

*Abusus Non Tollit Usum?* Korea's Legal Response to Coronavirus  
and the Shincheonji Church of Jesus

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**ABSTRACT:** The legislative framework crafted by the Korean government in response to the MERS outbreak in 2015 informed its approach when COVID-19 appeared on its territory. This framework conferred broad powers upon the authorities to react promptly and effectively to the pandemic as it developed. However, the relevant legislation suffered for a lack of human rights safeguards, and was ultimately rather opportunistically employed by the government to target an unpopular religious community, raising questions about Korea's commitment to the rule of law and human rights standards.

**KEYWORDS:** Shincheonji, Lee Man Hee, COVID-19 Epidemics in South Korea, COVID-19 and Religion, COVID-19 and Churches in South Korea.

*Introduction*

The year 2020 presented the 21<sup>st</sup> century world with an unprecedented global crisis. The COVID-19 pandemic spread rapidly around the globe, presenting all but the most isolated states and territories with a need to craft direct and effective responses to an as-yet incurable virus with no known vaccine. For scholars in many disciplines, the crisis represented an opportunity to reflect upon the respective approaches adopted by governments to curtail and control the virus. For legal scholars, in particular, any examination tends to be focused around derogations of legal and constitutional protections against executive power, deployed in the name of public health. Such an analysis reveals both common features and divergences, in terms of both the responses adopted and their effectiveness. Throughout the world, citizens have been obliged to submit to

restrictions upon their liberty to circulate freely (“stay at home orders”), to travel, and to engage in economic activity. Beyond this, new police powers and increased surveillance have been used, often without normal levels of legislative or judicial scrutiny, as state organs are hamstrung by the lockdown, and as the focus of media tends to be elsewhere.

Despite these common trends, the toll of the novel coronavirus on the protection of rights and liberties in individual countries has been anything but uniform. This is due not least to the fact that, even amongst democracies, states are differently constituted, prize some values more than others, and deal with crises differently. While firm categorizations may be difficult, some broad observations may be made. A *Verfassungsblog* symposium led by the COVID-DEM project in May of this year proposed four distinct categories of democratic response to the pandemic, namely: (a) effective rationalists; (b) constrained rationalists; (c) autocratic opportunists; and (d) fantasists (Daly 2020).

Tom Daly, summing up the symposium, proposed that a global study of 62 regimes had shown that effective rationalist regimes had

effectively addressed the pandemic through rational policy based on fact, acted within the constraints of the law, and placed clear limitations on emergency actions to preserve maximal democratic functioning,

noting that these states

have benefited from their starting position of high-quality democratic governance, high state capacity, and the economic ability to assist individuals negatively affected by emergency measures (Daly 2020).

Constrained rationalist regimes had also acted in the same vein, reacting in a broadly rational manner based on the rule of law, while being constrained in their policy choices due to poverty and a lack of resources.

These two categories were contrasted with autocratic opportunists and fantasists. Autocratic opportunists were defined as

states where democratic decay has been proceeding apace for years and governments, while seemingly recognizing the reality of the threat, have pounced on the crisis to further consolidate and expand their power,

while fantasists included

governments whose response has been impeded and distorted by partial or full denial of the facts presented by recognized experts, and engagement in conspiracy theories (e.g. that the pandemic is a Chinese bioweapon) (Daly 2020).

This included pandemic denial, while both the third and fourth categories were cast as representing extreme examples of what Sophia Rosenfeld calls “antitruth governance,” based on “indifference to the boundaries between truth and falsehood,” and on the rejection of discrete and respected scientific expertise (Rosenfeld 2018).

The separation between the first and second (“good”) categories and the third and fourth (“bad”) categories is largely one based on the honesty of efforts to take the pandemic seriously, and to meet the challenges arising from it to the best of the state in question’s abilities. Hungary’s use of COVID-19 as a Trojan horse for a power grab by Prime Minister Victor Orbán is presented as the autocratic opportunist model *par excellence*, while Brazil, Poland, and the United States are cast into the fantasist camp, relying on distorted official narratives and undermining the best scientific evidence for the respective administrations’ political ends. Both groups opportunistically employed the pandemic, albeit in different ways.

