Fighting COVID 19 - Legal Powers and Risks: South Korea

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I. Introduction

The Republic of Korea (South Korea) was calculated to be one of the countries that is "heavily hit" by the spread of COVID-19 that sprung from Wuhan, China. According to the latest Korea Centers for Disease Control and Prevention (KCDC) data, as of March 23, South Korea has reported just over 8,900 cases and 111 deaths.

Whereas many Western countries have reached ever higher number of infections, South Korea's outbreak curve has flattened. Since the highest counts of 909 new cases on February 29, South Korea, a country of 50 million, has seen its daily case count rise by as few as 74 cases. As of this Monday, 64 new cases are confirmed. At a recent interview with BBC, the Foreign Minister of South Korea, Kang Kyung-wha, announced that South Korea is seeing a "stabilizing trend".

South Korea has suppressed the significant number of new COVID-19 confirmed cases by not ordering stringent restrictions on speech and movement like China, or locking down regions and causing economic damage like in Europe and the United States. South Korea could successfully slow down the spread of COVID-19 along with the government's quick reaction to the disease. Government has been implementing nationwide free public testing programs. South Korea has more than 5200 tests per million inhabitants, while the United States has offered 74 tests per million inhabitants so far. 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 have opened up an innovative 'drive-through' testing area, which became a model followed by other countries including Germany, Ireland and the USA. The civil society has also generally followed the guidelines provided by Government. But authorities continue to remain highly alert amid new clusters of infections. The most of recent confirmed case of COVID-19 was found at a nursing home in the hardest-hit city of Daegu last week. And another 55 new cases were linked to a church south of Seoul.

II. Emergency Law? - No Need for Now

The Blue House (the executive office and official residence of the President of South Korea) announced on the March 3 that it was "not considering" the opposition's call for an emergency order to secure the patients' beds for new coronavirus infection. It said that the measures which were announced by the Central Disaster and Safety Countermeasures Headquarters (CDSCHQ), and the support from military facilities are enough to secure beds for COVID-19 confirmed patients.

The government added that the current situation did not meet the requirements of the Korean Constitution to issue an emergency order. 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)).

Art. 76 (1) reads:

> *"In time of internal turmoil, external menace, natural calamity or a grave financial or economic crisis [...] the President may take in respect to them the minimum necessary financial and economic actions or issue orders having the effect of Act, [...] only when [...] there is no time to await the convocation of the National Assembly."*

The emergency order pursuant to Art. 76 (2) shall only be adopted in the following situation:

> *"In case of major hostilities affecting national security [...] the President may issue orders [...] only when [...] it is impossible to convene the National Assembly."*

Earlier, Mayor Kwon Young-jin of Daegu requested on March 2 to support the city to secure more than 3,000 beds in the shortest time possible, with the President' issuing an "emergency order". The biggest opposition party also demanded that the President prescribe the current situation as a semi-war state and immediately invoke the President's emergency order under the Constitution to secure pathological facilities and concentrate medical personnel and equipment. But after that, Mayor Kwon apologized for "asking the President to issue an emergency order for the President with insufficient legal review" during a video meeting of the State Council on March 3. He acknowledged that the emergency order of Art. 76 (2) can only be issued when it is impossible to convene the National Assembly.

The Blue House maintains a position that even an "emergency financial order" of Art. 76 (1) is currently not necessary. This is because the head of a local government 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 (IDCPA).

III. Legal Powers and the Infectious Disease Control and Prevention Act

In Korea, the relevant legal regulations related to infectious diseases are: the Infectious Disease Control and Prevention Act, the Framework Act on the Management of Disasters and Safety, the Quarantine Act, the Regional Public Health Act, and the Prevention of Acquired Immunodeficiency Syndrome Act.

