

Public Health and Constitutional Rights During the COVID-19 Pandemic*

Sang-Hyeon Jeon**

Abstract

Measures to control and prevent the spread of infectious diseases, including the prohibition of mass gathering, closure of facilities, compulsory medical examinations, hospitalization or quarantine, and disclosure of personal information, substantially restrict individual freedom and rights. In the area of public health policy, which requires expertise, it is inevitable that authority be delegated to administrative agencies to some extent. However, final decisions on public health policy should be made by the people in accordance with democratic procedures. The ordinary standard of judicial review should be applied to public health law, even in times of crisis, such as a pandemic. Relaxing these standards may lead to reduced protections for constitutional rights. During a pandemic of an infectious disease, it is necessary to revisit social rights and the state's duty to protect constitutional rights. Heightened standards for scrutinizing judicial review are needed, especially related to the right to health and the state's duty to protect public health.

KEYWORDS: Infectious Disease, Public Health, COVID-19, Prohibition of Mass Gatherings, Right to Health

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** Associate Professor, Seoul National University School of Law.

I. Introduction

Since the first case of COVID-19 was identified in China in December 2019, the virus has spread globally at an alarming rate. Globally, more than 56 million cases were confirmed in less than a year, as well as 1.3 million deaths. Since the first case in South Korea was confirmed on January 20, 2020, the country had confirmed 30,403 cases of infection, with 503 recorded deaths, as of November 20, 2020.¹⁾ A global pandemic was declared, and countries around the world implemented measures including lockdowns, stay-at-home orders, compulsory hospitalization, quarantines, and bans on mass gatherings to prevent the spread of COVID-19. These measures imposed significant restrictions on individual freedom. Meanwhile, fear of the pandemic has limited social activities, while preventive measures involving social distancing have had grave economic impacts, including decreased consumption and increased unemployment. Therefore, COVID-19 is not only a health threat; it also endangers livelihoods, particularly those of disadvantaged members of society.

The experience during the COVID-19 pandemic raises questions about protecting fundamental rights during times of a pandemic. While the state's fundamental duty to protect people's lives and physical safety justifies the measures taken to prevent the spread of COVID-19, these actions also raise questions about violations of fundamental rights, as the infection control measures restrict basic human rights and freedom. Therefore, the potential conflict between health policy and protecting fundamental rights is now an important topic in the field of constitutional law. This is particularly important due to concerns that additional deadly infectious diseases will emerge in the future.

However, little attention has been paid to the impact of state infection control policies on constitutional issues, in contrast to the high number of active discussions of the impact of independent medical practices on the

1) The cumulative number of confirmed COVID-19 cases worldwide was 56,593,670 on November 21, 2020 at 9 AM; at that time, there were 1,355,462 confirmed deaths worldwide. COVID-19 INTERNET HOMEPAGE (<http://ncov.mohw.go.kr/>) (accessed November 21, 2020).

field of private law, either contract or tort law.²⁾ The government first instituted significant measures during the deadly Severe Acute Respiratory Syndrome (SARS), Influenza A Virus Subtype H1N1 (H1N1), and Middle East Respiratory Syndrome-Related Coronavirus (MERS) epidemics in the 2000s. The COVID-19 pandemic has led to the most stringent measures to prevent the spread of the virus, and the conflict between the state's duty to protect individual rights via infection control measures and the restrictions these measures impose on individual rights has been identified as an important legal issue.

This article reviews legal issues related to the impact of the government's infection control policy on fundamental rights in the so-called pandemic era. First, the article reviews which fundamental rights are restricted by infection control measures, paying particular attention to the measures outlined in the Infectious Disease Control and Prevention Act (II). Next, it examines the phenomena and problems related to the government's delegation of planning and executing specific infection control policies to various administrative institutions. While the need to control the spread of a contagious disease justifies delegation, as this goal requires scientific expertise, delegation to administrative institutions always raises issues related to the democratic control of power (III). Restrictions on fundamental rights imposed by the infection control policy also raise questions regarding the judicial standards for determining whether fundamental rights have been violated. This article examines the validity of the argument that judicial standards for planning and executing infection control measures should be relaxed under the national threat of a pandemic (IV). Finally, the article explores the issue of fundamental social rights and the state's duty to protect these rights. The state's duties include protecting citizens' lives and physical safety from the pandemic, ensuring basic humane livelihoods, and protecting the rights of individuals. Social rights related to health and welfare and the state's duty to protect fundamental rights are growing more important in the pandemic era (V).

This article introduces the issue of how infection control policies impact fundamental rights. The purpose of this article is to propose an expanded

2) Jiyong Park, *GongjungBogeonBeopagui Gaenyeomgwa Inyeomjeok Gicho* [A Definition and Ideological Foundation of Public Health Law], 141 JUSTICE 85 (2014) (In Korean).

discussion of how fundamental rights might be impacted by the planning and executing of infection control policies aimed to prevent the spread of an infectious disease.