Per Daly—and indeed, the tenor of the entire *Verfassungsblog* symposium—this is to be contrasted with the two rationalist groups, whose commitment to the rule of law involved making an honest effort to meet the challenges raised by the virus:

In many states, the pandemic has simply laid bare the true nature of the political system. Where commitment to good governance and the rule of law endures, it has been reflected in the action taken (Daly, 2020).

Amongst the regimes to attract praise were South Africa (despite resource limitations), New Zealand, and the Republic of Korea (South Korea: hereinafter, Korea), with the latter lauded for having “flattened the curve primarily through contact tracing and successfully held national elections on 15 April—the first country to do so” (Daly 2020).

Efforts to examine legal responses to COVID-19 are useful, demonstrating as they do that the virus itself is not the sole danger. Rather, an additional peril may arise from the abuse of emergency powers or other responses designed to deal with a developing crisis (Ferejohn and Paquino 2004). It is well known that sudden and widespread crises have, in the past—and not infrequently—been

used to enact extraordinary legal measures in the name of national security, public health, or other reasons (Feinberg 2016). Such measures often entail grave consequences for human rights protection, and are sometimes difficult to roll back once the crisis is over. As such, the identification of best practices, or good examples, is particularly valuable, as a means of insulating against future crises.

That Korea had been identified as one of the success stories in terms of its response to the outbreak of COVID-19 is hardly a surprise (White 2020). A rigorous system of contact tracing and multiple government interventions helped to keep the transmission rate relatively low. The government quickly identified the importance of preventive measures, early diagnostics, and a centralized control system (Oh 2020).

In addition, as distinct from many other countries, Korea was well prepared for the outbreak. The government had learned lessons from the comparatively recent outbreak of Middle East Respiratory Syndrome (MERS) in 2015, where Korea was the worst hit state outside the Middle East (Lee 2015). The lessons learned from the MERS outbreak led to significant legislative reform, and bespoke legislation to deal with future outbreaks, which was invoked in the wake of COVID-19, and which crucially rendered it unnecessary to declare a state of emergency (Kim B. 2020).

However, as shall be explained, the superficial veneer of Korea's success story obscures a troubling appendix. Many confirmed cases of the novel coronavirus have been officially linked to an already marginalized religious minority, and the Korean authorities' actions in relation to its members—and more recently, its leader—raise difficult questions concerning Korea's compliance with an assortment of international human rights norms, its own constitution, and whether the response of the authorities in fact belongs in the “effective rationalist” category at all.

### *Learning from MERS*

Korea experienced its first confirmed MERS infection in May of 2015. Directly thereafter, the Ministry of Health and other official organs undertook a range of public health protection measures, including several that were not

officially sanctioned by legislation (Kim 2017). The law that was then in force was seen as not being fit for purpose, as it failed to grant effective enforcement powers for mass public health measures to either the central or the regional authorities. As such, the authorities justified their response as doing what was necessary in the circumstances (Park 2017).

However, given that no legislation existed to guide the response, it was up to policy makers to determine how to proceed on an *ad hoc* basis. This resulted in a response characterized by a culture of secrecy, in the interest, *inter alia*, of the right to privacy of those infected as well as the prevention of public panic. The Health Ministry withheld details concerning the locations of infected individuals from the public, on the grounds that identifying the medical institution treating MERS patients might cause unnecessary anxiety to other patients (Shin 2015; Lim 2015; Bae 2015).

However, this approach was deeply unpopular, and resulted in local authorities—including hospitals and municipalities—being uninformed or underinformed about the risks they were facing from infected individuals in their locality, as well as ultimately spreading the virus further (Chowell et al. 2015, 210). Moreover, the government's approach to the outbreak was inconsistent over time, with policies changing in response to public outcry. This did not give the impression of a state led by persons with a firm hand on the tiller.

