they learn from Japan? Has Japan succeeded in limiting the harm from the coronavirus? Are there lessons that can be learned from the Japanese experience?

On February 3, 2020, after a languid trip through the waters of southeast Asia, the Diamond Princess was scheduled to dock in Yokohama. Just two days earlier, however, a passenger who had disembarked in Hong Kong tested positive for the novel coronavirus. With 2666 passengers and 1045 crew members travelling on the ship since January 20, the Japanese government had a dilemma. Should it allow the ship to dock and the passengers to disembark, or should the ship be quarantined?[1]

Quarantine had never been used in Japan to battle an infectious disease, but whatever hesitation the Japanese government may have had about quarantine was erased on February 5, when and a second case of the virus was confirmed. Between February 5 and March 1, when

[1] Quarantine Act, (Act No. 201 of 1951, amended by Act No.30 of 2008).

Captain Gennaro Arma finally disembarked from the ship, over 700 passengers and crew tested positive for the virus, making it the second largest coronavirus outbreak in the world (Wuhan was the largest). Sadly, the Japanese government appears to have mismanaged the outbreak. Passengers were told to remain in their cabins but the crew continued to work and sleep in tight quarters. Protocols to limit the spread of infectious disease were not followed. The supply of personal protective equipment was inadequate. In short, as the virus spread throughout the ship, it became clear that the government's policy was seriously flawed, and that the country was on the brink of a major outbreak that would make it a global epicenter of a deadly new pandemic.

Instead of being devastated by a dangerous new virus, however, Japan has largely avoided the fate of other industrialized democracies. Currently (as of October 28, 2020) 97,722 cases of the virus have been identified nationwide, with a total of 1737 deaths. Of those cases, 30,456 have been in Tokyo, with 171 deaths; 12,348 cases with 117 deaths in Osaka; and 8389 in Kanagawa, 5869 in Aichi, and 5653 in Saitama. Even the most cursory comparison with the US and Europe makes clear Japan's enviable case count. Despite Japan's aging population and urban density, there are currently (early November, 2020) more positive cases every day in the United States than cumulative cases in Japan, and more deaths every two days in the US than Japan's total death count.

Other G7 countries also provide a sharp contrast to Japan. France has over 1.2 million cases and 35,000 deaths; the UK, over 1 million cases and almost 47,000 deaths; Italy, 700,000-plus cases and nearly 40,000 deaths, and Germany, 545,000 cases and in excess of 10,000 deaths. Even Canada, which many have highlighted as a model for the US, far outpaces Japan; it has roughly 7 times the number of cases per capita, and over 15 times the number of per capita deaths.[2] At least when viewed from the West looking East, Japan has clearly succeeded in avoiding the tragic impact of the virus on the US and Europe.

If we compare Japan to some of its neighbors, however, there may be less cause for celebration. A number of countries (all of them with smaller populations than Japan) have just a fraction of Japan's number of infections and deaths: Taiwan has 550 cases and 7 deaths; Korea 26,146 cases and 462 deaths; Thailand 3759 cases and 59 deaths; Vietnam 1172 cases and 35 deaths. Even larger nations, like Indonesia (population 268 million) have better outcomes (at least for now) than Japan—396,000 cases and 13,000 deaths.

Success or Failure?

The difficult comparative question here is what the best comparative framework is for understanding the situation in Japan. Should we rate Japan a success as compared to other Western(ized) industrial nations, or a failure in comparison to its neighbors in Asia? Relatedly, is the measure of success only the epidemiological profile of the country, or should we be judging success/failure based upon a broader set of criteria? For example, surveys have shown that the

[2] https://www.theatlantic.com/ideas/archive/2020/07/i-moved-canada-during-pandemic/614569/.

Japanese public gives it government failing marks in its management of the coronavirus, judging it much more harshly than the public in XX (cite study and countries) where the virus has spread more rapidly and caused many more deaths. Other measures of success/failure could also be considered, such as how the public health infrastructure of different countries has functioned during the pandemic, whether a country has had a sufficient supply of PPE, whether treatment has been available to all who need it, etc.

Underlying these different perspectives is the question of why one compares, since the answer to that question will yield different comparative preferences. Our comparative framework may change if, for example, we are testing a theory that suggests regional variation in the virulence of the virus (eg, is there an Asian variant of the coronavirus that will have a similar impact across nations in Asia), or the prevalence of mask use and its impact on the spread of the virus, or the relationship between religious practices and the spread of the virus, or whether federalized or centralized states have had more success handling the virus, or if common law or civil law societies have fared better/worse during the pandemic. Which is to say that there is not clearly a 'right' or 'wrong' comparative framework, but different sorts of comparative questions and aspirations that will justify one or another comparative approach.

While acknowledging the complexity of comparison, my inclination is to compare Japan with other Westernized, industrialized democracies. They have much in common legally, politically, economically, institutionally, etc. And they are the places I know best, which makes comparison, even implicit comparison, possible. I'm skeptical of the comparison to Taiwan (the population of Tokyo and Taiwan are similar, so this is applies/oranges), or China (very different legal and political system, and many other differences), Hong Kong (it is a city, not a country). South Korea is closer and may well be a useful point of comparison; there, we saw the government embarking on an extremely aggressive strategy of testing and contact tracing, at least in part because of its experience with SARS and MERS. Perhaps one can say that Korea has been extraordinarily successful, even more so than Japan, but that compared to its cognate nations, Japan has also met with great success.[3]

Explaining Japan's Relatively Low Rate of Infection and Death

If my going-in view is that Japan is a success, then what explains that outcome? Good government? Good Science? Good luck? Good genes? A variety of explanations have been circulating, and it is far too early for a final assessment, but at least for now I think there are three top (and complementary) candidates—good habits (ie social norms), good luck, and good science.

