

COVID-19 and Korea

Viral xenophobia through a legal lens

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Abstract

Although South Korea's response to COVID-19 has been praised as efficient, effective, and well-planned, the legislation devised to tackle the pandemic suffered from a lack of human rights safeguards and was rather opportunistically employed by the government to target an unpopular religious community. In such situations, it falls to the courts to provide protection to those who may have suffered as a result of state excesses. The trial of Chairman Lee Man-hee of the Shincheonji Church of Jesus places these issues in sharp relief. Chairman Lee's prosecution is instructive regarding applications of the rule of law in situations of national emergency, freedom of religion, and the inadequacy of traditional legal remedies for certain human rights violations.

Keywords

South Korea, Shincheonji, human rights, rule of law, courts, COVID-19.

1. Introduction

On 12 August 2022, the Supreme Court of South Korea confirmed the verdict of the Suwon High Court of 30 August 2021, finding the leader of a South Korean religious movement not guilty of breaking virus control laws. At the same time, the Supreme Court confirmed the verdict of the Suwon High Court (and the earlier verdict of the Suwon District Court), finding the same individual – Chairman Lee Man-hee, who heads the Shincheonji Church of Jesus (SCJ) – guilty of embezzlement.

The SCJ was at the centre of South Korea's first major COVID-19 outbreak in February 2020, making it the target of considerable public anger at the time. However, as shall be demonstrated, much of this anger was unwarranted. More-

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over, it was exacerbated by Korean government efforts to harness the opprobrium directed at the SCJ for its own political ends, causing serious damage to the religion and its adherents.

The prosecution of Chairman Lee and the SCJ's status in the context of Korean society are instructive regarding applications of the rule of law in situations of national emergency, freedom of religion, and the inadequacy of traditional legal remedies for certain human rights violations, especially those affecting religious minorities. The present article endeavours to explore these issues and to explain more broadly how the Korean government harnessed the COVID-19 pandemic as a convenient foil to persecute elements in society that it deemed undesirable.

2. COVID-19 in Korea

COVID-19 has affected different countries in a wide variety of ways, and government responses to the pandemic have also varied. Australia, for example, declared a state of emergency, whereas Bangladesh acted in a more ad hoc manner, declaring a country-wide “general holiday” from 26 March to 5 May 2020 in lieu of an official lockdown. Japan declared a state of emergency but relied on “voluntary” social distancing (*jishuku*) rather than legal enforcement. In the meantime, Brazil and Hungary, amongst other states, avoided explicitly declaring an emergency but used the crisis as an excuse to exercise extraordinary powers and implement legislation aimed at curtailing civil liberties and granting additional authority to the executive branch. A wide range of other responses also occurred throughout the world.²

The catalogue above highlights the fact that the perils posed by a pandemic do not emanate only from the virus itself. Rather, additional danger may result from the abuse of emergency powers or other responses crafted to deal with a developing crisis. In the past, such emergency situations have been used as excuses to enact extraordinary legal measures in the name of national security, public health, or other justifications.³ However, such measures may in fact be intended to achieve other goals, such as curtailing dissent, dissolving Parliament, postponing elections or aggregating additional powers to the executive branch.

In this context, Korea offers a particularly interesting case study. Korea appeared well-prepared for the pandemic, rendering it perhaps less vulnerable to potential abuses such as those outlined above. Indeed, it was frequently identified as a prominent success story in terms of its response to the COVID-19 out-

² Tom Daly, “Democracy and the Global Emergency: Shared Experiences, Starkly Uneven Impacts,” *Verfassungsblog*, 15 May 2020.

