Tackling Covid-19: Lessons for A Global Challenge

Yanzhong Huang & Samantha Kiernan
China’s aggressive response has won plaudits, but it betrays some of the worrying signs of the SARS crisis.

Clare Wenham
Many countries have introduced border restrictions, but a close look suggests that they offer only the illusion of control.

Brian J. Kim
South Korea has a legal infrastructure that gives the government powerful tools to combat a disease outbreak. The US should take note.
South Korea Has the Legal Infrastructure to Fight Pandemics; The US Doesn’t

By Brian J. Kim

Throughout the crisis involving the coronavirus outbreak, attention has been focused almost exclusively on the medical and scientific aspects of the pandemic, with a secondary focus on its economic impact. But the remarkable efforts made in South Korea point to another significant component of the toolkit needed by governments—a legal infrastructure that enables the government to combat a disease outbreak. Brian J. Kim examines the differences between the relevant South Korean and American legal provisions.

On Jan. 20, the United States and South Korea both reported their first confirmed coronavirus cases. Two months later, South Korea had already screened more than 300,000 people for the virus, or roughly one in every 170 citizens, and was reporting more recoveries per day than new infections. The US, on the other hand, was still scrambling to ramp up testing and, as of March 19, reporting more than 2,000 new cases every 12 hours. Why the difference?

The South Korean Response

Emergency text messages from the South Korean government alerting citizens of nearby coronavirus cases; a government-mandated GPS-tracking app designed to monitor and punish people who break quarantine; Public government reports detailing the whereabouts of every single confirmed patient, down to which theater seat they sat in, which plastic surgery clinic they visited and even where they got their lingerie. All these examples are part of a sweeping tracking infrastructure erected by the South Korean government to contain what was at one point the largest coronavirus outbreak outside of mainland China. To date, South Korea has confirmed 8,799 coronavirus cases, with roughly 60 percent linked to the Shincheonji Church of Jesus, a secretive Korean cult. More than three-quarters of South Korean cases have occurred in the southeastern city of Daegu, where Shincheonji counts some 10,000 members.

South Korean public health law endows the government with highly specific levers to allocate resources and mobilize various actors in a whole-of-society effort to combat the spread of infectious disease. The law itself is the product of painful lessons learned from the 2015 Middle East respiratory syndrome (MERS) outbreak, which sent South Korean authorities scrambling to understand the path of infection after a delayed initial response that lacked both transparency and sufficient testing kits. South Korean legislators have since designed a bespoke legal regime tailored to meet the particular demands of a modern disease outbreak. Article 76-2(2) of South Korea’s Infectious Disease Control and Prevention Act (IDCPA), for instance, was amended in the aftermath of MERS to equip the minister of health with extensive legal authority to collect private data, without a warrant, from both already confirmed and potential patients. The article expressly mandates that private telecommunications companies and the National Police Agency share the “location information of patients … and [of] persons likely to be infected” with health authorities at their request. This is in addition to Article 76-2(1), which already enables the health minister and the director of the Korea Centers for Disease Control to require “medical institutions, pharmacies, corporations, organizations, and individuals” to provide “information concerning patients … and persons feared to be infected.”

Together, these provisions have allowed authorities to extract surveillance footage, credit card histories and cellular geolocation data of both confirmed and potential patients without a warrant. This explains how the South Korean government has been able to rapidly “contact-trace” hundreds of thousands of its own citizens to curb the outbreak. One South Korean governor invoked these authorities to descend on unsuspecting Shincheonji leaders in late February to seize a list of the cult’s highly secretive membershipship, including those who have kept their involvement hidden from their own families. (The government has since vowed to test all 200,000 members for the virus, and the South Korean outbreak as a result remains largely contained within the Shincheonji membership.) There is no legal criteria for identifying “potential” patients or “persons feared to be infected;” the only requirement under South Korean law is that each person under surveillance be ultimately notified and the information be destroyed when the “relevant tasks have been completed.” Articles 6 and 34-2 then specifically invoke the public’s “right to know” and require the minister of health to “promptly disclose information” about the “movement paths, transportation means … [and] contacts of patients of the infectious disease.” As a result, authorities in some cities have felt obligated to blast the whereabouts of certain patients to every single smartphone in their locale via emergency text, with one citizen reportedly receiving more than 900 alerts in just four days. In addition to the government’s own texting infrastructure, the disclosure requirement has allowed private developers to aggregate the released data and develop mobile apps that, for instance, warn members of the public if they come within 100 meters of a confirmed patient, Shincheonji facility or potentially contaminated building.

The government also has a legal tool for imposing physical restrictions during a health crisis. Article 47(1) empowers authorities to shut down any location “deemed contaminated.” Article 49(2) further permits the “restriction or prohibition of performances, assemblies, religious ceremonies, or any other large gathering of people,” explicitly authorizing a controversial imposition of state power over religion during a public health crisis. The South Korean government has invoked these provisions to forcibly shut down nearly 400 Shincheonji facilities.
in one province alone and to ban the cult’s religious services for at least two weeks. In response, Shincheonji leaders have complained of “persecution,” calling the government’s approach a “witch hunt.”

Aside from these provisions, South Korean law contains other specific instruments designed to strengthen the government’s arsenal in a public health emergency. A new amendment to the IDCPA added on March 3 allows the government to criminally prosecute suspected patients who refuse to get tested for the virus with a fine of up to 3,000,000 won (around $3,000). The amendment also significantly increases the potential penalty for breaking quarantine to up to one year imprisonment or a fine of 10,000,000 won (around $10,000) for the offense.