With regard to social norms, it is important to remember that we are dealing with a virus that spreads through contact as well as through airborne droplets and aerosols. As a result the mitigation strategies we have seen evolve around the world are sanitation (keeping surfaces and hands clean), social distancing, and the use of masks.

[3] And the Korean success has come with significant costs re: privacy and human rights, per Prof Ko, USALI webinar.

Japan was perfectly positioned to embrace these strategies. In fact, most of them were common practice in Japan before the coronavirus took hold. Unlike in the US, the use of masks in Japan is decidedly apolitical.[4] And unlike in the US, the Japanese are accustomed to wearing masks to protect others, not themselves, from illness.[5] Greeting involves bowing, not shaking hands, or hugging, or kissing, and certainly not the triple-kiss so common in parts of Europe. In places where one might expect virus transmission, like subways, the Japanese generally ride silently, and rarely speak loudly. At the start of the pandemic, shops quickly placed hand sanitizer at their entrances, built plexiglass shields, and did temperature checks. All of these practices limit the spread of the virus, and have surely helped to limit the number of infections in Japan.

Good science also explains Japan's ability to sidestep the worst of the coronavirus. While less aggressive than South Korea, the Japanese public health community understood early on the importance of contact tracing and took a proactive approach to what they call cluster-busting. Those who tested positive were quickly isolated, and everyone with whom they were in contact was notified and tested.[6] This approach appears to have worked to nip potential outbreaks in the bud so that community transmission never got out of hand. Similarly, some have credited the government with following the science and 'getting it right' in terms of how it managed the quarantine of the Diamond Princess, the closure of schools, the closure of borders, and more. There were, of course, disagreements among scientists, so scientific opinion was not always a clear guide. And politics diverged from science on multiple occasions, such as when the Governor of Osaka suggested that gargling with a povidone-iodine solution would treat the virus, and when Prime Minister Abe aggressively promoted the use of an untested drug called Avigan.[7] Still, for the most part, the Japanese government's response to the coronavirus was guided by public health experts, along with those charged with overseeing the economy. This explanation gives the government and its covid expert panels credit for doing a good job of keeping the virus under control while keeping the country economically afloat.[8]

Good luck, always an asset, also comes into play. The government pressed for the closure of schools at the end of February, and by early March schools across the country had shut their doors. One might think that is good science and not good luck, but Prime Minister Abe made

[4] Perhaps one exception was the Abe administration's policy of distributing two masks to every Japanese household at the start of the pandemic. The rollout was extremely slow, the cost high, and the masks embarrassingly skimpy. Dubbed 'abenomask,' they became a symbol of the government's bumbling approach to handling the coronavirus. Still, that did not politicize the wearing of masks, which appears to be uniform across the political spectrum in Japan.

[5] Masks in Japan are routinely used during hay fever and flu season.

[6] This happened with outbreaks in karaoke bars, gyms, and a New Years party in a floating restaurant held by a taxi association in Tokyo, attended by 70-90 guests, and resulted in at least a dozen cases.

[7] https://www.reuters.com/article/us-health-coronavirus-japan-gargling/gargling-solution-flies-off-japans-shelves-after-governor-touts-anti-virus-effect-idUSKCN2510PQ; https://www.nytimes.com/2020/05/05/business/japan-avigan-coronavirus.html.

[8] For example, see Yasutoshi Nishimura [Minister of State for Economic Revitalization and Minister in Charge of Covid-19 Response], "How Japan Beat Coronavirus Without Lockdowns," *Wall Street Journal*, July 7, 2020.

that recommendation without consulting with his health advisors.[9] Instead, it seems to have been an echo of the school closure ordered during H5N1 a decade earlier, and a political calculation by Abe aimed at improving his sagging popularity (it didn't work).[10]

Other theories have gained some traction without much, or any, supporting evidence. One is the claim that a "factor x" protects the Japanese people from covid, or that there is a different strain of the virus in different places, with a weaker virus in Japan than in the US or Europe, in CA vs NY, etc. Those who have made this claim include Inoue Tatsuo, a well-known law professor at the University of Tokyo, and former Tokyo Governor Masuzoe. Finance Minister Taro Aso provides a similar explanation, claiming that Japan's low infection rate is due to Japan's higher "cultural standard."[11] Other pseudoscientific claims point to a TB vaccine that was once used in Japan, the BCG vaccine, and suggest that it somehow provides protection against the coronavirus. It is an attractive theory, because it would help to explain how the Japanese population, and some other populations in Asia, seem to not be terribly impacted by the coronavirus. But at this point the theory appears to lack any significant scientific basis, and few if any serious scientists believe it.

Declaring a State of Emergency

As the number of cases in Japan crept upward in the spring of 2020, the central and local governments began to consider their policy options. For both, their ability to act was shaped by Japan's infectious disease control laws.

After a century of neglect--Japan's first infectious disease control law was passed in 1897 and remained in force until 1999—the legal framework for managing infectious diseases changed dramatically during the first two decades of the 21st century. The most significant change was the passage of the Infectious Disease Control Law (IDCL) of 1998, amended in 2008 and again in 2014, which classifies infectious diseases into five main types depending upon the nature of the disease and the type of action deemed appropriate for managing it.[12] Type I, II, and III diseases are by far the most serious, and include Ebola, plague, SARS, tuberculosis, H5N1 avian influenza, cholera and typhoid. Type IV and V diseases include yellow fever, hepatitis A, avian influenza (except H5N1), measles, and AIDS. The disease categories are critical in determining what sort of governmental response is permissible. Depending upon the perceived severity of an infectious disease, prefectural governors (Japan is divided into 47 prefectures) may be obligated to perform medical examinations on suspected patients, prohibit them from engaging in particular jobs (such as restaurant work), compel hospitalization, limit access to potentially

[9] https://www.washingtonpost.com/world/asia_pacific/japans-abe-faces-mounting-anger-over-school-closures-lack-of-virus-testing/2020/02/28/ddd3ca58-59e0-11ea-8efd-0f904bdd8057_story.html.