Anxious to avoid a repeat of the mistakes made in response to MERS, the government engaged in a stocktaking exercise after infections subsided, eager to be better prepared for the next infectious disease (Lee and Ki 2015, 706). A number of core issues to be addressed were identified, including inter-institutional cooperation. In order to deal with issues around communication, overlapping competences, and effective responses, it was decided that a new legal regime for the management of infectious disease outbreaks should be implemented. The main plank of this reformed legal structure was the Infectious Disease Control and Prevention Act (IDCPA), which came into force in 2016.

The IDCPA is a comprehensive legislative enactment, aiming to provide for a firm, overarching framework concerning measures that may be taken by the authorities in the event of an infectious disease outbreak. It represents *lex specialis*, therefore derogating from certain general provisions of Korean law (for example the Data Protection Act), but as ordinary legislation, is to be interpreted

and applied in accordance with the fundamental rights provisions of Korea's Constitution. This is an important consideration. Past examples from around the globe have shown that failure to guarantee fundamental rights in the face of emergencies can result in the scapegoating of unpopular minorities as a means of avoiding pointing the finger of blame at the authorities.

In addition, the public panic accompanying moments of national crisis can often mean that governmental responses thereto escape the usual scrutiny, giving public powers a freer hand to act against their enemies. The example *par excellence* is the 1933 *Ermächtigungsgesetz*, enacted by the Nazi regime, ostensibly in reaction to the arson of the *Reichstag*, allegedly by a Dutch Communist agitator (Schneider 1955). As noted, responding to COVID-19 has also provided some governments with an opportunity to seize additional powers, increasing the risk that minorities—including religious groups—may find themselves marginalized and ostracized.

#### *An Uncoordinated Comparator: The Indian Example*

The risks arising from an uncoordinated approach to COVID-19 have proven deeply problematic for religious communities in other states. India provides a prime example of a state in which case the virus outbreak resulted in increased discrimination against a particular religious group, namely the Muslim community. Members of the Muslim minority had gathered in confined places to pray together in close proximity, sharing food and socializing (Subramaniam 2020).

In India, the gathering of the Islamic group Tablighi Jamaat provided the starting point for discriminatory behavior within the Corona crisis. An outbreak was linked to a festival held by this group in Delhi, which included visitors from several other countries, including Thailand, Indonesia, and Sri Lanka, who visited India for the event, and then left India again (Subramaniam 2020). Muslim groups in India had been targeted well before the Corona crisis started, and bore the brunt of majoritarian prejudices (Kapila 2020). However, in India, this had been backed by official action. The government of Narendra Modi has pursued an agenda of promoting Hindu nationalism since 2014. This has involved repeated targeting of the Muslim minority in the country (Bajoria 2020). A prominent example of this is the Citizenship (Amendment) Act of 2019, which rendered

religion a relevant factor for the granting of citizenship (Bajoria 2020). The Act provided a right to attain citizenship for all non-Muslim irregular migrants present in India, though not for Muslims, thus directly discriminating on religious grounds (Human Rights Watch 2019).

The government of India has overtly and repeatedly linked the rapid spread of COVID-19 to minority religious groups. In India, claims were made that the Tablighi Jamaat was in the process of waging a “Corona Jihad” (Kapila 2020). Kapil Mishra, a member of the ruling Hindu nationalist Bharatiya Janata Party (BJP), claimed that “Tablighi Jamaat people have begun spitting on the doctors and other health workers. It’s clear, their aim is to infect as many people as possible with coronavirus and kill them” (Ellis-Petersen and Rahman 2020). Indian media went a step further, claiming that the Muslims, and not only the Tablighi Jamaat, were deliberately aiming to spread the virus across the country (Ellis-Petersen and Rahman 2020). Muslims were accused of spitting on food and infecting water supplies with the virus, being branded “corona terrorists,” an impression the government did little to dispel (Ellis-Petersen and Rahman 2020).

In addition, the machinery of the State was employed to menace leaders of the community via the criminal justice system. In India, Maulana Saad, the leader of the Tablighi Jamaat, was charged with breaking the Epidemic Diseases Act for not observing the social distancing recommendations of by the Government (Prasad 2020), and with culpable homicide and negligence (Krishnan 2020). The police in Maharashtra filed cases against more than 200 members of the group (*The Japan Times* 2020).