³ See for example Hans Mommsen, “The Reichstag Fire and Its Political Consequences,” *Aspects of the Third Reich* (London: Palgrave, 1985), 62-95.

break.⁴ A rigorous system of contact tracing and multiple government interventions aided in keeping the viral transmission rate relatively low. The government quickly identified the importance of preventive measures, early diagnostics, and a centralized control system.⁵ However, perhaps the key element distinguishing Korea from many other states' response to COVID-19 was the fact that it had garnered relevant experience via a similar recent event. The Korean government had learned valuable lessons from the comparatively recent outbreak of Middle East Respiratory Syndrome (MERS) in 2015, where Korea was the most severely affected country outside the Middle East.⁶

Korea's experience with MERS led to significant legislative innovation, including ordinary legislation devised to deal with future outbreaks. This legislation was invoked in response to the outbreak of COVID-19, and its application rendered it unnecessary for Korea to declare a state of emergency.⁷ However, as shall be explained, Korea's apparent success and its preparedness for the crisis do not imply that Korean society escaped the democratic and human rights abuses that often occur when emergency powers are invoked. Rather, the legislative framework itself furnished a means through which the Korean government could persecute a small and already marginalized religious group, namely the SCJ. This action raises uncomfortable questions concerning Korea's compliance with an assortment of international human rights norms, its own constitution, and the rule of law.

3. The Infectious Disease Control and Prevention Act

Korea reported its first confirmed case of the MERS virus on 20 May 2015. Thereafter, Korean public health authorities enforced a number of preventive measures for the protection of public health that were not authorized under Korean law. The legislation concerning infectious diseases that was in force at the time did not grant effective enforcement powers regarding mass public health measures to either the central or the regional authorities.⁸ The response was further characterised by government secrecy. The Korean Ministry of Health and Welfare initially withheld details concerning the locations of infected individuals from the public.⁹ This approach was heavily criticised as preventing the Ministry from

4 Edward White, "South Korea Reports No New Local Coronavirus Cases," *Financial Times*, 30 April 2020. Available at: <https://on.ft.com/3Viirmz>.

5 Seung-Youn Oh, "South Korea's Success Against COVID-19," *Regulatory Review*, 14 May 2020.

6 Sang-il Lee, "Costly Lessons From the 2015 Middle East Respiratory Syndrome Coronavirus Outbreak in Korea," *Journal of Preventive Medicine & Public Health* (2015), 48(6):274-276.

7 Brian Kim, "Lessons for America: How South Korean Authorities Used Law to Fight the Coronavirus," *Lawfare*, 16 March 2020. Available at: <http://bit.ly/3Fy2fVa>.

8 Mijeong Park, "Infectious Disease-Related Laws: Prevention and Control Measures," *Epidemiology and Health*, 39, 25 July 2017.

9 Ji-hye Shin, "Korea Mulling Disclosure of MERS-Affected Hospitals," *Korea Herald*, 2 June 2015; Poh Lian

properly notifying hospitals and municipal governments as to risks they might face, reflecting a seeming prioritisation of the privacy of those infected over broader public health concerns.

The MERS crisis continued only for a matter of months, but both the public and the Korean authorities were shocked that the virus was able to kill 38 people. Korea's MERS infection toll was the highest for any country outside the Middle Eastern region, spurring the Korean government into action.¹⁰ Seoul was eager to learn lessons from the experience of MERS and to be better prepared for the next pandemic, in the hope that *ad hoc* responses would not be required.¹¹ Inter-institutional co-operation was identified as a key action area. Prior to the outbreak, various state agencies and government organs claimed overlapping competencies, often hindering the co-ordination of national efforts. It was determined at an early juncture that this situation required improvement, and that new legislation to manage infectious disease outbreaks was needed. The result was the Infectious Disease Control and Prevention Act (IDCPA), which came into force in 2016.¹²

The IDCPA was designed as comprehensive legislation for the management of outbreaks of infectious diseases. It endows the central government with a wide array of powers. For example, Article 26 bis allows the authorities to carry out checks of prior vaccination records; Article 27(1) provides for a centralized system of certificates of vaccination, administered at the municipal level; Article 33 establishes an integrated vaccination management system (including the processing of personal data); and Article 41 requires private entities, including employers, to co-operate with public authorities where so requested. These provisions all represent *lex specialis* and derogations from the provisions of ordinary Korean law.

