

South Korea's Combating COVID-19 Under the Rule of Law

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Overview

The Republic of Korea (South Korea) was one of the first countries in the world to be heavily affected by COVID-19. [By early March](#) 2020, it became the second most infected country after China. [According to the data of Korea Disease Control and Prevention Agency \(KCDA\) – formerly Korea Centers for Disease Control and Prevention \(KCDC\) –](#), the first peak of the outbreak, which was mainly related to a religious group, was on 29 February 2020, reporting 909 infected in a single day.

But after overcoming the initial peak, South Korea [has been able to maintain new cases](#) at around 10 cases per day in the third week of April, whereas many countries have reached ever higher number of infections. Afterwards “the second wave” has come since mid-August (the peak was on 27 August: 441 daily cases) and “the third” since mid-November (the peak was on 25 December: 1241 daily cases). But these two have been also gradually calmed down ([as of early March 2021](#)).

South Korea has reduced the significant number of new confirmed COVID-19 cases [without ordering stringent restrictions](#), nor locking down regions and causing severe economic damage. South Korea was able to slow down the spread of COVID-19 along with the [government's quick reaction to the disease](#). The government has been implementing nationwide free public testing programs. The KCDC in the government tracked all the confirmed cases' geographic footprints and publicized the information to the people via online websites and mobile texts. Local cities opened up an innovative ‘drive-through’ testing area, which became a model followed by other countries. The civil society has also generally followed the guidelines provided by government, including using medical face masks and adapting to ‘social-distancing.’ Though authorities remain highly alert amid new clusters of infections, and gradually and inevitably several social and economic problems have also arisen in South Korea due to the ‘social distancing’ measures sustained for a long period, [the virus curve appears to be relatively flattening again even after “the third wave”](#).

Emergency Law? – Not Used So Far

According to [Art. 76 of the Constitution](#), there are two types of measures that the President can urgently issue in case of emergency: an “emergency financial order” ([Art. 76 \(1\)](#)) and an “emergency order” ([Art. 76 \(2\)](#)) – if we exclude the possibility of the martial law clause (Art. 77) which grants direct military control of

normal civil functions or suspension of civil law and can rekindle the trauma of the authoritarian past.

The executive office and official residence of the President of South Korea (The Blue House) [announced](#) already on 3 March 2020 that it was “not considering” the opposition’s call for an emergency order to secure patients’ beds for new coronavirus infections. The government added that the current situation did not meet the requirements of the Korean Constitution to issue an emergency order. For example, Article 76 (1) has the requirement of “[...] only when [...] there is no time to await the convocation of the National Assembly” and even then there was no problem with the convocation of the National Assembly.

The Blue House has maintained the position that emergency law is [currently not necessary](#). This is because the heads of local governments can designate all medical institutions as infectious disease management institutions to utilize the beds and use private facilities as a first aid measure, according to the Infectious Disease Control and Prevention Act (hereinafter the IDCPA; the [most updated version \(amended on 9 March 2021, as Act No. 17920\) is in Korean](#), and a recent version of the Act, amended on 4 March 2020 (Act No. 17067), is available [in English](#)). However, the political debate on this does not seem to be completely over even in 2021. On 26 January 2021, [the leader of the main opposition party renewed a proposal](#). The proposal was that the President should issue an emergency financial order [Art. 76 (1)] to set aside a 100 trillion won (around \$89.1 billion) budget to deal with the coronavirus aftereffects [including financial bailouts and compensation for losses](#), whereas [the ruling party plans to use the ordinary legislative process for such measures](#).

The Effectiveness of Legislative Scrutiny and Judicial Oversight

After the mistakes made during the initial response to the 2015 MERS outbreak, the South Korean legislature (the National Assembly) revised relevant provisions of the [IDCPA](#), which essentially prepared Korea against the devastating effects of COVID-19. The revision extended the administrative measures in response to epidemic situations, which include authorizing the Minister of Health to collect personal data to ‘track’ the travel history of confirmed patients without a court order during infectious disease emergency situations (Article 76-2(2)), and disclose these information to the public (Article 34-2 (1)). These revisions served as the legal basis for the various administrative countermeasures the Korean government implemented to protect the public against COVID-19. The bitter experience during MERS actually prepared the Korean government to effectively fight against infectious diseases.