The public reaction in India was predictably extreme. Examples of excesses by members of the public and officials abound. An imam was stopped on his scooter by a police officer who assaulted him, and accused him of spreading the virus (Regan, Sur, and Sud 2020). Some Muslims were denied medical care (Slater and Masih 2020). The privately-run Valentis Cancer Hospital in Uttar Pradesh published an advertisement stating that any Muslim desiring treatment must prove beforehand that he or she was free from COVID-19 (Naqvi and Trivedi 2020). Other hospitals have separated their patients into Hindus and Muslims (Yashoda 2020). Certain villages have denied access to Muslims, and warned that if any Hindu were found to be fraternizing with a Muslim, they would be fined 500 to 1,000 rupees (Ellis-Petersen and Rahman 2020).

*Korea's Coronavirus Response: A Legal Framework Fit for Purpose?*

On the face of it, as noted, Korea's Constitutional framework, as well as its commitment to the rule of law, its adherence to international human rights treaties, but in particular, its bespoke legislation, gave good grounds to assume that a proportionate, evidence-based response to COVID-19 would be deployed, and rendered the position of marginalized minority groups much safer than in a context like that of India. However, the reality as it transpired did not reflect this supposition. In order to explain why this was the case, it is necessary to examine in detail the framework itself.

Korea's 1948 Constitution was substantially revised in 1987, in order to strengthen the protections for democracy and the rule of law; this was accompanied by several legislative enactments covering human rights (West and Baker 1988, 135). The Constitution now contains a number of provisions covering human rights. Specifically, the right to freedom of religion is protected under Article 20, which also provides for the separation of church and state, and proscribes the recognition of a single national creed. Further, Article 11 proscribes any discrimination based on a citizen's religious belief.

In tandem, Korea has progressively increased its level of international human rights protection, having ratified seven significant human rights treaties: the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and its Optional Protocol, the International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Convention on the Rights of Persons with Disabilities (CRPD) (Lee 2017, 96). The overall impression, then, is one of a state that is deeply concerned with the protection of human rights on its territory.

It is into this framework that the IDCPA was inserted. The IDCPA was essentially a technical enactment, having little enough, on the face of it, to do with human rights, but rather representing a *modus operandi* of effectively dealing with any outbreaks of infectious diseases that might occur in the future. However, in reality, its impact upon the rights of one particular religious community was

considerable, owing chiefly to the flexibility that formed part of its legislative design. Article 76-2 of the IDCPA grants the Ministry of Health and the Director of the Korean Center for Disease Control (KCDC) legal authority to collect personal data, without a warrant, from those already infected and from potential patients. Article 76-2(1) enables the authorities to require “medical institutions, pharmacies, corporations, organizations, and individuals” to provide “information concerning patients [...] and persons likely to be infected.”

Article 76-2(4) also expressly mandates private telecommunications companies, as well as the National Police Agency to share the “location information of patients [...] and [of] persons likely to be infected” with health authorities, upon request. It should also be noted that no criteria were provided for identifying persons “likely to be infected” through contact tracing or otherwise, thus giving the authorities significant discretion in this regard. In addition, per Article 76, upon request, both public and private actors were obliged to surrender, *inter alia*: (a) personal information, such as names, resident registration numbers, addresses, and telephone numbers; (b) prescriptions and records of medical treatment; (c) records of immigration control; and (d) other information for monitoring the movement of patients with infectious diseases.

Again, the category of “other information” was left undefined, to be determined on an *ad hoc* basis via presidential decrees. These provisions ensured that the ambit of the material that might be suggested by the authorities was extremely broad. While the Data Protection Act continued to apply to the extent that it did not conflict with the IDCPA, the only significant protections afforded in this regard were that individuals placed under surveillance should be notified, and that information gathered should be destroyed when the “relevant tasks have been completed,” though the means by which such information can be effectively destroyed was not prescribed.

In addition to Article 76, several provisions of Articles 6 and 34(2) are also highly relevant. These were drafted as a result of the public perception that the response to the 2015 outbreak was overly secretive. Articles 6 and 34(2) invoke the public “right to know,” requiring the Ministry of Health to “promptly disclose information” to the public about the “movement paths, transportation means [...] [and] contacts of patients of the infectious disease.” These articles, read together, constitute another significant incursion into the private lives of infected persons and of those with whom they had contact (Jo 2020).