Beyond the above, certain IDCPA provisions confer the Seoul government with discretionary powers, or powers that were either loosely defined or couched in open-ended terminology. Article 76-2(2) of the IDCPA gives the Ministry of Health extensive legal authority to collect private personal data, without a warrant, from both individuals already confirmed as infected and those suspected of infection (with the latter category being undefined). The same article requires telecommunications companies, as well as the National Police Agency, to share the

Lim, "Middle East Respiratory Syndrome (MERS) in Asia: Lessons Gleaned from the South Korean Outbreak," *Transactions of the Royal Society of Tropical Medicine and Hygiene* (September 2015), 109(9):541-542; Jong-Myon Bae, "The Duty to Prevent' during an Epidemic Situation like 2015 Korean MERS outbreak," *Epidemiology and Health*, 2015, 37:e2015037-e2015037.

10 Han Ki Seo, "The Daily Records of the Outbreak of MERS in South Korea," *Yonhap News*, 8 September 2018. Available at: <https://www.yna.co.kr/view/AKR20180908044400017>.

11 KCDC, *The End to the MERS based on WHO Standard*. Available at: <http://bit.ly/3BD5MA6>.

12 Act No. 13639, revised on 29 December 2015 and effective since 30 June 2016.

“location information of patients ... and [of] persons likely to be infected” with health authorities, upon the request of the latter.

In addition, Article 76-2(1) enables the Ministry of Health and the Director of the Korea Centers for Disease Control (KCDC) to require “medical institutions, pharmacies, corporations, organisations, and individuals” to provide “information concerning patients ... and persons feared to be infected.” Public and private authorities, upon request, are obliged by Article 76 to surrender, among other items, (a) personal information, such as names, resident registration numbers prescribed in Article 7(3) of the Resident Registration Act, addresses, and telephone numbers (including cell phone numbers); (b) prescriptions described in Article 17 of the Medical Service Act and records of medical treatment described in Article 22 of the same Act; (c) records of immigration control during the period determined by the Minister of Health and Welfare; and (d) other information prescribed by presidential decree for monitoring the movement paths of patients with infectious diseases.

Article 76 is supported and explicitly linked to several subsections of Articles 6 and 34(2), which specifically invoke the public’s “right to know” and require 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.”

The provisions in question espouse transparency and the prioritisation of public health over the privacy of those infected. As such, they represent a *volte-face* in respect of the response to the MERS outbreak in Korea. However, closer scrutiny of these provisions reveals significant shortcomings in several respects, not least their compliance with fundamental tenets of the rule of law, most prominently legal certainty. Furthermore, their open-ended nature confers considerable flexibility upon the powers that be, ultimately creating a risk of abuse of power. More specifically, the legislation fails to define the factors to be considered in identifying persons feared or suspected of being infected through contact tracing. This feature raises the possibility of large lists of individuals being drawn up based upon criteria devised by state officials, rather than legal or medical professionals, with the result that these people’s personal data – including records of their movements, transactions, and private activities – would be surrendered to central governmental authorities. Indeed, as shall be discussed, this very eventuality transpired shortly after the outbreak of the COVID-19 pandemic, specifically with reference to members of the SCJ, many of whom could not possibly have had contact with infected persons in Korea because they were not in the country at the time.

Furthermore, the open-ended nature of Article 76’s reference to “other information” means that the ambit of collectable material is potentially very broad

indeed. Finally, the creation of a public “right to know” and an obligation for state authorities to share information with them concerning infected individuals implies a decision that individual privacy is significantly less important than the protection of public health. In addition, the legislation gives the government a variety of legal tools for imposing physical restrictions during a health crisis. In particular, Article 47(1) empowers authorities to shut down any location “deemed contaminated,” without stipulating any test for contamination that should apply. Article 49(2) further permits the “restrict[ion] or prohibit[ion of] performances, assemblies, religious ceremonies, or any other large gathering of people.” Again, these tools would be applied swiftly and decisively against the SCJ shortly after the outbreak of the pandemic.

4. Lee Man-hee and the SCJ

The SCJ is a small Christian sect with multiple outposts in China, including Wuhan. The church enjoys a disproportionately high profile in Korea for its size (at the beginning of the pandemic, it had approximately 320,000 members) and is unpopular with members of other religious congregations as well as with certain sections of the general public, in particular the counter-cult movement.¹³ Many of the larger Protestant congregations have historically adopted hostile positions towards the SCJ, which they view as an upstart movement with heretical views.¹⁴ The church was founded in 1984 by Lee Man-hee. The visible devotion and fervour of many of its adherents have stirred controversy ever since the congregation’s founding, both in Korea and abroad.