[10] When Governor Suzuki of Hokkaido declared a state of emergency (a symbolic act, because he lacked the legal authority to do so) and closed the schools his popularity soared. Abe was surely hoping for the same result.

[11] https://www.bloomberg.com/news/articles/2020-06-05/japan-minister-says-higher-cultural-standard-helped-beat-virus.

[12] Infectious Disease Control Act, 1998 (Act No.114 of 1998, amended by Act No. 114 of 2008, Act No. 115 of 2014).

contaminated buildings, eliminate traffic in certain areas, curtail the movement of infected persons, and more.

Of course, not all diseases are specifically categorized under the IDCL, so the law enables the government to manage new infectious diseases under a set of provisions that require the Cabinet to apply the label 'designated infectious disease' to those diseases "which would be likely to serious affect the health of the public in the event of its spread."[13] Doing so enables the government to apply its powers under the IDCL to the new disease, as it did with SARS in 2003 and H5N1 avian influenza in 2006, both of which were later added to the IDCL as Category II infectious diseases.

In the aftermath of the threat posed by the H5N1 avian flu, the Japanese government decided to create a legal instrument specific to pandemic influenza.[14] It drafted an *Action Plan to Counter Influenza* in 2005, and in 2012 passed the *Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response* (API).[15] The Act applies to new types of influenza enumerated in the IDCL, and confers a broad range of powers on the national and local governments when faced with a virus that is "newly becoming transmissible from person to person as a pathogen and which is deemed to be likely to seriously affect the lives and health of the public in the event of its rapid spread across the country." For the Prime Minister to exercise his power under the API he must first establish an Advisory Committee, though he is not bound by its recommendations. He may then declare a state of emergency, lasting up to two years, if the route of infection of the new influenza is unclear and it is "causing or could cause significant damage to the daily lives of the people and the national economy by rapidly spreading nationwide"[16] Under a state of emergency, citizens can be asked to remain indoors, business will be told to close or limit their hours, residents can be vaccinated, emergency medical facilities can be opened, and more.[17]

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[13] Article 6(8) of the IDCL.

[14] Sayuri Umeda, "Japan: Legal Responses to Health Emergencies," https://www.loc.gov/law/help/health-emergencies/japan.php.

[15] The Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response (Act No. 31 of 2012).

[16] Article 32(1) of the Act, see https://www.cas.go.jp/jp/seisaku/ful/keikaku/pdf/national%20action%20plan.pdf.

[17] As stated in the API, p.7: "As for countermeasures against PI [pandemic influenza] that could cause significant damage to the lives and health of the people, it is necessary to comprehensively implement a combination of non-medical measures, such as reducing opportunities for people-to-people contact by calling on the general public to refrain from going out unless it is urgent and unavoidable, requesting restrictions on the use of facilities and asking business operators to scale back business operations, and medical measures, including the use of vaccine and anti-influenza virus drugs…. Regarding non-medical infection control measures in particular, adopting a "whole-of society approach" is expected to be effective. Therefore, it is important for all business operators not only to make voluntary efforts to prevent infection in workplaces but also to proactively consider implementing such measures as narrowing the range of important operations that should be continued from the perspective of preventing the expansion of infection…. It is necessary for each business operator and each individual person to take appropriate actions and make preparations, including stockpiling necessary supplies, in order to prevent infection and expansion of infection."

On January 28, 2020, the Ministry of Health, Labor, and Welfare asked the Cabinet to include the novel coronavirus as a 'designated infectious disease' under the IDCL, thereby triggering the provisions of the API. Simultaneously, the Cabinet ordered a revision of the 1951 Quarantine Act by including coronavirus as a quarantinable disease, which gave the government legal cover when it quarantined the Diamond Princess. Another Cabinet Order two weeks later expanded the government's quarantine authority for the coronavirus, allowing it to isolate asymptomatic individuals who test positive.

Because Japan is not a federalized system, and the balance of power between central and local government in Japan is decidedly toward centralization, and prefectures have far less autonomy than states in the US (Ch.8 of the Constitution addresses these powers, see Art 92 and 94). As one might expect, therefore, prefectural governments generally seek to increase their legal authority, which creates predictable political tension.[18] The sometimes uncomfortable balance between central and local control in Japan is highlighted by Covid-19.

With regard to local government, prefectural governors (each of Japan's 47 prefectures has its own governor) have no legal power to declare public health emergencies, and therefore no legal authority to order lockdowns.[19] Instead, they are dependent upon an emergency declaration issued by the central government, which then confers on them a range of options. That did not keep some governors from exercising their political power and taking action not sanctioned by the central government.