However, South Korea’s ‘track’ and ‘disclose’ strategies raise concerns about privacy and surveillance. Fortunately, these problems have now been partially resolved through the revisions of laws and guidelines. For example, on 29 September 2020, an additional limitation was inserted to Paragraph 1 of Article 34-2 of the IDCPA, which states that “personal information determined to be irrelevant to the prevention

of infectious diseases by Presidential Decree, such as sex, age, and so on, shall be excluded.” (As of 31 March 2021, [this provision is not translated yet and only available in Korean.](#))

Some have also raised issues with [Article 76-2 of the IDCPA](#), which allows the Director of KCDC or local government to request a wide array of information from various governmental and non-governmental institutions. Such provision may allow possible infringements of human rights, thereby rendering the protection of personal information ineffective. A petition questioning the constitutionality of Article 76-2 was filed to the Constitutional Court, and it is currently under review.

The ban on gathering based on [Article 49 of the IDCPA](#), is one of the most frequently used administrative public health measures by the Korean government. Limiting the number of people allowed to join for private gatherings or restricting gatherings at certain locations all intend to slow the spread of the virus. However, these measures may infringe upon certain constitutional rights, as these gathering restrictions are also applied to protests, religious events, and gatherings at specific businesses, like cafes, weddings, and nightclubs.

Nevertheless, seemingly invasive measures were initially happily condoned by the public, which was evident by the extremely small number of lawsuits filed by citizens against the government in South Korea in the early stages of the pandemic. In fact, the government actually lodged several damage suits against religious organizations and individuals who violated quarantine laws. However, as the COVID-19 situation prolonged, new restrictions on constitutional rights were introduced by the government, and public’s fatigue increased. As a result, there has been a rise in legal disputes between individuals and the government during the recent months. One prominent example is the damage suit filed by infected inmates at the district jail [against the government](#) for its failure to prevent and address the spread of the virus within the detention facility.

There have been many requests for suspension regarding the ban on gatherings, but the courts have struggled to adjudicate. These cases request for a speedy trial which leaves insufficient time for a fair review, and the review is carried out with a limited amount of epidemiologic information. Furthermore, the court lacks uniform standards based on scientific knowledge. While most courts upheld local governments’ orders to ban large gatherings in light of public safety concerns, some courts did allow some of the rallies to take place, despite the increased coronavirus risk, citing civil liberties of the protesters. [In fact, on 14 August 2020, Administrative Chamber 11 of Seoul Administrative Court issued an injunction that prevented the banning of a large-scale demonstrations in the heart of Seoul in mid-August.](#) However, this demonstration ignited a surge of confirmed patients in Korea, which illustrates the difficult position of the courts.

COVID-19 Management Framework of South Korean Governance

In South Korea, a unitary country, [the 'Korea Disease Control and Prevention Agency' \(KDCA\)](#) is an independent administrative agency within the central government, which functions as a control tower for the prevention of epidemics. It was originally affiliated with the Ministry of Health and Welfare, under the name of the 'Korea Centers for Disease Control and Prevention' (KCDC). Soon after the breakout of COVID-19, the affiliated center was promoted to an independent agency.

[The Central Disaster Management Headquarters \(CDMH\) within the Central Disaster and Safety Countermeasure Headquarter \(CDSCH\)](#), headed by the Prime Minister of the central government, is responsible for supporting the Central Disease Control Headquarters (CDCH). Local governments are responsible for infection monitoring, epidemiological investigation, and community management. Metropolitan and provincial governments are in charge of managing a larger community area, along with providing intensive-care rooms for infected patients. Furthermore, basic local governments are responsible for disclosing infection routes within their area, conducting diagnosis, quarantine, and vaccination tasks centered in affiliated health centers.

In South Korea, the current medical system centers around public and private medical institutions and staff. Therefore, establishing a solid medical support system through public-private cooperation is vital. So far, we can evaluate that such cooperation in South Korea has played a critical role in preventing further outbreak of COVID-19. Additionally, the availability of low-cost diagnostic tests made possible through Korea's strong 'universal healthcare system' played a key part in Korea's success.