An alleged connection was drawn between the SCJ and the outbreak of COVID-19 in Korea. Initially, this connection was based on a single case, the so-called “Patient 31,” a member of the church who spread the virus to many of her fellow congregants. By 23 February 2020, over 50 percent of all active cases officially registered in South Korea were linked to this outbreak.¹⁵ By 8 March, the KCDC announced that 79.4 percent of confirmed COVID-19 cases were related to group infections. The KCDC further noted that the outbreak associated with SCJ involved 4,482 infections, accounting for 62.8 percent of the confirmed cases in the country.¹⁶

13 Massimo Introvigne, “Killing the Competition: Opposition to Shincheonji before and after the COVID-19 Crisis,” *Nova Religio* (2021), 25(1):14-39.

14 Massimo Introvigne, Willy Fautré, Rosita Šoryté, Alessandro Amicarelli, and Marco Respinti, *Shincheonji and Coronavirus in South Korea: Sorting Fact from Fiction. A White Paper*, CESNUR and Human Rights Without Frontiers, 2020, 13. Available at: <http://bit.ly/3WdsR4E>.

15 “Coronavirus Live Updates: Xi Acknowledges ‘Shortcomings’ in Fight Against Outbreak,” *New York Times*, 23 February 2020. Available at: <https://nyti.ms/3PJU1Ox>.

16 Bahk Eun-ji, “New Cases of Infections Drop for Third Day,” *Korea Times*, 9 March 2022. Available at: <http://bit.ly/3Wofbu1>.

This official announcement of a connection between the SCJ and the COVID-19 outbreak provided considerable fodder for those who wished the church ill. The church was repeatedly cited in the media as having impeded the government's requests for transparency concerning its membership, and even of having provided false lists of members and asked its members to hide from authorities.¹⁷ These allegations ultimately provided the kernel of the indictment against Lee Man-hee before the Suwon District Court, to which we shall return anon.

In addition, entirely spurious allegations were made against Lee and the church. The media alleged that Lee had instructed SCJ members not to wear face coverings, as their faith would shield them against infection. A number of congregants were also allegedly instructed to endure COVID-19 and to attend SCJ services in spite of their infected status, thereby spreading the virus still further in violation of Korean law.¹⁸

The credibility of these allegations was bolstered by official action by the Korean authorities. The KCDC repeatedly issued press releases explicitly linking the SCJ to the outbreak in statistical terms. Other churches linked to outbreaks of COVID-19 were not subjected to the same treatment. For example, the Wangsung Presbyterian Church was linked to a separate outbreak, but as a much smaller congregation, it attracted less attention.¹⁹ 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.²⁰ In the context of these outbreaks, the KCDC recommended a generalized framework of preventive measures applicable to all religious facilities – including contactless events, directions on how to move towards online activities, social distancing, and avoiding activities such as singing, chanting, and shouting – without specifying or taking measures against any individual congregation or mentioning specific churches in its press releases.²¹ This was in spite of the fact that by July 2020, when these additional clusters arose, the pandemic in Korea was both less controllable and more serious than when the bulk of infections originated in a single cluster, linked to the SCJ.²² None of the other churches involved were subjected to indi-

17 Christopher Khatouki, "Clandestine Cults and Cynical Politics: How South Korea Became the New Coronavirus Epicentre," *The Diplomat*, 12 March 2020. Available at: <http://bit.ly/3FRnBy1>.

18 *Ibid.*

19 Yonhap, "S. Korea Reports 51 More Coronavirus Cases amid Cluster Infections at Seoul Church," *Korea Herald*, 27 June 2020. Available at: <http://bit.ly/3jQSWJe>.

20 Korean Centre for Disease Control, "The Updates on COVID-19 in Korea as of 6 July." Available at: <http://bit.ly/3FxmTOB>.