II. Disease Prevention and Control and the Restriction of Fundamental Rights

1. Disease Prevention and Control as a Function of the State and the Restriction of Fundamental Rights

Disease prevention and control is designed to protect the life and health of citizens from infectious diseases. The Infectious Disease Control and Prevention Act aims to prevent the outbreak and spread of infectious diseases that endanger public health and to help promote and maintain public health.³⁾ Infectious diseases are illnesses caused by pathogens that enter the body; infectious diseases that spread via human-to-human transmission are called contagious diseases.⁴⁾

Assuming that one of the most important functions of a state is to protect citizens' lives, bodies, and property, disease prevention and control is a primary mission of the state, a function as fundamental as securing public order. In his book *Seoyugyeonmun*, Gil-Jun Yu writes that "rules on hygiene are one of the big items that the government deals with" and calls for "an enactment of the law on hygiene with which the people should comply and a severe punishment to those who neglect the law," saying that "not prohibiting people from throwing away sewage in big cities is like

3) Infectious Disease Control and Prevention Act (Act No. 15334, Jan. 1, 2020) art. 1 (S. Kor.).

4) YOON-CHEOL HONG, PANDEMIC 13 (2020) (In Korean). With the amendment to the Prevention of Contagious Diseases Act by the Infectious Disease Control and Prevention Act in 2009, the term "contagious disease" was replaced by "infectious disease" to clarify that diseases that do not pass from human to human, in other words, infectious diseases that are not contagious, are also subject to control. *See* reason for amendment of the Infectious Disease Control and Prevention Act, Act No. 9847, Dec. 29, 2009, at the Korean Law Information Center.

sending out a tiger in the street.”⁵⁾ This emphasizes that maintaining public health and preventing and controlling disease are some of the most basic duties of the modern state. The current Constitution of the Republic of Korea states in Article 36 (3) that “the health of all citizens shall be protected by the State,” thereby establishing the state’s responsibility for the health of its citizens. Neglecting disease prevention and control or failing to protect citizens’ health would, therefore, constitute neglect of the state’s responsibilities as explicitly stated in the Constitution.

However, measures to prevent and disease inevitably restrict individual freedoms and rights. Whereas individual medical practice is a private matter that mainly involves the relationships between medical personnel and patients, public disease prevention and control relies on the state’s exercise of power over all members of the community.⁶⁾ As experienced in the COVID-19 crisis, measures such as mask mandates, restrictions on or prohibitions of gatherings, quarantine of persons with suspected infection, compulsory hospitalization of persons with confirmed infection, and identification and disclosure of an individual’s locations at specific times to determine the chain of transmission incur substantial restrictions on individual freedom. Although the final goal of such preventive measures is to protect individuals’ life and health, the consequent restrictions on fundamental rights cannot always be justified. If the state can at any time interfere with an individual’s life in unwanted ways in order to protect that individual’s life or health, it would be difficult to guarantee individual autonomy and human dignity, the ultimate ideals of our Constitution.⁷⁾

5) GIL-JUN YU, SEUYUGYEONMUN [TRAVELOGUE TO WEST] 198-199 (Gyeong-Jin Heo trans., 2004) (In Korean).

6) Sang-Don Lee, *Beobeul Tonghan Bogeongwa Uiryoui Tonghap?—Bogeonuiryobeobui Chegyegihoeke daehan Bipangwa Jeonmang* [Integration of Public Health and Medical Treatment Through Law: Criticisms and Prospects of the System Planning of the Framework Act on Health and Medical Services], 36 KOREA L. R. 122-123 (2001) (In Korean).

7) See Park, *supra* note 2, at 97-112 for an explanation of the ideology of public health law and the antagonistic relationship between individual autonomy and state interference.

2. *Restrictions on Fundamental Rights as per the Infectious Disease Control and Prevention Act*

The disease control measures stipulated in Infectious Disease Control and Prevention Act that may restrict fundamental rights are listed below.

1) *Mass gathering ban*

Under Article 49 (1) 2, the Commissioner of the Korea Disease Control and Prevention Agency (KDCA), Mayors/Do Governors, or the heads of Sis/Guns/Gus may restrict or prohibit performances, assemblies, religious ceremonies, or any other large gathering of people to prevent the spread of an infectious disease. The provision lists performances, assemblies, and religious ceremonies as examples, but as any large gathering of people is subject to the measure, all activities that require many people to gather can be restricted or prohibited. This not only restricts the freedom of assembly, but also the right to work and freedom of religion, since the provision explicitly includes performances and religious ceremonies.⁸⁾

Furthermore, the ban on mass gatherings and related restrictions on fundamental rights can affect each religion and individuals differently, as mass gatherings have varying degrees of importance in different religious doctrines and to different individuals' faith. For example, for a religion whose doctrine emphasizes group services, the ban on mass gatherings is problematic⁹⁾; for a religion for which mass services are of little importance, this ban creates fewer limits on the freedom of religion. Some people claim

8) As is generally known, freedom of religion includes freedom of belief, freedom of religious activities, and freedom of religious assembly and association. Constitutional Court [Const. Ct.], 2012Hun-Ma782, June 26, 2014 (KCCR 26-1 Ha 670, 675) (S. Kor.).