The Infectious Disease Control and Prevention Act (IDCPA, Act No. 14286, amended on December 2, 2016 in English, and most updated version in Korean, which has been amended on March 4, 2020) is the most relevant law in effect regarding the explosive COVID-19 outbreak in South Korea. The IDCPA endows the government with highly specific means to distribute resources and mobilize and stimulate various actors across the whole of society in the effort to fight against the spread of infectious disease.

The purpose of this act is to contribute to improving and maintaining citizens' health by preventing the occurrence and prevalence of infectious diseases hazardous to citizens' health, and prescribing necessary matters for the prevention and control thereof. The act stipulates certain powers and responsibilities of the state, local governments and medical personnel, in addition to the rights and duties of the people. The law also has a wide range of regulations, including basic plans and projects for prevention and surveillance management of infectious diseases, process of notification and reporting on diseases, epidemiological investigations, preventive measures, and compensation. The current Act itself is the outcome of bitter lessons learned from the 2015 Middle East Respiratory Syndrome (MERS) outbreak period, when South Korean authorities were flurried to trace the path of infection after a delayed earliest response which did not fulfill standards of democratic transparency nor could provide sufficient testing kits. The Act was initially enacted in 1954 as an independent law with far fewer provisions compared to the current one, and has been so far revised over forty times, largely in response to miscellaneous infectious disease threats, including MERS.

And it should be noted that, with the payment being authorized by Art. 70-4 of the IDCPA, compensation will be given to all people who have been hospitalized, as well as those that have been in self-quarantine.

> *"All applications will be screened to see if the person has faithfully stayed in quarantine and followed rules regarding making contact with others, with a person belonging to a four person family to be provided 1.23 million won (around USD 1,000) if he or she has been in isolation for 14*

days or more," announced the Ministry of Health and Welfare on February 8.

And if a person without a family is quarantined, the ministry said it will supply 454,900 won if that person has been in isolation for 14 days. And there has been widespread and free public testing. If a doctor suspects someone needs to be tested for virus – for example, if they have recently returned from China or other hard-hit countries, had contact with someone known to be infected or belong to an at-risk group – the procedure is done free of charge. People who do not belong to those categories but want to be tested are charged 160,000 won (around USD 130) and reimbursed if the result is positive, with the government bearing expenses for any treatments they receive. This is the payment being authorized by the IDCPA, too.

IV. Safeguards for Employers and Employees

1. Employees: Protective Laws and Policies

(1) The first scenario addresses the situation that a company closes its business voluntarily. This can be the case due to the outbreak of an infectious disease, such as COVID 19, and the expected economic loss that is related to it. In this case, there will be a decrease in sales and a lack of profit, and the company's employees will be asked by the employer to stay home. Consequently, the employees are subject to the provision of 'allowances' under the Labor Standards Act.

During the period of absence, 70% of the average wage must be compensated with the allowance. According to Art. 46 of the Labor Standards Act, if the place is closed for reasons attributable to the employer, the employer must pay at least 70% of the average wage during the period. Therefore, it is a violation of the law to have a company (i.e. employer) oblige unpaid leave on their employees. In reality, however, often there will be an agreement between the employer and the employee to take unpaid leave in times of crisis.

(2) As for the second scenario, what would happen if one of the employees is a confirmed patient, suspected patient, or close contact suspect of infectious disease, so the company has to shut down part of its workplace or provide leave of absence to its employees?

First of all, Art. 41-2 of IDCPA prescribes that where an employee is hospitalized or isolated under the Act, the relevant employer may grant a paid leave during the period of such hospitalization or isolation. This is in addition to the paid leave provided for in Art. 60 of the Labor Standards Act. Furthermore, if the cost of granting paid leave is subsidized by the State (i.e. when the subsidy is offered by related laws and government policies and the employer has received it), the employer shall provide the paid leave (Art. 41-2 of IDCPA), which means in this case granting paid leave is 'compulsory'.