For example, the Governor of Hokkaido, Naomichi Suzuki, closed schools on February 26 and declared a state of emergency on February 28, a symbolic declaration (and political gesture) that lacked legal force.[20] Likewise, the Governor of Osaka, Hirofumi Yoshimura, understood that the coronavirus provided him with an opportunity to elevate his national stature, and capitalized on that opportunity. He has led the call for giving prefectural governors more power to manage the virus, insisting that they be able to close down and fine businesses like nightclubs, karaoke lounges, bars, and others if they defy government requests to close.[21] Moreover, when the central government was slow to announce a plan to reopen the economy, Governor Yoshimura created his own set of standards for reopening that garnered national attention. Yoshinobu Nisaka, the Governor of Wakayama, is known for his independent streak; he developed a response to the coronavirus dubbed the 'Wakayama model' that depends upon particularly aggressive testing and tracing. Tokyo Governor Yuriko Koike, along with other governors, has voiced frustration at what she sees as the central government's sluggish policy

[18] See Dan Rosen's article, which likens the tension between the prefectures and central government re: Covid-19 to Japan's feudal past.
[19] It may be that the prefectural governors would be able to take more aggressive action if the novel coronavirus were included under the 1998 *Infectious Disease Control Law* (IDCL), but that was not the case in spring 2020.
[20] See Tomohiro Osaki, "How Far…."
[21] Eric Johnston, "Osaka governor spearheads national effort to enforce business shutdowns over coronavirus," *The Japan Times*, July 25, 2020, https://www.japantimes.co.jp/news/2020/07/25/national/osaka-governor-business-shutdowns-coronavirus/.

response, and through a series of press conferences and public announcements became an important voice in crafting national policy.[22]

The relatively proactive response by some of Japan's most visible prefectural governors highlights the sluggish response of the central government. One reason for Prime Minister Abe's slow reaction to Covid-19 was his reluctance to rely on the 2012 *Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response* (API) as the legal basis for declaring a state of emergency. The API was passed by the Democratic Party of Japan (during one of the brief interludes in postwar Japan when the Liberal Democratic Party was out of power) in order to combat H5N1 avian flu, and Abe's distaste for relying on legislation not passed by his Liberal Democratic Party appears to have contributed to his view that the API had to be amended before he had the legal authority to declare a state of emergency.

The formal reason given for the need to amend the API was asserted by Chief Cabinet Secretary Yoshihide Suga, who stated that the IDCL could not be applied to the novel coronavirus because only completely new infectious diseases can be declared "designated infectious diseases," and coronaviruses have been around for many years. His view was echoed by Japan's Minister of Health, Labor and Welfare Katsunobu Kato, as well as by some legal scholars. That claim has been disputed by other scholars and politicians, who argue that the existing legislation could have been interpreted as applying to the coronavirus. To clear up any ambiguity about the API, Abe began to press for its amendment. During the legislative debate, there was considerable back and forth between the LDP and opposition parties, with one key member of the CDP (Constitutional Democratic Party), Shiori Yamao, rejecting the recommendation of CDP leader Yukio Edano to support the amendment. Instead, she voted against it because it did not require Diet (parliament) approval of emergency declarations, gave the Prime Minister too long a window (two years) during which to declare states of emergency, and provided the government with too much power to limit daily activities. [23]

On March 13, 2020, the Diet amended the API, which explicitly gave the prime minister the legal authority to declare a state of emergency assuming certain specified criteria (such as…) were met.[24] That in turn enables prefectural governors to issue stay-at-home requests for residents and temporary closure requests for certain businesses. As cases in Japan escalated, Prime Minister Abe declared a state of emergency for seven prefectures on April 7, and nine days later extended it to the remaining 40 prefectures.

Japan's 'Soft' Lockdown

[22] It seems that some prefectural governors did not want the state of emergency to be lifted because they would lose their power, albeit limited, to control the virus. On the other hand, they often enjoy more public support than the central government or Prime Minister, so it may be that a request from the prefecture is sufficient to gain compliance without legal sanctions.

[23] https://www.japantimes.co.jp/news/2020/03/13/national/politics-diplomacy/japans-diet-unites-surface-least-pass-coronavirus-emergency-bill/.

[24] https://www.mhlw.go.jp/content/10900000/000624195.pdf

A state of emergency may evoke images of isolated streets in Rome, lockdowns in Wuhan, and a desolate Manhattan, but a Japanese-style emergency is a different matter. Under the amended API, a state of emergency can last for up to 2 years, and prefectures included in the declaration must ask residents to exercise 'self-restraint' by staying home, can expropriate private land for medical facilities, and are able to require manufacturers and suppliers to sell them essential supplies like food and medicine.[25]

Importantly, neither the central government nor prefectural governments have the legal authority to order business closures or individual lockdowns under the API.[26] Instead once the central government declares a state of emergency, governors can then make requests to businesses and individuals to curtail their activities, but those requests are not backed up by any enforcement power.

Why does the government lack the legal authority to order the sort of 'hard' lockdown that characterize the response to the coronavirus in so my other nations? One view is that the government could do more than simply request compliance if it were to rely on the 1998 *Infectious Disease Control Law* (IDCL) but that it has either been unsure of which law to rely on (the IDCL or API) or has not wanted to order a strict lockdown.[27] Its reluctance to order a legally mandated lockdown could be the result of its lack of appetite for paying financial compensation to businesses that are forced to close. It is not clear that the government would be required to pay such compensation, but Article 29 of the Constitution ("The right to own or to hold property is inviolable. Property rights shall be defined by law, in conformity with the public welfare. Private property may be taken for public use upon just compensation therefor") could be interpreted as requiring the government to compensate businesses ordered to close.[28]

Perhaps more important is the observation by a former big city governor that even if the government were not legally required to pay compensation it would be political suicide to not do so because it would cost them the next election. And, as everywhere, the government is acutely aware of the economic impact of closing down the economy. In fact, the Japanese government has spent aggressively to shore up the economy during the pandemic. Every household received a 100yen/person payment, and the government approved two large stimulus packages, each 117 trillion yen ($1.1 trillion), to cover increased medical costs, payments to firms unable to cover their rent, subsidies to businesses with a drop in sales, and more (a 3rd such package is under consideration).[29] Such payments, of course, not only help to