9) From a legal perspective, Christians' Sunday worship is a question of freedom of religious activities, but it is a question of freedom of religion for worshippers. Young-Man Han, *Jjeonghuui Corona19 Gamnyeombeong Yebang Jochie Daehan Gatolligyohoeui Hyeomnyeok: Jonggyo Jayue Daehan Gwollitwa Gukmin Geonganggwone Daehan Johwa [Cooperation of the Catholic Church with Government Prevention Measures Against Coronavirus Disease (COVID-19): Balancing the Right to Religious Freedom and the Right to Health]*, 20 L. REV. 2, 40-41 (2020) (In Korean). However, in the emergent situation of the COVID-19 pandemic, the Catholic Church needs to abide by governmental disease prevention measures, and the inevitable limitation on religious assemblies does not contradict its doctrines. *See id.* at 48-54.

that, just as religious assemblies are not subject to regulation under the Assembly and Demonstration Act, they should be handled differently under the Infectious Disease Control and Prevention Act.¹⁰⁾

However, since the ban on mass gatherings is designed to prevent infectious disease from spreading via physical contact, these rules cannot be applied differently depending on the purpose of gathering. The reason for this ban is to ensure physical distance between people – the reason why those people wish to gather is meaningless in terms of disease control. If rules can be applied differently depending on the purpose of assembly, this only proves that the mass-gathering ban itself is unnecessary. If religious assemblies are exempted from the ban, this violates the right to equality and the principle of separation of church and state, as it would comprise favorable treatment of religion by the state.

From the perspective of disease control, the criterion for the ban on mass gatherings should not be the purpose of the assembly but rather whether it is possible for participants to maintain physical distance from one another. Thus, the most important criteria are the location and the size of the gathering. In other words, whether mass gatherings should be banned depends on whether the gathering is indoors or outdoors, the size of the space, and the number of people gathering. The only reason why the purpose of gathering should be considered is to judge whether dangerous actions, from the perspective of disease control, are likely due to the purpose of the gathering.

2) *Temporary closure of facilities*

In order to prevent the further spread of an infectious disease during an epidemic, the Commissioner of the KDCA, Mayors/Do Governors, or heads of Sis/Guns/Gus may order temporary closure or prohibit entry of the general public into places where patients with an infectious disease are present, or places deemed to be contaminated with the infectious pathogens (Article 47, subparagraph 1). This leads to restrictions of property rights because it prevents individuals from using and profiting from facilities. It also restricts freedom of occupation of business facilities.

10) Jae-Jin Myung, *Corona Sataewa Jonggyoewi Jayoo* [The Coronavirus Outbreak and Religious Freedom], 7 CHURCH AND LAW 1, 12-13 (2020) (In Korean).

In the case of restriction of property rights, it is problematic whether this should be considered a “social restriction” under Article 23, paragraphs 1 and 2 of the Constitution, or a restriction of private property due to public necessity, or “expropriation” under Article 23, paragraph 3. The Constitutional Court views the slaughter of infected livestock and suspension of slaughterhouse operations to prevent the spread of the epidemic as a kind of social restriction, rather than expropriation.¹¹⁾ This would mean that compensation for expropriation would not be a relevant issue in such cases. However, if the financial burden of facility closure is too heavy, coordinative compensation to ease this burden might be needed. The same problem arises when items that are infected or suspected of being infected by an infectious pathogen need to be disposed of (art. 47, subpara. 4; art. 49, para. 1, subpara. 6).

The void for vagueness doctrine could be a problem regarding “issuing an order to disinfect or take other necessary measures for facilities or places related to public sanitation” (art. 49, para. 1, subpara. 8). First, it is difficult to determine the scope of “facilities related to public sanitation,” which are the target of this law. This may be understood to mean “public health business[es]”¹²⁾ that are subject to regulation under the Public Health Control Act. However, when quarantine is necessary due to an epidemic or pandemic, the range of facilities impacted by regulations related to public sanitation is much wider. This may include facilities involved in the field of hospitality,¹³⁾ such as theaters and restaurants, but it may also impact all public-access facilities, including government offices and schools. It is also unclear whether the relationship to public health refers to the original purpose of the facility or to the activities that take place in the facility. In the mid-1980s, during the outbreak and rapid spread of AIDS, the US

11) Constitutional Court [Const. Ct.], 2013Hun-Ba110, April 24, 2014 (KCCR 26-1Ha 88, 93-94) (S. Kor.) (Slaughter of Livestock); 2012Hun-Ba367, October 21, 2015 (KCCR 27-2 Sang 708, 719-720) (S. Kor.) (Suspension of Slaughterhouse Operations).

12) The Public Health Control Act defines public health businesses as “lodgings, public baths, barbers and hair salons, beauty services, laundries, and building sanitary control services” (art. 2, subpara. 1).