The IDCPA also provides the government with a variety of legal means to impose physical restrictions upon individuals during a pandemic or similar outbreak. Article 47(1) empowers authorities to shut down any location “recognized (or confirmed) to have been infected,” without stipulating any test for contamination. Article 49(1)(2) further permits the “restrict[ion] or prohibit[ion of] performances, assemblies, religious ceremonies, or any other large gathering of people.”

While it is clear that the framework proposed by the IDCPA answers many of the objections that may have been levelled against the previous response to MERS, prioritizing as it does transparency and the protection of public health vis-à-vis data protection and personal privacy, some objections might be levelled against it. Most obviously, the categories described are broad, key terms are left undefined, and the entire IDCPA, read together, suffers for a lack of legal certainty. This entailed that it could be applied in a number of different ways in practice, as was to become apparent during the novel coronavirus outbreak of 2020, with problematic results.

#### *Applying the IDCPA and the Shincheonji Church of Jesus*

The vague definitions and broad terminology of the IDCPA were to prove significant in the context of the COVID-19 pandemic, which spread to Korea in early 2020, with the first confirmed case being announced on January 20. Preparations for the management of a fresh epidemic began as early as November 2019, however, adding to the impression of a country that was well prepared to weather the gathering storm (Khatouki, 2020). In mid-February, President Moon declared that he was confident that “the situation [would] almost disappear” (Khatouki 2020), and urged people not to succumb to “excessive fear and anxiety [that would make] it more difficult for the economy” (Do 2020).

However, the positive outlook was to change. On February 16, 2020, a 61-year-old woman, “Patient 31,” entered a building belonging to the Shincheonji Church of Jesus (SCJ) in Daegu, and joined a ceremony with approximately 1,000 other church members. She left several hours later, having apparently scattered pathogens around the building, which was later identified by the Korean authorities as having triggered one of the largest COVID-19 outbreaks in the world (Thompson 2020).

The SCJ, a Christian group with approximately 320,000 members (KOSIS 2017), is part of the so-called Christian new religious movements in Korea. New religions are especially popular there, particularly since the end of the Korean War (Pokorny 2018, 243–44). Other movements within this group, however, have larger membership bases (Barker 2018; Pokorny 2018). The SCJ enjoys a disproportionately high profile, being unpopular with other religious congregations in particular, which resent its rapid growth at their expense, and which have endeavored to engender public hostility to the SCJ (International Institute for Religious Freedom 2020; see also Introvigne 2020). In response to the hostility that it has faced, the SCJ defended its position via recruitment and information campaigns. In tandem with this, a culture of increasing secrecy has developed, partly due to the fact that members of the SCJ face discrimination if “outed.” This secrecy has raised claims that those who join the SCJ may have been deceived (Introvigne 2020).

Prior to the identification of Patient 31, the SCJ took measures to inform its members concerning the risks associated with COVID-19, and preventive measures that might be undertaken. From February onwards, anyone who was at risk of being infected with the virus was prohibited from participating in church events. Despite this, Patient 31 attended several such events, and is assumed to have spread the disease to hundreds of SCJ members (Khatouki 2020).

By February 20, 53 of those who had attended the SCJ ceremony in Daegu, or family members of attendees, had been infected with the virus. Three days later, this figure had risen to 300, representing over 50% of cases in Korea, though with virtually no spread outside the city of Daegu (*The New York Times* 2020). By March 8, the KCDC announced that 79.4% of confirmed COVID-19 cases were related to group infections, and that the outbreak associated with SCJ totaled 4,482 infections, or 62.8% of all confirmed cases in Korea (Bahk 2020). As of July 21, the proportion of the total cases associated with the SCJ had dropped to 37%, though the proportion was still notably high (Korean Centre for Disease Control 2020a). However, as time went on, the origin of the confirmed cases around Korea became more diversified, with a progressively lower proportion being linked to the SCJ (Kang 2020, 168–70).