21 *Ibid.*

22 Lee Hye-in and Bak Chae-yeong, "Infectious Disease Experts Call for Need to Expand Level 2 Physical Distancing Nationwide," *Kyunghyang Shinmun*. Available at: <http://bit.ly/3Psbz1j>.

vidualised measures.²³ A number of additional Protestant churches refused to close their doors and move services online, sparking some public criticism but no further action.²⁴

The uneven treatment of the SCJ by the KCDC was paralleled by further action at municipal and national levels. In March 2020, Seoul Mayor Park Won-soon announced a lawsuit against 12 SCJ leaders “for murder, injury, and violation of prevention and management of infectious diseases.”²⁵ The central government further requested a list of all church members and moved quickly to close SCJ facilities and buildings. In the meantime, media agencies printed sensationalist reports about how much the SCJ-linked outbreak had cost the government, effectively placing blame for the outbreak at the door of the church.²⁶ In late February, within a few days of its launch, a petition to Korea’s president urging the disbanding of the SCJ had attracted over 750,000 signatures. The SCJ’s headquarters in Gwacheon was raided by law enforcement officers, and government officials announced that all members of the religious group would be located and tested for infection.

5. The indictment of Lee Man-hee

As noted above, following the outbreak linked by the authorities to Patient 31 in Daegu, the Korean government requested that the SCJ supply lists of all its members, not only in Daegu but throughout South Korea and even abroad, as well as a list of its property interests.

The SCJ supplied several lists in response to this request. However, the authorities suspected that the lists contained omissions. Therefore, a raid was carried out on the church’s headquarters. SCJ leaders, including Chairman Lee himself, were accused of obstructing the work of health authorities by submitting incomplete lists, even though the police admitted that any discrepancies in the lists were minor in nature.²⁷ On the night of 31 July,²⁸ the then 89-year-old Chairman

23 Park Chan-kyong, “Coronavirus Cluster Emerges at Another South Korean Church, as Others Press Ahead with Sunday Services,” *South China Morning Post*, 30 March 2020. Available at: <http://bit.ly/3PBPBm>.

24 Kim Boram, “(2nd LD) Protestant Churches Under Fire for Holding Sunday Services despite Coronavirus Epidemic,” *Yonhap News Agency*, 17 March 2020. Available at: <http://bit.ly/3YT8fj5>.

25 Rhea Mahbubani, “The Leader of a Fringe Religious Sect at the Center of South Korea’s Coronavirus Outbreak Has Apologized as Seoul’s Mayor Files Lawsuit Accusing the Group of ‘Murder’ and ‘Injury,’” *Business Insider*, 2 March 2020. Available at: <http://bit.ly/3uR8QVR>.

26 홍완기 (14 April 2020). “31번 확진자 입원 ‘58일째’... 치료 길어지는 이유는?” *의협신문 Doctor’s News* (in Korean). Available at: <http://bit.ly/3FUErvS>.

27 Massimo Introvigne, “Chairman Lee’s ‘Embezzlement of Fund’: Stealing from His Own Pocket,” *Bitter Winter*, 2 March 2021. Available at: <http://bit.ly/3lGwwdS>.

28 For additional details on the arrest and subsequent proceedings, see Massimo Introvigne, Willy Fautré, Rosita Šoryté, Alessandro Amicarelli, and Marco Respinti, *Shincheonji and Coronavirus in South Korea: Sorting Fact from Fiction. A White Paper*, CESNUR and Human Rights Without Frontiers, 2020. Available at: <http://bit.ly/3WdsR4E>.

Lee was arrested. He was later committed to trial before the Suwon District Court, which rendered its verdict on 13 January 2021.

The principal question before the court concerned the application of the IDCPA by the Korean authorities. More specifically, the court was asked how far health authorities may go in applying the IDCPA when summoning, during a pandemic, information that private parties would normally have the right to keep confidential on the basis of privacy legislation. The Korean judges agreed that in the exceptional situation of a pandemic, authorities may summon otherwise confidential information, but that this power is subject to reasonable limits and based on a principle of proportionality, and that it may not be used in an arbitrary manner or for purposes beyond its original intent. This position reflected academic criticism of how the IDCPA had been invoked in relation to COVID-19, particularly in view of Korea's international human rights obligations.²⁹ The judges held that demanding lists of SCJ members, including those based abroad, and of the church's property interests exceeded the prescribed limits.