[25] https://www.mhlw.go.jp/content/10900000/000624195.pdf.
[26] It may have been possible for the Prime Minister to rely on the 1998 *Infectious Disease Control Law* (IDCL) rather than the *Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response* (API) to combat covid-19, but his legal and political advisors clearly saw the API as the better alternative.
[27] Need to check to be sure this is permissible under the IDCL.
[28] Minister Nishimura said that no compensation would be necessary. Masuzoe says that you can't force shops to close w/o compensating them, and that is why the gvt requests but does not require, enforce shutdowns.
[29] The 100,000yen/person payout was not based on an assessment of need (I'm told that a need-based payout to individuals was considered but in the end it was too complicated, would take too long, etc.).

support Japan's sagging economy, but were also targeted at improving the Prime Minister's sagging popularity.

There is another reason for the lack of appetite for a 'hard' lockdown. All it took in Japan was a 'soft' lockdown to achieve the degree of compliance that the government thought was necessary to combat the spread of the coronavirus. This is not meant to suggest some sort of innate deference to authority that makes the Japanese public inherently compliant. Instead, it is generally true that most people, in most places, will follow public health recommendations. In Philadelphia, for example, the mayor signed an Executive Order in June 2020 requiring the use of masks to combat covid-19. Failure to comply with the order, however, "does not create grounds for any law enforcement officer to stop, detain, or arrest any individual."[30] Despite the lack of sanctions, by mid-July over 80% of Center City residents were masked, a level of compliance that increased through the summer.[31] Moreover, the Japanese public had recently learned of the death of Ken Shimura on March 29, 2020. Shimura was a household name in Japan for almost half a century, and his death, like that of Rock Hudson from AIDS, make Covid-19 a reality for the entire population and primed the public to take it seriously.

Complying with an unenforceable mask ordinance is not the same as complying with an order to stay home, or closing one's business, and it is difficult to know whether Philadelphia residents and companies would be as compliant with a toothless lockdown as citizens and businesses across Japan. Moreover, the government's goal was not that 100% of people and businesses go dark. Instead, the stated goal was a 70-80% reduction in social interaction. Businesses were asked to close or to reduce their hours. Sporting events and other large cultural events were asked to cancel.[32] Banks, supermarkets, and train service continued, as did other essential services. Perhaps most important was the government's emphasis on personal conduct. People were asked to work from home, especially white-collar workers, and to not cross prefectural boundaries or go to nightclubs or music venues. Going to a medical facility or getting outdoor exercise was fine, but not speaking on public transport or sitting across from people while eating a meal (side by side was fine). As an overall guide to personal conduct the government emphasized the avoidance of what it called the "three Cs," or *mitsu no mitsu*: closed, poorly ventilated spaces (mippei); crowded spaces (misshuu), and close contact (missetsu).[33]

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[30] City of Philadelphia, Office of the Mayor, Department of Public Health, "Emergency Order Concerning the Use of Face Coverings to Prevent the Spread of 2019 Novel Coronavirus (Covid-19)," https://www.phila.gov/media/20200628193437/Mask-Order-Signed-06-26-20.pdf.

[31] https://www.phillymag.com/news/2020/07/20/philadelphia-masks-coronavirus-survey/; https://billypenn.com/2020/09/09/philadelphia-mask-wearing-data-doubles-coronavirus-cases-drop-maskupphl-campaign/.

[32] Need more detail here re; whether gvt can enforce limits on size of gatherings (I don't think so), and on the 1000 sqm limit re: gvt requests, which covers most restos, bars.

[33] The 'three Cs" in Japanese are 換気の悪い密閉空間 (kanki no warui mippei kūkan, closed spaces); 多数が集まる密集場所 (tasū ga atsumaru misshū basho, crowded spaces); 間近で会話や発声をする密接場面(madjika de kaiwa ya hassei o suru missetsu bamen, close contact).

Measuring compliance is difficult, but Google's Mobility Data provides insight into the impact of the 'soft' lockdown. [I need to go back to the raw data, and also get data from NTT/Docomo and JR/Metro, and provide egs, but it is clear that in almost all areas of life/behavior there was a high degree of compliance w/ the government's requests. Over Golden Week, for example, there was a 90%+ drop in Shinkansen use. Department stores and many other retailers closed. A significant number of restaurants remained open but shut down by 8pm.[34]].

Jishuku Keisatsu

Culture and social norms may help to explain compliance with government requests, but they can easily be overgeneralized. Deference to authority, and a focus on community well-being, may both exist in Japan, but neither is sufficiently defined to be terribly illuminating. There is, however, a somewhat more specific cultural practice that helps to explain the high degree of compliance—subtle, and not so subtle, social pressure. In its weakest form that involves government regulators nudging big companies to comply, and those companies in turn nudging their employees. But in its stronger form it involves what the Japanese call 'jishuku keisatsu.' Kyoto University anthropologist Makoto Nishi describes 'jishuku' as "a practice of voluntary restraint from fun, luxury and celebration," and 'keisatsu' refers to the police.[35] Combined, 'jishuku keisatsu' involves the practice of citizens monitoring each other to be sure they are behaving properly, and pressuring them if they fail to do so.

The enforcers of norms of behavior are not appointed by the government, but instead take it upon themselves to pressure their fellow citizens. They are not affiliated with particular political parties, radical ideologies, or linked by any formal networks. Instead, they are the neighborhood busy-bodies who check to be sure that the trash is properly sorted, that bicycles are parked in the right spot, and that neighbors are not being too noisy when having a party. Some say they tend to be older, retired, with time on their hands, but given their apparent prowess at tracking people down online and making use of the internet to pressure individuals and businesses it is unlikely that all of them are retirees.