13) Article 151 of the Commercial Act defines a hospitality service operator as “any person who engages in the business of making transactions at theaters, hotels, restaurants, or other facilities used by the public.”

government ordered the closure of a public bathhouse where gay men publicly engaged in sexual intercourse. Although the facility of the bathhouse itself posed no risk of HIV infection, the order was based on the actions taking place in the facility. In New York City, in accordance with New York State health guidelines, facilities where “high-risk sexual activity” took place could be closed. However, the original purpose of the bathhouse did not pose any disease-related risk, and if the government had targeted all locations where same-sex sexual intercourse took place, places like houses and hotels could also have been subject to closure.¹⁴⁾

3) Hospitalization and quarantine

Hospitalizing or quarantining infectious patients is the most basic measure not only for treating the patients but also for controlling the spread of infectious diseases.¹⁵⁾ According to the Infectious Disease Control and Prevention Act, patients infected with class 1 infectious diseases or infectious diseases listed by the Commissioner of the KDCA must be hospitalized for treatment. They may be penalized if they refuse to be hospitalized (art. 41, para. 1; art. 79-3). The Commissioner of the KDCA may hospitalize or quarantine persons suspected of having contracted an infectious disease (art. 49, para. 1, subpara. 14). These measures limit the rights to personal liberty, freedom of movement, and self-determination.

Restricting basic human rights by requiring patients infected with a highly dangerous diseases to be hospitalized may be justified, but forced quarantine or hospitalization of persons suspected of having an infectious disease may also violate the principle against excessive restriction.

In the Infectious Disease Control and Prevention Act, the phrase “persons suspected of contracting an infectious disease” includes not only

14) The New York State Court ruled that, considering high mortality rate of AIDS, protecting the health and safety of the public was a compelling interest, and the closure order did not violate the fundamental rights of those who used the facility. *New York v. New St. Mark's Baths*, 497 N.Y.S. 2d 979 (1986).

15) During the late Chosun period and the Japanese colonial era, when there were few or no treatments for various infectious diseases, the basic measure to prevent the spread of infectious diseases was quarantine. Minjae Chung, *Jeonyumbyung, Anjeon, Gukga: Jeonyumbyung Bangyugui Yeoksawa Mereuseusatae [Infectious Disease, Safety, and the State: The History of Infectious Disease Prevention and MERS]*, 34 CRITICAL STUDIES ON MODERN KOREAN HISTORY 520-521 (2015) (In Korean).

any person who has had contact with a person who has an infectious disease, but also “a person who is suspected of coming into contact with a patient,” “a person who has stayed in, or passed through, a quarantine inspection required area or strict quarantine inspection required area and may have contracted an infectious disease,” and “a person who has been exposed to risk factors, such as infectious pathogens, and may have contracted an infectious disease” (art. 2, subpara. 15-2). The scope of persons suspected of contracting an infectious disease is therefore very broad. It may not be necessary to quarantine all individuals suspected of contracting an infectious disease, and even when quarantine is necessary, subjecting all persons suspected of contracting an infectious disease to the same duration of quarantine may be an excessive restriction of basic human rights.¹⁶⁾

4) *Disclosing information about individuals' movements*

The Infectious Disease Control and Prevention Act stipulates that, where the spread of an infectious disease harmful to citizens' health results in the issuance of a crisis alert of the caution level or higher, as prescribed in the Framework Act on the Management of Disasters and Safety, the Commissioner of the KDCA shall promptly disclose information about preventing the spread of the infectious disease, such as the path of its spread, means of transmission, medical treatment institutions, and contacts of patients of the infectious disease (art. 34-2, para. 1). This Act also stipulates that, if it is necessary to prevent the spread of infectious diseases, the Commissioner of the KDCA may request the heads of relevant central administrative agencies, the heads of local governments, public and medical institutions, pharmacies, corporations, organizations, and individuals to provide the names, resident registration numbers, addresses, telephone numbers, prescriptions, medical records, and immigration control records of patients with infectious diseases and persons suspected of having contracted an infectious disease, as well as any other information prescribed by Presidential Decree for monitoring the movement of such patients and persons (art. 76-2, para. 1).

16) So Yeon Kim, *Gibongwoneuroseoui Anjeonkwon Injeonge Daehan Heonbeobjeok Gochal* [The Fundamental Right to Safety in the Korean Constitution], 3 PUBLIC L. 190-191 (2017) (In Korean).

This regulation restricts the right to privacy and the right to informational self-determination for patients with infectious diseases and individuals suspected of having been exposed to an infectious disease.¹⁷⁾ Furthermore, these requests for information are not limited to the state, local governments, or public institutions but include all corporations, organizations, and individuals. Therefore, any state agency or private person may request such information from virtually any individual or organization. In addition, information such as prescription or medical records may include sensitive or confidential information. Under the Presidential Decree enacted in accordance with these legal provisions, usage records for credit cards, debit cards, prepaid cards, and transportation cards, as well as CCTV video records, are also included in the targeted information (Enforcement Decree, art. 32-2). Collecting such information implies an extensive restriction on all areas of individual privacy. Control and deletion procedures for the storage and use of collected information emerge as important issues in protecting the right to privacy and the right to informational self-determination.