The judgment further noted that the Korean Central Disease Control Headquarters (CDCH) did not submit a clear and unambiguous request as to which properties should be included in any list. Ultimately, a list of 1,100 facilities was submitted on 22 February, seven days after the CDCH's first request, followed by a more complete list of 2,041 facilities on 9 March. Although four properties were omitted, as Chairman Lee argued that they did not really belong to the SCJ, ultimately the church was found, overall, to have co-operated effectively.

The court reached a similar conclusion concerning the list of SCJ members. The prosecution had built its case on a wiretapped phone conversation in which Chairman Lee, when first informed that a full list of church members had been requested, reacted negatively. However, as noted, the request itself was excessive and went beyond the terms of what was permitted by the IDCPA. As such, the court found, Chairman Lee's reaction was justified. In any event, ultimately, the list requested, including names, dates of birth, genders, addresses, and telephone numbers, was ultimately supplied to the authorities on 25 February. While prosecutors objected that the list was incomplete, because it did not include the resident registration numbers of the members, the court noted that this information had not been specifically requested and could therefore be omitted.

Ultimately, details of 212,324 domestic members and 33,281 overseas members were supplied by the SCJ. The prosecution claimed that the lists were misleading because of errata in the data supplied. Specifically, 24 dates were incorrect, and

²⁹ Ciarán Burke, "Abusus Non Tollit Usum? Korea's Legal Response to Coronavirus and the Shincheonji Church of Jesus." *Journal of CESNUR* (2020), 4(5):64-85.

eight names were missing. However, these discrepancies were attributed to simple mistakes in the database itself, as the court observed that the birthdates were not altered after the CDCH requested the list, so that the inaccuracy did not reflect an intent to obstruct the administration's measures against COVID-19. As for the eight missing names, some were dead while others had left the church (and two were in the process of doing so) and had requested the removal of their personal data from the SCJ's database.

The court heard statements from public health officials that there was no evidence of obstruction of anti-COVID measures by the SCJ. Rather, the SCJ was found to have actively co-operated with the requests, providing the data promptly to the CDCH. However, the charges of obstruction and non-compliance with the IDCPA were not the only ones levied against Chairman Lee. Rather, additional charges were added to the indictment, relating to incidents that preceded the pandemic altogether. These concerned the embezzlement of funds belonging to the SCJ and the organisation of activities in certain venues after rental agreements had been cancelled by the owners.

The addition of these charges to the indictment raised eyebrows. Writing in the *Korea Times* before the trial began, Michael Breen noted that in court cases involving leaders of unpopular religious movements, a charge of embezzlement of funds is commonly included, as "the court is almost certain to accept this as embezzlement if the prosecutors say it is."³⁰ Korean prosecutors handling prominent criminal cases frequently insert an embezzlement charge as a failsafe should other charges fail, as failure to secure a conviction is viewed as particularly problematic in a country with a 97 percent conviction rate.³¹ Breen's prediction was correct, as the court accepted this charge. Introvigne notes that this result is consistent with other similar cases relating to churches labelled as "cults" in Korea.³²

Accusations of embezzlement of funds such as those levelled against Chairman Lee are common against leaders of religious movements. As Introvigne has stated, when a religious movement is in its first generation, with the leader still alive, commingling of the assets of the movement and those of the leader is common. For members, it may be unclear whether they are donating to the leader or the movement. The leader represents the movement, and by supporting the leader, his or her travels around the world, and similar activities, devotees believe they are supporting the religious organisation. As such, the leader is often charged with stealing from his or her own (institutional) wallet. Defending

30 Michael Breen, "Can Unpopular Sect Expect Justice?" *Korea Times*, 5 August 2020. Available at: <http://bit.ly/3C1t27>.

31 See in this regard Hee-Jong Joo, "Crime and Crime Control," *Social Indicators Research* (2003). 62/63:239-263.

32 Introvigne, "Chairman Lee's 'Embezzlement of Fund.'"

against such charges may be difficult, and all the more so in a jurisdiction such as Korea, where prosecutions are virtually always successful.