In mid-February, President Moon called for a full survey and examination of all members of SCJ (Choi 2020). In response, the Prime Minister instructed the KCDC to test the entire SCJ community (*Yonhap News Agency* 2020b). He

vowed that all members of the Church would be “found and tested” (Kim S. 2020). The implication seemed to be that the church’s leadership was attempting to hamper such activities. SCJ members were thus interviewed and tested, regardless of whether they had come into contact with the virus, or were even in Korea at the time. This policy was not applied to other groups at the source of outbreaks in the country.

The differential treatment of the SCJ was exacerbated by the media, which cited a culture of secrecy as thwarting the efforts of the KCDC (Rachid 2020). On March 3, SCJ Chairman Lee Man Hee publicly apologized for the church’s role in the outbreak, and called for an end to the “stigmatization, hatred and slander” of its followers (Shin and Park 2020). However, no such reprieve was to be granted. Rather, it was clear that the connection between the SCJ and the COVID-19 pandemic was providing ample ammunition for those opposed to the Church and its interests. The SCJ was repeatedly cast as having provided false lists of members to the government (Khatouki 2020). Other false and increasingly wild rumors were also propagated (Khatouki 2020).

Just as the media added fuel to the government’s fire, official action was, in turn, cast as responding to the outrages reported by the media. The KCDC issued repeated press releases explicitly linking the SCJ to the outbreak in statistical terms, using a separate column for SCJ-linked cases of coronavirus, thereby contributing to the impression that the SCJ should continue to be seen as an independent originator of the virus. The same treatment was not applied to other groups. Patient 31 was often referred to as a “superspreader” (Korean Centre for Disease Control 2020b). The KCDC called the SCJ a “cult” in an official report that led world news to employ the same term (Down to Earth 2020). This led to increased marginalization.

In March, Seoul Mayor, the late Park Won-soon (1956–2020), announced a lawsuit against 12 SCJ leaders “for murder, injury, and violation of prevention and management of infectious diseases” (Mahbubani 2020) “through willful negligence” (Choe 2020). He also threatened to revoke the SCJ’s operating license, while the central government closed SCJ facilities (Choe 2020). In late February, a petition to President Moon urging the disbandment of the SCJ attracted over 750,000 signatures, most of them from fundamentalist Christian groups (Kim T. 2020). In response, the Korean Government admitted that it was not within its powers to ban a church, but the National Tax Service immediately

started investigating the SCJ (Yonhap 2020a). On February 25, SCJ headquarters in Gwacheon, Gyeonggi Province, was raided (Jun 2020). Lee Jaemyung, the Governor of Gyeonggi Province, and member of the ruling Democratic Party, who led the raid, pronounced that “this is a state of war,” with the SCJ clearly identified as the enemy (Rachid 2020).

On June 22, the City of Daegu began the process of suing the SCJ for damages on the grounds of allegedly hindering lockdown efforts and causing thousands of additional infections, demanding 100 billion won, or two-thirds of the coronavirus-related spending of the city (Perper 2020). On July 8, Suwon District Court issued a warrant for the arrest of three SCJ officials on charges of obstructing justice and inciting the destruction of evidence (*Yonhap News Agency* 2020c). These individuals were accused of providing health authorities with erroneous information and documentation regarding the number of SCJ followers and the venues of past gatherings. Further prosecutions occurred, in turn, on grounds of allegedly concealing information concerning a limited number of church members (*Teller Report* 2020).

While the SCJ was facing continued attacks from both the media and the central government, other churches had also been linked to outbreaks of COVID-19 in Korea. These included the Wangsung Presbyterian Church (WPC), though as a much smaller congregation, it attracted less attention (Yonhap 2020b). However, further clusters were identified around the Anyang Jesus Younggwang Church, the Ilgok Central Church, the River of Grace Community Church in Seongnam, the Manmim Central Church, and the Gwangneuksa Temple in Gwangju (Korean Centre for Disease Control 2020b). The response of the Korean administration to these outbreaks was distinctly different from that which had been meted out to the SCJ. The KCDC recommended a generalized framework of preventive measures applicable to *all* religious facilities, without specifying or taking measures against any individual congregation. These included contactless events, directions on how to move towards online activities, social distancing, and avoiding activities such as singing, chanting, and shouting that may be prone to move respiratory droplets through the air (Korean Centre for Disease Control 2020b).