5) *Medical examinations and vaccinations*

The commissioner of KDCA and others may take measures such as requiring a person suspected of having an infectious disease to undergo a medical examination or receive a vaccination (art. 46; art. 49, para. 1, subpara. 3). Mandatory medical examinations or vaccinations restrict the right to self-determination and the right to bodily integrity. Furthermore, those who refuse or evade medical examinations may be punished (art. 81, subpara. 10).

Regarding mandatory vaccinations, the US Supreme Court ruled in the 1905 *Jacobson v. Massachusetts* Judgment (“*Jacobson Judgment*”) that Massachusetts law, which allowed local governments to order compulsory smallpox vaccinations for all residents during a smallpox outbreak, did not infringe on the freedom guaranteed by the due process principle of the 14th

17) For a detailed analysis of the problem of disclosing individuals’ movements, see Jong Gu Jeong & Jung Goo Son, *Corona 19 Dongseongonggae Daehan Beobjeok Gochal – Gaeinjeongbo mit Sasaenghwal Chimhaeui Munjeleul Jungsimeulo* [Legal Analysis of COVID-19 Disclosure], 70 L. J. 103, 103-131 (2020) (In Korean).

Amendment to the US Constitution.¹⁸⁾ This ruling held that all communities have the right to protect their members based on the principle of self-defense and that protecting the safety of local communities falls under the authority of the state and local governments. Therefore, the Federal Supreme Court may not invalidate the infectious disease prevention and control measures imposed by other state agencies, as this would infringe on their authority in this area.¹⁹⁾ The court also said that infectious disease prevention and control measures could be invalidated through judicial review only if the measures had no real or substantial relation to legislative purpose or were, beyond all question, palpable invasions of rights secured by the fundamental law.²⁰⁾ This ruling is still accepted as a leading case in the public health sector in the United States today,²¹⁾ but the issue of whether vaccinations can be compulsory remains controversial. Unlike medical examinations, our Infectious Disease Control and Prevention Act does not make it possible to punish individuals for refusing a vaccination.

III. Delegation of Authority to Administrative Agencies

1. Delegation of Authority Under the Infectious Disease Control and Prevention Act

Under the Infectious Disease Control and Prevention Act, much decision-making authority related to disease control is delegated to administrative agencies. Article 2 categorizes infectious diseases to four classes based on severity. This Act allows “infectious diseases designated by the Commissioner of the KDCA in consultation with the Minister of

18) *Jacobson v. Massachusetts*, 197 US 11 (1905).

19) *Id.* at 27-28.

20) *Id.* at 30-31.

21) For the content and historical significance of this judgment, see LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 116-131 (2nd ed., 2008); NAN D. HUNTER, THE LAW OF EMERGENCIES: PUBLIC HEALTH AND DISASTER MANAGEMENT 23-31 (1st ed. 2009); for the domestic literature introducing this judgment, see Ji Yong Park, *Jacobson v. Massachusetts Pangyeolui Yeoksajeok Uimi [Historical Significance of Jacobson v. Massachusetts in the US Supreme Court]*, 28 STUDIES OF THE AMERICAN CONSTITUTION 1, 79-108 (2017) (In Korean).

Health and Welfare, which are predicted to be suddenly introduced domestically or cause domestic outbreak and thus require urgent prevention and control” to be classified as Class 1, 2 or 3 infectious diseases.²²⁾ The commissioner of the KDCA is permitted to partially decide the range of application of the Infectious Disease Control and Prevention Act. This means that administrative agencies, particularly the commissioner of the KDCA, have the power to supplement the contents of the Act.

In addition, the Infectious Disease Control and Prevention Act requires the disclosure of an infected individual’s movements, means of transportation, location of medical treatment, contacts, etc. (art. 34-2, para. 1). The Act delegates matters necessary for the scope of, procedures, methods, etc. for disclosing information and raising objections to the Ordinance of the Ministry of Health and Welfare (art. 34-2, para. 5). The Enforcement Rule of the Act, which was enacted accordingly, stipulates that the scope of disclosure shall be decided by the Commissioner of the KDCA based on the gravity of the situation, the nature of the infectious disease, and the epidemiological requirements (Enforcement Rule, art. 27-4). Therefore, the Commissioner of the KDCA has authority over the scope of disclosure required for disease control.

The Infectious Disease Control and Prevention Act further delegates most of the authority to implement disease control measures to the Commissioner of the KDCA and the heads of local governments, including province governors and the heads of Si/Gun/Gu, allowing these authorities a significant amount of discretion regarding decisions about specific control measures.

2. The Legal Foundations of the Delegation of Authority and Related Issues

Identifying and assessing the threat of an infectious disease is

²²⁾ According to the Infectious Disease Control and Prevention Act (Act No. 15534, Jan. 1, 2020), amended on Mar. 27, 2018, it was originally the Minister of Health and Welfare who prescribed this classification. However, with the founding of the KCDA under the amended Government Organization Act of Aug. 11, 2020 (Act No. 17472, Sep. 12, 2020), the Act has been amended so that the Commissioner of the KCDA, in consultation with the Minister of Health and Welfare, prescribes this matter.

imperative to disease control. The top priorities are identifying the source of infection, determining the methods and conditions of transmission, and assessing the infectiousness and the threat the disease poses to human life and health. To do this, expert knowledge of medicine and epidemiology is necessary. Thus, expert opinions play an important part in establishing and implementing infection control policies.²³⁾ In other words, a democratic decision-making process is of little use in defining a particular infection control policy. Should excessive fear rooted in ignorance or groundless optimism hold sway over the majority of community members, a democratically made decision is likely to lead to a failure of disease control. Therefore, when establishing infection control policies, it is more important to make decisions based on scientific judgments and expertise rather than democratic processes.