Although the details of the case against Lee are complex – and related to events unconnected to and predating the pandemic – the crux of the court’s judgment on this count was that according to the SCJ’s own regulations, donations to individuals were prohibited. The court concluded that by depositing donations received into a bank account registered in his own name, Chairman Lee was guilty of embezzlement of funds. Statements by donors submitted by the defence as evidence that they had no complaints and were indeed happy that Chairman Lee used their gifts for his travels and related activities were regarded by the court as irrelevant.

With respect to the organisation of “illegal events,” these accusations again concerned events that had occurred long before and were substantially unrelated to the COVID-19 crisis. The facts of these events were clear and known to authorities, yet Chairman Lee was not prosecuted for them before the COVID-19 crisis. Only after the indictment related to breaches of the IDCPA was brought forward were these events resurrected.

The charge of organising illegal events was related to a number of incidents between 2014 and 2019 in which the SCJ and other organisations with which Lee was associated had rented premises for an event. The rental agreement was then cancelled due to pressures by the SCJ’s opponents; the SCJ deemed the cancellation illegal (as a breach of contract) and held the event nonetheless. The leaders and members of the SCJ and related organisations did not enter the premises by force, and indeed, any communication of cancellation by the rental agencies or venues seems to have been merely formal. Ultimately, complaints by the rental agencies were dismissed or withdrawn. However, in 2020, these cases were reopened and cited amongst the reasons for arresting and prosecuting Chairman Lee.

Accusations that Chairman Lee and the SCJ had held illegal events were resolved well before 2020. Moreover, in relation to the majority of such events, the Suwon District Court concluded that “these cases had been already investigated in the past and cleared.” It found Chairman Lee not guilty in connection with these three events. However, when examining one 2017 case, the court found Chairman Lee guilty of having “known and directed” actions misleading the City of Hwaseong into believing that the organiser of the event was a “volunteer organisation”, when it was in fact the SCJ. Here, under pressure from anti-SCJ pressure groups, the city of Hwaseong attempted to cancel the agreement it had signed five days before the event, which the lessees did not accept. In the end, officers of the city of Hwaseong attended the event, were satisfied that it was not a proselytisation rally for the SCJ but rather a civil event organised by an NGO, and asked for the payment of the rent

(which followed shortly) to close the matter. Nonetheless, Lee was found to have organised an illegal event, as the court found that the event was against the terms of the lease agreement, which prohibited religious ceremonies.

It is difficult to make sense of the additional charges relating to embezzlement and illegal events, as they were substantially and temporally unconnected to the IDCPA or the pandemic. In addition, they had previously been investigated, with the authorities having found that Chairman Lee had no case to answer. However, in adding them to the COVID-19-related indictment, prosecutors ultimately ensured that Lee would be convicted of an offence, thus saving face for the state. He was sentenced to three years' imprisonment, suspended for four years. This sentence, as well as the verdict (acquittal on the charges related to the IDCPA, conviction on the embezzlement and illegal events charges), was confirmed by the Court of Appeal and ultimately by the Korean Supreme Court (with the suspension extended from four to five years).

6. Conclusion: Korea and the rule of law

On paper, Korea's response to COVID-19 seemed superior to that of many states around the world. By using regular legislation, crafted for the purpose of pandemic response, Korea managed to avoid enacting broad emergency measures. 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.

In this context, arresting a religious leader, let alone one in his late eighties, for failing to co-operate with draconian measures undertaken on the basis of a broad and uncertain law would seem *prima facie* suspect and difficult to reconcile with Korea's avowed respect for human rights. No other religious leaders were arrested. This fact, combined with the prior history of persecution of the SCJ and the group's unpopularity, contributes to the impression that the legal framework was employed in a manner contrary to the twin principles of proportionality and non-discrimination, and for the purpose of harassing enemies of the political regime.³³

A certain temptation to allow governments space and time to tackle crises is quite normal. Dealing with a crisis requires flexibility. However, democratic oversight mechanisms and human rights are not just fair-weather friends. They are especially important when no one is looking, or when people's attention is elsewhere. Legislative drafting must take into account the political temptation to

33 Some further reflections in this regard are offered in Burke, "Abusus Non Tollit Usum?"

use flexible legislation in a non-impartial manner in order to scapegoat and pursue one's enemies. When the government fails to prevent excesses, as happened in Korea, the courts represent the next port of call.