From an epidemiological perspective, the situation as it had evolved by July, involving multiple clusters, was and is far less controllable and potentially more disconcerting than when infections originated in a single cluster (involving the

SCJ) (Lee and Bak 2020). Despite this, as noted, none of the churches involved was subjected to individualized measures on the part of the government attacks by the media, as the SCJ had been in the first wave, although some of their practices appear *prima facie* significantly more controversial than those of SCJ, particularly several months into the epidemic (Park 2020). For example, in March, at the River of Grace Church in Sungnam City, the wife of its leading pastor sprayed salt water into the mouths of followers in the belief that this would prevent the spread of the virus (Park 2020). Many other Protestant churches refused to close their doors and move worship online, sparking some public criticism, but nothing more (*Yonhap News Agency* 2020a), with the exception of the Sarang Jeil Church, whose leader is a well-known opponent of President Moon, and whose prosecution for COVID-19-related violations has just started at the time of this writing.

*Abusus non Tollit Usum? Assessing Korea's Interaction with the SCJ in Light of its Human Rights Commitments*

The treatment of the SCJ by the Korean authorities—at local, municipal, regional, and central level—raises two *prima facie* concerns. The first pertains to the differential treatment of members of the SCJ *vis-à-vis* members of other religious congregations in Korea. This raises questions of (non-)discrimination. The second concern relates to the measures employed in relation to the SCJ, and whether they were actually fit for purpose in order to contain the spread of the pandemic, or whether less restrictive and invasive measures could have served the same purpose. This raises questions of *proportionality*.

Non-discrimination and proportionality are important obligations, incumbent upon states by virtue of international human rights law, including core treaties to which Korea is a party. These same treaties allowed for Korea to issue notifications concerning unilateral derogations from certain human rights norms in circumstances in which the state's government deemed there to be a state of emergency threatening the life of the nation. In the event, over 20 states have submitted notifications to the United Nations, the Organization of American States, or the Council of Europe concerning unilateral derogations from some of their treaty obligations under the ICCPR (Article 4), and two regional human rights treaties, the ACHR (Article 27) and the ECHR (Article 15). However,

Korea did not find it necessary to do so, as it was well legislatively prepared (via the IDCPA) to tackle the crisis. The government further explicitly argued that the situation did not meet the requirements of the Korean Constitution for the issuance of an emergency order (Lee 2020). This entailed that the government was convinced that it could tackle the COVID-19 situation with no substantial derogation to human rights norms, even when legal tools were at its disposal allowing it to derogate, in a limited manner, from such norms.

Despite the *de iure* analysis above, as noted, the *de facto* employment of the legislation in question raises concerns. Although, quite clearly, the Korean authorities had devised a legislative framework that allowed the principal purpose of the IDCPA to be achieved, namely curbing the pandemic (which was factually more successful in Korea than in many other countries), its negative side-effects were significant. The reasons for this have much to do with legislative design.

The IDCPA was conceived in 2015 to deal with an evolving, potentially uncertain, situation involving a future outbreak. Every infectious disease outbreak is different from the last. As such, any legislation aiming to prospectively deal with such outbreaks must fulfil a number of criteria. It must provide the authorities within the state with ample *authority* to take any measures necessary to contain the virus, hamper its spread, deal with infected persons, contact-trace possibly infected persons, and keep the public informed. In addition, it must provide *flexibility* to take account of the particular characteristics of the outbreak as it evolves.

This combination of broad powers (any measures necessary) and flexible working definitions explains much of the language of the IDCPA. Key definitions, such as persons “likely to be infected” (Article 76), are left undefined, as determining infection may be accomplished according to different criteria for different viruses. Similarly, the fact that the definition of the information that the public authorities may seize, and how they may use it, is not made clear. This is particularly relevant, given how quickly information technology is developing, insofar as an open category allows the IDCPA to keep pace with the steady march of technological advancement. However, such flexibility may also pave the road for abuse. Other provisions of the IDCPA also raise similar concerns. Allowing for search and seizure of personal data without judicial oversight may be necessary in a public health emergency, but it represents a very serious intrusion into the private lives of citizens.