Currently, the Government is asking companies to pay the allowance for suspension of work to its workers, and recommends companies to apply for Employment Maintenance Fund (EMF). The EMF provides limited funding for companies who had to decrease production due to economic downturn. It covers between 2/3 and ½ of the allowance paid to employees. Considering that the EMF's limitations, the funding has the potential to reduce the burden on the companies, but to a limited extent only.

(3) In the third scenario I am focusing on what would happen if a certain geographical area faces on 'lockdown' as a whole under an executive order.

It is important to note that this kind of lockdown has not occurred in Korea yet, and Government is making recommendations for (strict) self-control of individuals and enterprises, which takes into account proportionality. However, were it to happen, it would be considered a force majeure, just like a natural disaster that cannot be controlled or managed by the company. There is no obligation for companies to compensate the employees for the suspension of work, but Government is expected to guide and suggest companies to pay the allowance for suspension of work to the workers, and recommends companies to apply for the EMF.

2. Enterprises: Supportive Measures

(1) Compensation

Companies and business owners may claim compensation pursuant to Art. 70 of the IDCPA. Such compensation is limited to very specific cases specified in Art. 70 (1) of the IDCPA. Most preventive measures against the coronavirus do not qualify under the provision, such as stopping public traffic completely or partially (Art. 49 (1) 1 of the IDCPA), restricting or prohibiting performances, assemblies, religious ceremonies, or any other large gathering of people (Art. 49 (1) 2 of the IDCPA) .

Again, the absence of a legal provision allowing to claim compensation for losses, can be a reason for a constitutional appeal alleging a violation of the right to property and the right to equality (See here). Art. 70 (1) of the current IDCPA does not include compensation for the losses of business owners due to lockdowns of areas or entire regions by the government to stop the spread of COVID 19. Currently, the government makes recommendations for self-control, which takes into account proportionality and the legal situation mentioned above. If regional 'lockdown' measures have to be used in South Korea with unexpected escalation of the situation someday, separate legislative measures may be necessary. I believe it is time to consider this in advance to prevent any potential unconstitutional situation.

(2) Financial Aid

As pointed out above, there are still large gaps regarding the right to compensation despite the existing IDCPA. Despite that, from the economic perspective, providing benefits in tax and loans earlier is more effective than providing compensation to them long after the loss has occurred. The former measure has more possibility to prevent unexpected bankruptcy of companies.

Therefore, based on this perception, the current government has issued various aid policies. For instance, recently President Moon Jae-in made public a major small business rescue package worth 50 trillion won (USD 39 billion) on last Thursday in response to the coronavirus crisis during an inaugural "emergency economic council" session. The financial support program centers around much needed support to small and medium-sized firms and people with low credit ratings, according to Finance Minister. And this would not be the last one (for example, the amount has just been doubled as 100 trillion won on March 24, while I am proofreading this post).

Meanwhile, the government of Daegu, the south-eastern city hit hardest by the coronavirus outbreak, on this Monday (23 March) announced emergency financial assistance of about 660 billion won (USD 517 million) to help about 640,000 of the city's 1.03 million households, to hand out varying amounts of financial support to low-income households, small business owners and self-employed people, beginning April 16.

In addition, several local government heads (Governor of Gyeonggi-do, Governor of Gyeongnam etc.) are proposing proposals for "basic income" for disasters to pay cash or gift certificates altogether. In the United States, the Trump administration has already announced plans to pay about USD 1,000 per person. It remains to be seen whether the Korean government will respond to the crisis in the traditional way, such as by providing benefits in tax and loans, or whether it will use non-traditional means, such as "basic income for disasters".

V. Conclusion

So far, this new coronavirus containment efforts of South Korea have been comparatively successful and it has shown its ability to quickly address public health crises under democratic transparency and rule of law. But, there are still considerable potential risks, especially for more vulnerable economic actors in the looming economic consequences of the outbreak of virus. And it turns out that the current legal rules are still not enough to address these risks. Solving this will be another challenging task to South Korea.

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