In a society that respects the rule of law, it is essential that courts function as guarantors to counter such excesses by the executive branch. Such guarantees are all the more important in times of crisis, particularly in light of the propensity of such crises to provide opportunities for the repression of minorities, particularly religious minorities.³⁴ Here again, Korea appears to have failed the test. Although Chairman Lee was acquitted of the charges pertaining to the matter at issue – namely, failure to comply with the IDCPA – other charges unconnected to the pandemic were added to the indictment. Whether they should properly have been tried together, particularly during a time when Lee and the SCJ were receiving consistent negative media coverage, is questionable, as is the fact that Lee was convicted of what appear, factually, to be tenuous offences that authorities had previously investigated and had determined did not warrant his indictment.³⁵

Tempering the above, to some degree at least, is the sentence handed down. The fact that Lee escaped spending time in prison, with the custodial portion of his sentence having been suspended, seems, on the face of it, to lessen the apparent injustice of the verdict. However, such a conclusion ignores the broader context. The events recounted in the present contribution – from the outbreak of the virus in Korea to the confirmation of the verdict by the Supreme Court – took more than two years, during which Lee and the SCJ were scapegoated and castigated by public figures and the Korean media. This caused the SCJ to lose many of its congregants, who suffered due to their association with the religion and who ultimately left the church.

Korea styles itself as a progressive, democratic regime and is a party to a number of important human rights treaties.³⁶ In addition, Korea's constitution contains multiple provisions concerning human rights. Specifically, the right to

34 See in this regard Evan J. Criddle and Evan Fox-Decent, "Human Rights, Emergencies, and the Rule of Law," *Human Rights Quarterly* (2012), 34:39; Silvio Ferrari, "Religious Rules and Legal Pluralism: An Introduction," in *Religious Rules, State Law, and Normative Pluralism: A Comparative Overview*, edited by Rossella Bottoni, Rinaldo Cristofori, and Silvio Ferrari (Cham: Springer, 2016), 1-25.

35 For some general reflections on the parameters to be considered in determining whether offences should be properly tried together or separately, see James Farrin "Rethinking Criminal Joinder: An Analysis of the Empirical Research and Its Implications for Justice," *Law and Contemporary Problems* (1989), 52(4):325-340.

36 In particular, one may note 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). See Whiejin Lee. "The Enforcement of Human Rights Treaties in Korean Courts," *Asian Yearbook of International Law* (2017), 23(95):96.

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. Furthermore, Article 11 proscribes any discrimination based on a citizen's religious belief. This human rights framework and Korea's commitment to the rule of law entailed that there were reasonable grounds for assuming that the Korean authorities would deploy a proportionate, evidence-based response to COVID-19. However, this did not occur, raising questions concerning the seriousness of Korea's commitment to fundamental rights and the rule of law.

Of further note, the damage inflicted is unlikely to be rectifiable. Tarrred with the stain of having contributed to the pandemic and convicted of crimes, Lee and his church have lost momentum, congregants, and respectability. Even if the SCJ had legal avenues to claim compensation for breaches, for example, of Article 11 of the Korean constitution – a very unlikely possibility – no remedy could compel former members to re-join the church or completely remove the stain caused by this ugly episode.³⁷ The fact that such remedies are unlikely ever to be available when religious groups are singled out for special treatment in this manner reinforces the contention that protecting such groups is particularly important in pluralist democratic states, since any damage caused by such treatment will likely be permanent and irreparable.

37 See more generally in this regard Benjamin Schonthal, Tamir Moustafa, Matthew Nelson, and Shylashri Shankar, "Is the Rule of Law an Antidote for Religious Tension? The Promise and Peril of Judicializing Religious Freedom," *American Behavioral Scientist* (2016). 60(8):966-986.