Another March 3 amendment specifically grants officials the legal authority to take “necessary means” to make masks available to children and the elderly in a public health crisis involving any respiratory virus. This amendment explicitly authorizes a temporary ban on the export of certain medical supplies in order to prevent price gouging. Articles 50-56 also spell out a “disinfection duty” for the government, creating an affirmative obligation for authorities to disinfect potential sites of contamination like subways. Article 6 stipulates that all citizens have a “right to receive the diagnosis and medical treatment of any infectious disease” and that the “State and local governments shall bear expenses incurred within.” These provisions together form the legal spine that has shaped the South Korean government’s response capacity in the current outbreak.

THE AMERICAN RESPONSE

But could the South Korean approach be replicated in other democracies such as the United States? Most of the highly specific levers available to the South Korean government, for instance, have no comparable analogue in American federal law. This difference is by design, rooted in deep American constitutional instincts about civil liberties and federalism.

To be sure, the relative lack of express authorities does not mean the US federal government could not take extraordinary action in a crisis. As the Brennan Center for Justice has documented, the president would have significant authority in a national emergency declared under the National Emergencies Act (50 U.S.C. §§ 1601-51) and the Stafford Act (42 U.S.C. §§ 5121-5207). (President Trump invoked the Stafford Act when he declared the coronavirus crisis a national emergency.) The declaration immediately activates more than 120 emergency provisions, some of which grant power to the president to deploy troops or convert commissioned corps of the public health service to be a military service. Under the Commerce Clause, which endows Congress with the exclusive authority to regulate interstate commerce, the federal government could also enact other health measures including a quarantine — a route taken by President Benjamin Harrison in a quarantine order during the 1892 cholera outbreak.

In addition, under Section 319 of the Public Health Service Act (42 U.S.C. § 247d), the secretary of health and human services may also declare a public health emergency, which then triggers a broader authority to “take such action as may be appropriate to respond.” The act also equips the surgeon general with the power to prevent the spread of communicable disease with any measures that “in his judgment may be necessary.”

Expansive though they could be, the legal instruments in America’s toolkit in a public health emergency are strikingly nonspecific. Nowhere, for instance, does US law — like South Korean law — guarantee the right of citizens to get tested on the government’s dime or impose affirmative duties on federal health authorities to disclose to the public crucial information such as the total number of conducted tests. For better or for worse, the silence of US emergency law also means that the more controversial components of the South Korean toolkit have no analogue in the US. Unlike South Korean law, for example, the American legal regime does not grant express powers to health authorities to shut down religious gatherings or to extract geolocation data of data even for contact-tracing might run afoul of Fourth Amendment prohibitions on unreasonable searches and seizures.

Moreover, in the US, public health has long been the province of states and local governments, which derive their authority from the police powers granted by their respective constitutions and reserved to them by the 10th Amendment. By design, the federal government’s emergency powers reflect a fundamentally bottom-up system focused on allowing states and local governments to operate with highly specific levers to allocate resources and mobilize various actors in a whole-of-society effort to combat the spread of infectious disease. The law itself is the product of painful lessons learned from the 2015 outbreak of Middle East Respiratory Syndrome.

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from hundreds of thousands of people for contact-tracing without a warrant.

For one, American constitutional instincts would inflict a high political cost, if not a legal barrier, against such extraordinary action. The forced closure of hundreds of Shincheonji facilities in South Korea might seem to many Americans an egregious violation of basic First Amendment concepts regarding the freedom of religion, right to assemble, and separation of church and state. Warrantless collection and dissemination of personal data even for contact-tracing might run afoul of Fourth Amendment prohibitions on unreasonable searches and seizures.

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state and private laboratories, the federal Centers for Disease Control and Prevention (CDC) has struggled to arrive at an official count of total tests conducted nationwide. In unexpected ways, federalism is already a decentralizing variable that has handicapped the US response to the outbreak.

**CONCLUSION**

In the absence of custom-made provisions, the Trump administration has invoked a 70-year-old law passed during the Korean War just to accelerate the production of medical supplies such as face masks and gloves. South Korean authorities, in the same scenario, simply looked toward Article 49-2 of their Infectious Disease Control and Prevention Act, which endowed the government with the specific authority to make masks available to the public in a health crisis involving respiratory viruses.

This difference in South Korean and US law is reproduced in countless other areas of crisis response. The Korean CDC continues to release detailed reports of new tests, infections, and recoveries twice a day, while the most reliable US test count comes from the Atlantic’s “Covid Tracking Project,” which has frantically aggregated numbers from each state in the absence of authoritative federal data. Meanwhile, American officials, like the South Koreans, are belatedly discussing ways to collect smartphone geolocation data, but in an anonymous, aggregated form to preserve privacy rights.

Such examples raise hard questions about efficacy and the balance between civil liberties and government power in an emergency. Could commitment to civil liberties or even federalism in a public health crisis lead to outcomes that are scientifically unfavorable? Are positive, affirmative legal duties more effective against a public health threat?

The US legislative response in the current crisis has focused largely on mitigating the economic impact of the outbreak. There is virtually no conversation about new legal provisions that would enable a more co-ordinated government response to a public health crisis. That responsibility, instead, falls on state legislatures: New Hampshire could invent new authorities to prosecute those who break quarantine, like the student who attended a Dartmouth party despite being advised to avoid contact. New York City could improve its health code by introducing new disclosure requirements that would force authorities to share important epidemiological data with residents.

If the current crisis has demonstrated anything, it is that the novel coronavirus does not wait around for these discussions. The ability of the US to weather the current outbreak and defeat future ones will depend on the speed and imagination with which its lawmakers are able to update the country’s legal toolkit.

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