Promptness is another important factor in establishing and implementing an infection control policy. Breakdowns of the medical infrastructure and the disease control system may occur due to a failure to promptly take the proper control measures at the early stages of an outbreak of an infectious disease. The more infectious a disease is, the more necessary it is to take quick and powerful preliminary control measures. Promptness is, therefore, no less important than expertise in establishing and implementing an infection control policy. As such, extensive delegation of authority over control measures to administrative agencies can be justified by the need for expertise and promptness in establishing and implementing these policies.

However, this delegation to the administrative agencies raises a constitutional issue: The restrictions of fundamental rights and the scope and procedures involved in control measures are prescribed by the decisions of the agencies, not by legislation. For example, the disclosure of information such as an infected person's movements and contacts impacts data confidentiality and individual privacy. If the Director of the Center for

23) Under the Infektionsschutzgesetz (IfSG), the German equivalent of the Korean Infectious Disease Control and Prevention Act, the Robert Koch Institute is in charge of key tasks related to disease control, including epidemiological investigations and assessing pathogens. Jin-Ah Yoon, *Dokilui Gamyemyeong Yebang mit Gwanli Beobje Gochal [Study of the German Legislation for the Prevention and Control of Infectious Diseases]*, 4 KOREAN A. L. & Pol. 260, 266 (2018) (In Korean).

Disease Control and Prevention can determine how and to whom such private information is disclosed, this may violate the principles of legal reservation or parliamentary reservation.²⁴⁾ Furthermore, if this information disclosure is not controlled by administrative legislation (a presidential decree, prime ministerial decree, or deputy decree) but by the independent authority of the Minister of Health and Welfare, the commissioner of the KDCA, or the head of a local government, this means that individuals' basic rights can also be restricted by normative forms (that is, administrative rules such as public notices, instructions, and guidelines) that the Constitution does not prescribe at all. The Constitutional Court sees this method of delegation as inevitable in areas requiring expertise, but it is problematic because it is a form of legislation that is not intended by the Constitution and because it empowers the head of an administrative agency alone to determine the manner in which these fundamental rights may be restricted.²⁵⁾

3. *The Need for Democratic Control*

Although decisions about infection control policies require expertise in medicine and epidemiology, scientific expertise alone cannot determine policies. No matter how effective an infection control policy is from a scientific point of view, it cannot be implemented if it restricts fundamental rights to a degree that people cannot accept. Many factors come into play. Is it better to implement a policy that is more effective but restricts

24) Geon-bo Kwon, *Gamyembyeog Ugi Daeunggwwa Jeongboingwon [Response to an Infectious Disease Crisis and Information Human Rights]*, 21 *STUDY OF PUBLIC L.* 19 (2020) (In Korean). Kwon holds the view that information about individuals' movements is very important to the right to self-determination of personal information and authorizing the Director of the KCDA to determine the scope of the disclosure of such information could contravene the principle of legal reservation.

25) The Constitutional Court shall permit this delegation only for matters that are technical or minor or that that must be delegated due to the nature of the work (Constitutional Court [Const. Ct.], 99Hun-Ba91, Oct. 28, 2004 [KCCR 16-2 Ha 104, 118-120]) (S. Kor.). However, as the dissenting opinion by Seong Kwon, Sun hoe Choo and Sang Kyung Lee points out, this delegation is problematic in that it is not an anticipated form of legislation and does not involve the proactive and procedural controls that apply to administrative legislation (KCCR 16-2 Ha 104, 129-131).

fundamental rights to a greater degree or a policy that is less effective that imposes fewer restrictions on fundamental rights? If restrictions on various types of fundamental rights could prevent the spread of an infectious disease to an equal degree, which rights should be prioritized? These questions cannot be answered by scientific expertise alone. Experts can use science to determine facts and make predictions, but it is ultimately community members who must decide which policies to implement based on these facts and predictions.

In response to the COVID-19 pandemic, Europe and the United States have chosen methods such as lockdowns or regional stay-at-home orders, but Korea has taken an approach that involves proactively identifying potential cases by tracking the movements and contacts of infected individuals.²⁶⁾ This method—trace, test, and treat—imposes relatively few restrictions on basic rights. Unlike local lockdowns and stay-at-home orders, this approach allows people to go about their lives with relative freedom, but it imposes significant restrictions on data privacy and the right of self-determination. Some have praised the so-called K-quarantine, while others criticize it as an excessive violation of individual privacy. Europe and the United States may be unable to adopt similar approaches to that of Korea due to technical constraints, as their infrastructures for tracking individuals' movements are less well-equipped than Korea's.²⁷⁾ However, a more significant issue may be that European and US citizens value data privacy more than Koreans. This means that, no matter how effective the trace, test, and treat approach may be, they would not accept the negative impact of this approach on data privacy.