One colleague of mine, a senior attorney, describes running to a store to purchase something for his child and forgetting his mask. There is no law that requires mask use in Japan, and the store did not require customers to wear masks, but the cold stares he received when he got on line to buy his goods were so off-putting that he gave up on the purchase and went home to get his mask. A similar situation was described to me by a law professor in Tokyo who was made to feel extremely uncomfortable by another subway passenger because he wasn't wearing a mask. Even one of the government's coronavirus policy advisors experienced the wrath of the jishuku keisatsu when jogging in Tokyo and getting poked by an umbrella because he was not masked.

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[34] Good data here re: testing, cases, mobility, etc., though the mobility data seems to show more modest changes than the raw data from Google Mobility that I've looked at, despite the fact that this data is based on the Google data. https://news.google.com/covid19/map?hl=en-US&mid=%2Fm%2F03_3d&gl=US&ceid=US%3Aen

[35] https://onlinelibrary.wiley.com/doi/10.1111/1469-8676.12853#:~:text=The%20Japanese%20term%20jishuku%20is,death%20of%20the%20Showa%20emperor.

One might imagine that the government would discourage people from taking the law into their own hands. Japan, after all, has a well-developed legal system, and compared to most countries demonstrates a high degree of respect for the rule of law. Nonetheless, the government appears to rely on and approve of the jishuku keisatsu. [Here, say something about Haley, how lack of sanctions is a typical feature of J law, with enforcement done informally. And note the irony that the government's limited power to declare a state of emergency, and to be able to legally enforce it, is often explained with reference to bad memories of the behavior of the military police during WWII, a high degree of sensitivity to being controlled by the state, and concern about the infringement of human rights. Yet jishuku keisatsu, which harkens back to a time when neighbors violated one another's privacy and informed on each other, does not seem to trigger the same worries about surveillance and intrusion on human rights.]

The policing of private conduct in order to boost compliance with the government's emergency order is akin to the one sanction available to prefectural governors under the API. That sanction is public shaming. Section 45 of the API allows prefectural government to publish the names of businesses that do not comply with its requests to curtail business activities.[36] The expectation is that businesses will want to avoid the reputational loss that might result from being outed by the government, and will comply before they are publicly named and shamed. Those businesses that are particularly intransigent will have their names announced by the government and are then expected to fold to the pressure and follow the recommendations of the prefectural authorities.

Perhaps not surprisingly, instances of such shaming are rare; most businesses fall into line without the need to be pressured. Perhaps less surprising is that public shaming seems to have been focused on the pachinko industry, a Japanese form of gambling. [37] That is not to say that pachinko parlors were either unusually resistant to government requests, or hotbeds of infection. There is no evidence that pachinko parlors were especially reluctant to comply with prefectural government requests. Nor have pachinko parlors been host to any clusters of infection that would make them unusually worrisome as vectors of coronavirus infection.[38] What distinguishes pachinko parlors is their reputation as "a very second class and kind of vulgar and dirty and dangerous business" owned and operated by Korean Japanese.[39] To be fair, gambling in Japan is a huge industry, with 30 times the gambling revenue of Las Vegas, and

[36] National Action Plan for Pandemic Influenza and New Infectious Diseases, June 7, 2013, p.91 (http://www.cas.go.jp/jp/seisaku/ful/keikaku/pdf/national%20action%20plan.pdf). According to the official translation of the law, "Designated prefectures will make requests on restrictions on the use of facilities when the spread of infection can occur. When such requests are not met with no [sic] justifiable reason, designated prefectures will make further requests and instructions. These requests and instructions will be made public." Basic Policies for Novel Coronavirus Disease Control by the Government of Japan (Summary)," March 28, 2020 (revised April 16, 2020).

[37] https://www.reuters.com/article/us-health-coronavirus-japan-pachinko/japans-osaka-to-name-and-shame-pachinko-parlours-defying-coronavirus-lockdown-idUSKCN22903Z.

[38] Some have suggested that the lack of coronavirus clusters in pachinko parlors can be explained by the wearing of masks and the fact that patrons do not speak. https://japantoday.com/category/national/why-have-no-covid-19-clusters-occurred-in-pachinko-parlors.

[39] https://www.businessinsider.com/what-is-pachinko-gambling-japan-2018-7.

it occurs in crowded, smoke-filled spaces that one might imagine could trigger super-spreader events. Pressing them to comply with prefectural requests is surely justifiable, but treating them differently than other potentially worrisome businesses would be unjustifiable.

Ironically, the shaming of pachinko parlors by the Osaka and Kanagawa prefectural governments did not work out as planned. Perhaps because of their already maligned reputation, only a portion of them closed when they were outed, but others remained opened. Those that stayed open appear to have experienced a boom in their business; after all, once their names were publicized, the pachinko-obsessed public knew where to go if they wanted to gamble.[40] In short, public shaming is the only available enforcement mechanism for prefectures seeking to limit business activity during a pandemic, and it is low cost and easy to do, but it lacks the teeth and legitimacy of legal sanctions and appears to have been of limited value during the coronavirus emergency.

Discrimination

In addition to the enforcement of social norms through jishuku keisatsu and the naming/shaming of businesses by prefectural governments, there is a tendency in Japan to treat those who have been in contact with covid-19 patients or tested positive for the virus as in some way at fault for their predicament. The inclination to 'blame the victims' of the coronavirus—they were not careful, didn't wear a mask, may have travelled, could have spread it, they deserved it—echoes the treatment of A-bomb victims, those with HIV/AIDS, Hansen's disease patients, and people who were affected by the nuclear accident in Fukushima. The result is what is now called 'korona-ijime' or 'korona-sabetsu,' meaning coronavirus-related bullying and discrimination.