Better legislative design can obviate such problems. For example, if search and seizure of personal data without judicial oversight is to be countenanced, such powers should be accompanied by sufficient safeguards, including the data minimization principle, storage limitation, integrity and confidentiality, accountability of the data controller, as well as lawfulness, fairness, and transparency—principles succinctly expressed by the European Union General Data Protection Regulation, which represents the gold standard in this domain. Moreover, an effective system of data protection oversight and judicial review must ultimately be available to injured citizens. However, the IDCPA does not espouse similar standards. Rather, the legislation, drafted in the name of efficiency and flexibility, leaves too much room for interpretation by the state authorities, allowing them to employ the Act in a manner contrary to the ICCPR and Korea's human rights obligations, and particularly the proportionality and non-discrimination principles.

The proportionality of actions by Korean state actors—at national, regional, and local level—against the SCJ must be assessed in light of the factual situation. It should be noted that, clearly, the SCJ is not directly and solely responsible for the epidemiological situation in Korea. The latter is highly volatile, and continues to evolve over time. Although the SCJ was, according to the KCDC, linked to approximately 60% of initial infections, by late July, it had been linked with around 35% of cases, and relatively few new cases. Further, *all* SCJ members were traced by the Korean authorities, regardless of whether they had contact with the Daegu cluster. It was not justified for a few dozen initial cases to lead to tracing hundreds of thousands of SCJ members, including some outside Korea. In addition, the legislative framework did not provide sufficient guarantees for data protection, and the authorities effectively identified many SCJ members and made their details public, though this was not necessary to protect public health. On this basis, it is clear that the proportionality principle was not respected.

In addition, as noted previously, the non-discrimination principle was also breached by the action of the Korean authorities, as a significantly less restrictive approach was employed with regard to other congregations within Korea that were linked to outbreaks. This has persisted until today, with the KCDC's publications still distinguishing SCJ-linked cases from all other cases, despite new cases associated with the SCJ becoming progressively less statistically significant as time goes on.

## *Conclusion*

On 31 July 2020, Lee Man Hee, Chairman of the SCJ, was arrested for allegedly hiding crucial information from authorities concerning the Church, and thereby contributing to the outbreak. At the time of writing, the case against him has yet to properly begin, and the weight of the evidence is unclear. However, arresting a church leader, let alone an 88-year-old one, for failing to co-operate with draconian measures undertaken on the basis of a broad and uncertain law seems, on the face of it, deeply suspect, and difficult to reconcile with Korea's avowed respect for human rights. It is also worth noting that no other religious leaders have been arrested (at the time of this writing), contributing to the impression that the legal framework is being employed in a manner contrary to the twin principles of proportionality and non-discrimination, and for the persecution of enemies of the political regime.

Responding to any emergency, including one pertaining to public health, involves compromises, which may include human rights implications. Officially declaring a state of emergency and notifying international institutions about derogations from certain human rights treaty obligations can tame emergency powers by making states justify measures taken on the basis of necessity, proportionality, exigency in the situation, temporality, and a commitment to human rights.

However, Korea chose to pursue a different course, which, on the face of it, seemed a good one. By framing the situation as within the bounds of normalcy, and using regular legislation, broad emergency measures were avoided. However, as shown by the IDCPA model, the flexibility needed to make such a model effective may still result in abuses, because pandemics are likely to require exceptional measures and some deviation from full enjoyment of all human rights by all citizens.

The temptation is to give the government space and time to fix the problems that may arise in a time of national crisis. However, democratic oversight mechanisms and human rights are not just fair-weather friends. They are, above all, important when no-one is looking, when people's attention is elsewhere. Legislative drafting must take into account the political temptation to use flexible legislation in a non-impartial manner in order to scapegoat and pursue one's enemies. History has repeatedly shown this to be a potential pitfall of such

enactments. The Korean example, and the IDCPA, are reminders that we should remain vigilant to such problems in the future.

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