Moreover, the voluntary and active participation in preventive measures by the public should also be recognized for its role in Korea's fight against the pandemic. One of the reasons for such high public cooperation may be the social pressure derived from Korea's collectivist culture. But another important factor that deserves more attention would be the citizens' confidence in the effectiveness of social distancing, which emphasizes the potency of quarantine and wearing a mask.

Considerations of Human Rights and Civil Liberties

During the early stages of the pandemic, South Korea was one of the few countries that have been fighting the coronavirus without a physical lockdown or curfews. Instead, Korea employed an "epidemiological approach," where the government spent its resources on gathering the travel history of confirmed patients, performing diagnostic testing on anyone who came in contact with the infected, and providing treatment. The government introduced three-tiered (later five-tier) ['social distancing guidelines'](#) in its three-tier (later five-tier) system where more restrictive measures are implemented based on the daily number of newly confirmed cases. Accordingly,

once the number of confirmed cases rapidly increased in December of 2020, the government applied higher tier regulations based on the guidelines.

Most of all there has been controversy over whether the ban of gatherings is an excessive restriction on the constitutional rights like freedom of assembly and religion. Fines or punishment are imposed for these violations. In South Korea, places of worship were one of the most high-risk areas for spreading the virus, and it has been confirmed that the virus continues to spread through religious services. This has led to some collective animosity towards religious institutions (especially specific sects), which eventually challenged the freedom of religion.

A wide range of stores, restaurants, gyms and cafes were subjected to [strict measures](#) of 'social distancing,' which prevented them from operating normally. This measure was prolonged to the extent that it was practically impossible for the business owners to sustain a living. Even though there have been no lockdowns in South Korea, this kind of measures, such as 'bans on private gatherings of 5 or more people' (based on the Article 49 of the IDCPA) caused severe deduction in income for many. Many have raised concerns regarding the proportionality of these administrative measures regarding constitutional rights. Especially certain types of businesses, like entertainment centers and sports arenas where infections frequently occurred, were completely prohibited from operating for a prolonged period of time. They remained closed until the number of infected cases decreased to a significantly lower number. The excessive restrictions on their economic freedom and the discrimination against high-risk entertainment centers became another legal issue. Currently, small businesses and merchants have filed [a petition](#) against the social distancing measures without compensation to the Constitutional Court. When there is no law, 'compensation for loss' due to the restriction of property rights due to business suspension based on lawful administrative action [is controversial](#). The government plans [to institutionalize specific compensation measures into law as well as additional financial bailout laws](#) to supplement the suspensions of high-risk businesses.

The reinforced regulation even prohibits private gatherings of 5 or more people among family members, acquaintances, and friends. The broad restriction can be justified only as an urgent and temporary measure. Nevertheless, the restriction has been in effect for months, due to statistical evidence that points to correlations between the increase in private gatherings and mass infections. The regulation is implemented through the cooperation of the public.

Also, infected patients are socially condemned for being infected, regardless of their unpreventable circumstances. This leads to a concern of social discrimination against the confirmed patients. The pandemic has ignited some discriminations against homosexuals, due to an outbreak in a LGBTQ club. Quarantining the disabled was another issue of importance. Therefore, the Korean National Human Rights Commission was urged to monitor any unfair discrimination fueled by corona phobia, and provide protection for the disabled people during the pandemic.

Outlook

Along with intensive preventive measures against COVID-19, the number of active infected cases has decreased for now. However, the long-term countermeasures should also be established immediately, and meticulously. The following points should be considered when preparing for the new phase of the COVID-19 pandemic.

Most importantly, legal measures need to be implemented to address the heavier burden placed on the socially underprivileged citizens due to the pandemic. Some examples may be institutionalizing family care, supporting individuals who struggle with accelerated digitalization from prolonged epidemics, and strengthening support for the unemployed, all accompanied by the expansion of basic social rights.

Furthermore, it is necessary to establish a detailed legal system regarding the distribution and inoculation of vaccines. [The concept of vaccination is](#) widely approved among South Koreans. Therefore, the legal system requires a comprehensive and socially acceptable structure in establishing the vaccine priority groups and selecting type of immunizations, handling vaccine skeptics, adjusting the cost of vaccines and signing in compensation laws for vaccine related injury.

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