Although empirical evidence is lacking, there have been a significant number of anecdotal reports of such discrimination. Members of the Disaster Medical Assistance Team (DMAT) who took care of Japanese evacuees and other passengers from the Diamond Princess reported being treated like 'germs,' and were asked to keep their children out of nursery and elementary schools.[41] At Sagamihara Chuo Hospital in Kanagawa Prefecture, a nurse who cared for Japan's first Covid-19 fatality was herself infected, and the city government said that publicity around the event led to discrimination against other hospital employees and their children.[42] A young woman who knew she has tested positive boarded an overnight from Shinjuku to Yamanashi, an event about which the prefecture notified the public, and the woman became the target of

[40] Shusaku Kitajima and Stacey Steele, "COVID-19 Responses in Japan From an Administrative Law Perspective: Why Won't Pachinko Parlours Close Down?," Asian Law Center, Melbourne Law School, https://law.unimelb.edu.au/centres/alc/engagement/asian-legal-conversations-covid-19/alc-original-articles/covid-19-responses-in-japan-from-an-administrative-law-perspective-why-wont-pachinko-parlours-close-down.

[41] Shigeko Segawa, "Medical staff responding to virus bullied in the workplace," *Asashi Shimbun*, February 23, 2020.

[42] Shigeko Segawa, "Medical staff responding to virus bullied in the workplace," *Asashi Shimbun*, February 23, 2020.

vicious attacks on social media.[43] A graduation party at Kyoto Sangyo University that led to a cluster of infections prompted physician Atsushi Taniguchi to lament that students "who have been infected have been unfairly discriminated against, and university students have become cautious about testing. Frankly speaking, it has become "common sense" to keep it quiet even if there is a possibility of infection. The school will be known if the infection is confirmed, and the infected person and all students at the same university may be discriminated against. Infection affects friendships, relationships in circles and clubs, and even employment."[44]

In an article in *The Washington Post* evocatively titled "In Japan, coronavirus discrimination proves almost as hard to eradicate as the disease," the authors describe how children of those who work in hospitals that treat coronavirus patients have been refused entry to nursery schools and participation in extracurricular activities, and spouses have been told to stay away from their workplaces. According to the authors, "some even said they were afraid to go home, and afraid of being seen by their neighbors. They got family members to put the garbage out for them. Some said they would go to work when it was dark and come home when it was dark again." Hospitals have refused to admit covid patients out of concern for losing business, and because the staff did not want to treat them. One hospital was even threatened with arson.[45] Discrimination against non-ethic Japanese, long an issue in Japan, has also occurred, with owners of some establishments in Yokohama's Chinatown told to 'get the hell out of Japan."[46] The Tokyo Metropolitan Government has acknowledged korona-ijime and distributed animated materials aimed at helping those who have been victims of discrimination, and human rights groups have published videos on youtube in an effort to reduce discrimination.[47]

Testing

There are many reasons to be concerned about discrimination, but one with significant public health consequences is its impact on testing. If testing positive for the coronavirus will lead to social sanction and blame, then one's inclination to be tested may significantly decrease. This is particularly true in rural areas, where public health centers are legally required to disclose the number of positive test results, which make it relatively easy to figure out who in the community is infected. Indeed, on average Japan conducts 20-25,000 tests per day with the exception of Sundays, when that number drops below 10,000. The total number of tests

[43] Get cite

[44] Atsushi Taniguchi, "Novel Coronavirus: Let's Celebrate Those Who Want to be Tested," *Mainichi Shimbun*, August 27, 2020 (in Japanese). https://mainichi.jp/premier/health/articles/20200826/med/00m/100/011000c.

[45] Simon Denyer and Akiko Kashiwagi, "In Japan, coronavirus discrimination proves almost as hard to eradicate as the disease," *The Washington Post*, September 14, 2020, https://www.washingtonpost.com/world/asia_pacific/japan-coronavirus-discrimination/2020/09/13/e82e5aa4-eea0-11ea-bd08-1b10132b458f_story.html.

[46] "Foreigners in Japan becoming target of discrimination due to virus," Kyodo News, Sept 12, 2020. https://english.kyodonews.net/news/2020/09/b7a412698d9e-feature-foreigners-in-japan-becoming-target-of-discrimination-due-to-virus.html.

[47] https://ijime.metro.tokyo.lg.jp/a5/pdf/a5_instruction_materials_1_en.pdf: https://www.youtube.com/watch?v=MszLz_nph90&feature=youtu.be; http://www.asahi.com/ajw/articles/13649395.

administered in Japan as of 30 Oct 2020 is 2.68 million, compared to approximately 80 million in the US. In fact, Japan's testing rates are extremely low when compared to those of other similarly situated nations.

Fear of discrimination may be one reason for Japan's limited testing, but it is certainly not the only reason.[48] The Summer Olympics were scheduled to begin on July 24 in Tokyo, and with 600,000 visitors expected to attend and an investment of well over $10 billion, Prime Minister Abe and his economic team were determined to not imperil the games. In an effort to keep the Olympics on track, the government severely limited coronavirus testing throughout February and well into March of 2020, performing fewer than 2000 PCR tests per day.[49] Limiting testing inevitably limited the number of positive test results. By March 22, 2020, with over 35,000 cases in the US, only 1110 people had tested positive for the coronavirus in Japan.[50] When the International Olympic Committee announced on March 23 that the games would be postponed, however, Japan's testing policy suddenly changed. No longer needing to worry about preserving the summer games, on March 30 over 3000 PCR tests were administered; on April 2 over 5000; and by April 9 over 8000 tests were administered.[51] Likewise, during the week of March 16-22, an average of 41 cases per day were reported by the MHLW; following the postponement, from March 23-29, that number had tripled to 123 cases per day.[52] As the number of reported cases climbed to almost 250 on March 30 and close to 400 on April 6, it became increasingly clear that it was time for the government to declare a state of emergency.