In the end, while scientific expertise plays an important role in determining appropriate measures to limit the spread of an infectious disease, members of the community should hold the final authority over such policies. Therefore, the people's intention should be reflected in the process of policymaking, and only the people should have the final say.

26) Geon-bo Kwon, *supra* note 24, at 7.

27) *Id.* at 10. Kwon highlights the context in Korea, where all residents are assigned a resident registration number, the fingerprints of all adults are recorded, traceable credit cards (and transport cards) are common, CCTVs are installed everywhere, and location tracking systems are available through mobile phones.

This means that democratic control of the exercise of authority is indispensable, even when this authority is delegated to appropriate administrative agencies with the necessary expertise or ability to act quickly to prevent the spread of an infectious disease.

IV. Standards of Review

1. Basis for Relaxing Standards of Review of Infection Control Measures

The basis for relaxing standards of judicial review can be largely divided into the principles of democracy and the judiciary's capability. One argument holds that, since the courts lack democratic legitimacy and accountability, they should respect the judgments of the legislature and the executive branch of government as much as possible. This approach emphasizes the principle of democracy. Another argument holds that courts reach more reasonable conclusions when they respect the judgments of the legislature or the executive branch. This is because, first, there is no guarantee that the judiciary's judgment is always right. Second, the legislature or the executive branch may be more qualified than the judiciary to make judgments in certain areas. This argument highlights the limitations of the judiciary's capability.²⁸⁾

It is difficult to argue that standards of review for infection control policies should be relaxed based on democratic principles. The agencies in charge of establishing and enforcing such policies have no more democratic legitimacy or accountability than the agencies that administer other areas; on the contrary, they have less democratic legitimacy than other departments since the disciplinary authority related to infection control measures is largely delegated to administrative agencies, as described above. Thus, only an argument based on the capabilities of each government branch can justify relaxed standards of review for such policies. This argument holds that it is desirable to *defer* to the decision of

28) This also provides grounds for judicial restraint. On the definition and basis of judicial restraint, see Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 520-521 (2012).

the legislature or the executive, since the judiciary consists of generalist judges who lack expertise in controlling the spread of contagious diseases.

In the case of *Jacobson* (mentioned above), the Supreme Court of the United States substantially relaxed the standards of review, saying that the court could nullify the state or local government's quarantine measures only if those measures had *no real or substantial relation* to legislative intents or were, *beyond all question*, a plain and palpable invasion of rights secured by the fundamental law.²⁹⁾ This approach is justified by the principle of separation of powers (federalism) or by the principle of democracy.³⁰⁾ However, the court's ruling that the legislature, not the judiciary, had the authority to choose between the opposing medical theories regarding the effectiveness of vaccination in preventing the spread of smallpox,³¹⁾ can be understood as the court's respect for the decision of the agency with expertise.³²⁾

Another plausible ground for relaxing the standards of review for infection control policies is the emergency situation theory. The outbreak and spread of a pandemic that threatens people's lives and health creates a state of emergency, and measures to limit the impacts of such a crisis are exceptional and urgent and therefore differ from the usual exercise of governmental power. Therefore, the courts shall not easily nullify such measures by means of judicial review. This argument is based on concerns that such strict judicial review could throw the entire community into crisis by hindering swift and effective measures to prevent the spread of a contagious disease.

29) See the discussion in II. B. e. of this article.

30) In *Jacobson*, the court's attitude can be explained by the principle of separation of powers (federalism) since the judgement respects the authority of the state government. In addition, social compact theory, which argues that the state or local government exists to protect the lives and health of its members and thus naturally holds the disciplinary authority of quarantine, can also justify the court's stance. See Gostin, *supra* note 21, at 120-128.

31) *Jacobson*, 197 US, at 30 (1905).

32) LAWRENCE O. GOSTIN & LINDSAY F. WILEY eds., PUBLIC HEALTH LAW AND ETHICS 152 (3rd ed. 2017).

2. Assessment of the Basis for Relaxing Standards of Review

1) Expertise

An infection control policy requires expertise, as it should be based on future projections supported by scientific knowledge of medicine, epidemiology, statistics, etc. However, such expertise is not only necessary in the development of such policies. The development of every legal regulation should be supported by expertise, as all policies should be based on projections of their future effects. Judicial review, which is a review of the validity of certain legislative or administrative acts, is essentially a normative judgment. This judgement can only be reached after a factual assessment of the effects of certain policies. The criteria for a judicial review on proportionality are a matter of factual assessment. A judicial review assesses the means, or the effectiveness of certain policy means for achieving the intended goals, and the minimal impairment, or whether other policy means that imposed fewer restrictions on constitutional rights might have been implemented instead.³³⁾ Such assessments always demand knowledge of the contents and effects of policies. Furthermore, assessments of the effects of policies and the degrees to which they restrict fundamental rights always involve some degree of uncertainty, as they involve some speculation about future possibilities.³⁴⁾

However, while assessments of the effectiveness of certain infection control policies or the possibility of other alternatives require expert knowledge, this does not inevitably lead to more relaxed standards of review. Compared to the legislature or the executive, judges generally lack expertise in specific regulatory realms, including infection control policies.