Under the API, those who test positive for a disease covered by the Act must be hospitalized. Without knowing how many positive tests would result from widespread testing in Japan, and worried that hospitals could not accommodate a major uptick in covid-19 patients, the government was reluctant to make testing widely available. The reimbursement procedure for testing also put a cap on how many tests could be administered. Tests are only reimbursed if done by a lab authorized by the National Institute for Infectious Diseases, which means that the vast majority of tests are conducted by government centers.[53] A few non-governmental bodies have received permission to conduct testing, including a center set up by the Japan Medical Association. But many other potential testing venues, including university medical centers, have not been able to engage in coronavirus testing.

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[48] I have been told that people who tested positive have had to move or committed suicide. Personal communication with senior government advisor.

[49] https://toyokeizai.net/sp/visual/tko/covid19/en.html.

[50] https://mhlw-gis.maps.arcgis.com/apps/opsdashboard/index.html#/0c5d0502bbb54f9a8dddebca003631b8.

[51] https://toyokeizai.net/sp/visual/tko/covid19/en.html.

[52] https://mhlw-gis.maps.arcgis.com/apps/opsdashboard/index.html#/0c5d0502bbb54f9a8dddebca003631b8. Prime Minister Abe was quoted as saying "I'm aware that some people suspect Japan is hiding the numbers, but I believe that's not true." "Tokyo's Infection Spike After Olympic Delay Sparks Questions," The Asahi Shimbun, April 2, 2020, https://www.asahi.com/ajw/articles/13256446.

[53] This also enables the government to control testing data.

Instead of making testing widely available, the government's approach has been to focus on the identification of clusters and then engage in comprehensive contact tracing. It has accomplished that through 469 Public Health Centers whose mandate is to help prevent the spread of infectious diseases. These centers were instrumental in dealing with TB in Japan, and the staff of 25,000 has turned its expertise to coronavirus contact tracing, mostly by making phone calls and talking to those who may have been exposed.[54] When cases began to spike in Tokyo's Shinjuku entertainment district over the summer, for example, the public health authorities descended on the many host and hostess clubs in the area, where cases appeared to be clustered. With the cooperation of the local association that oversees Shinjuku's 280 host clubs and 8000 hosts, they were able to do extensive testing, and found high (30-50%) rates of infection in asymptomatic individuals.[55] Hostess clubs were a different story. Many hostesses have daytime jobs, and at least some of the clubs are operated by the yakuza, which dampened their interest in cooperating with the authorities. The result was that the media reported an alarmingly high rate of positive tests among hosts but had much less to say about hostesses.

Constitutional Reform

The coronavirus will leave its mark on a wide range of Japanese institutions, one of which may turn out to be the Constitution. Constitutional revision has been on the ruling LDPs mind for many years, and Covid-19 has become an important part of that conversation. On May 3, 2020, Constitution Day in Japan, while the government's emergency declaration was in effect, Prime Minister Abe once again raised the issue of constitutional revision. The prime target of constitutional revisionists is Article 9, the so-called pacifist clause. Among the LDP's other objectives, however, is a constitutional amendment that explicitly gives the government the power to declare and enforce an emergency declaration.[56] Such a clause would enable the Cabinet to issue legally binding polities, such as enforceable lockdowns, without the approval of the Diet.

With the recent resignation of Prime Minister Abe, it seems highly unlikely that the LDP would have the political power or votes to enable revision—the process of constitutional revision in Japan is burdensome, and Japan's 1947 Constitution has never been revised. Still, one is left to wonder whether the inclusion of a clause in the Constitution granting emergency powers to the government could ultimately provide a more effective wedge for constitutional revision than the long-debated Article 9.

Even without constitutional revision, the Diet can pass a law that grants the Prime Minister the power to declare a state of emergency, as it did by revising the API (could the Diet pass a general law, under Article 41 of the Constitution, that gives the Prime Minister the authority to

[54] Contact tracing app, Cocoa, only 6M people downloaded it, which is not many, seems they were worried about privacy. Tells you if you have been in close contact w/someone who tested positive.
[55] Many of them live in small dorms, which lead to clusters of infections.
[56] It seems this would involve a change to Article 73, but need to confirm.

declare a state of emergency at his/her discretion?). But that would make the Prime Minister dependent upon Diet action, which conflicts with Abe's goal of increasing executive power so that he could govern through his Cabinet without Diet approval.

Many constitutional law scholars in Japan, along with civil libertarians like Lawrence Repeta, are strongly opposed to revising the Constitution. Doing so, they claim, would open the door to the sorts of civil liberty abuses carried out by Japan's secret military policy, the kenpeitai, from the late 19th century until the end of WWII.[57] At least for now, they feel confident that constitutional amendment is unlikely. Nonetheless, prefectural governors have been pressing the central government for more legal authority during states of emergency, and this winter the Diet will consider legislation that will enable prefectures to legally enforce (with financial penalties) what until now have been weak requests for compliance with emergency declarations.[58] So the legal landscape is changing in as yet unpredictable ways.

Conclusion

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[57] Repeta article: (https://www.japantimes.co.jp/opinion/2020/04/14/commentary/japan-commentary/coronavirus-japans-constitution/)

[58] The law is likely to focus on penalties for commercial establishments, not individuals.