33) Regarding proportionality, the rational connection of means and minimal impairment are matters of factual possibility, whereas the balance of legal interests is a matter of legal possibility. See Robert Alexy, *Proportionality and Rationality*, in *PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES* 14 (VICKI C. JACKSON & MARK TUSHNET eds., 2017).

34) On the uncertainty problems raised by an assessment of the appropriateness of means, see Aharon Barak, *Proportionality* 308-315 (2012). For a perspective explaining the adjustment of the degree of review in applying the proportionality principle as a matter of solving the uncertainty problem, see JAEHONG LEE, *CANADA YEONBANGDAEBEOWONUI GWAINGGEUMJIWONCHIK JEOKYONGE GWANHAN YEONGU [PROPORTIONALITY REVIEW OF THE SUPREME COURT OF CANADA]* 170-223 (2020) (In Korean).

Nevertheless, judges are allowed to conduct judicial reviews, not because they are experts in every regulatory realm, but because they can evaluate the plausibility of the reports of experts in various regulatory realms. Courts do not speculate on the future effects of each policy or seek alternatives based on their own knowledge; they make decisions by demanding plausible explanations of the matters and policies at hand. Therefore, the level of expertise needed for policymaking and execution can be different from that needed for judicial review. There is no reason to relax the standards of review just because the members of the judiciary do not personally have the necessary expertise to make or execute certain policies.

Above all, judicial reviews cannot be based only on factual assessments of certain policies; they are based on the effectiveness of policies and the degree to which they restrict fundamental rights. The courts examine problems such as what kinds of fundamental rights are infringed, how much they are restricted, and whether these restrictions are balanced by the public good of the measures. These are matters of normative judgment that cannot be resolved by expertise in individual policies.³⁵⁾ The judicial branch, that is, the courts and the Constitutional Court, have the most expertise in such normative judgments.

2) *Emergency situation theory*

The national emergency situation caused by the pandemic cannot be a reason for relaxing the criteria for judicial review of infringements of fundamental rights. The urgency of crisis situations is emphasized in this argument for relaxing the normal standards of review due to concerns that a strict review may hinder effective response to a crisis. However, even if the standards of review are not relaxed, the constitutionality of necessary measures in crises can always be acknowledged.³⁶⁾

The public good aimed at by the restriction of fundamental rights is

35) However, according to Hans Kelsen, every judgment in law is a judgment of fact, except for the "Grundnorm," which can be justified by itself, not by other goals. In Kelsen's view, law is only about factual judgment, while normative judgments lie in the realms of politics. See Hans Kelsen, *Science and Politics*, 45 THE AMERICAN POLITICAL SCIENCE REV. 641, 641-661 (1951).

36) Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. FORUM 179, 188-189 (2020).

usually abstract and indirect; therefore, it is difficult to define or measure it concretely. However, as seen in the COVID-19 crisis, the public interest of infection control measures is vividly felt in a national crisis caused by an infectious disease. This is because many citizens witness or experience the death and severe illness caused by the disease, and the spread of the infection is measurable (in the number of deaths, cases, etc.). In addition, when measures for preventing or treating an infectious disease are unclear or insufficient (if prevention and treatment are clear and sufficient, there is no crisis), it is highly likely that the judiciary will acknowledge the appropriateness of means and confirm that the measures infringe fundamental rights as minimally as possible. In addition, the balance of legal interests is clear: Protecting the public from the spread of an infectious disease does not support the interests of specific individuals but that of the entire community.³⁷⁾ Therefore, if there truly is a national crisis due to an outbreak of an infectious disease, it is unlikely that the courts will nullify measures necessary for controlling the spread of the disease, even if ordinary review standards are applied.³⁸⁾

Rather, if the logic of a crisis is overemphasized, there is a risk that the courts will justify restrictions on fundamental rights too easily, so that the judicial review itself becomes meaningless. During World War II, the United States imposed an executive order forcing Japanese individuals (including Japanese-Americans) living on the Pacific Coast to relocate inland. The Supreme Court ruled that the measure was constitutional in *Korematsu v. United States*.³⁹⁾ The Supreme Court said that it applied the

37) See Kihoon You et al., *Corona19 Gongjungbogeon Wigi Sanghwangeseoui Jayugwon Jehane Daehan Haenkui Wonri Jeokyeonggwa Hwakjang* [Application and Expansion of the Harm Principle to the Restrictions of Liberty in the COVID-19 Public Health Crisis: Focusing on the Revised Bill of the March 2020, Infectious Disease Control and Prevention Act, 21(2) KOREAN SOCIETY OF L. AND MEDICINE 105, 105-162 (2020) (In Korean) for an explanation of the ideological justification for restricting fundamental rights in the face of a public health crisis based on the risk to the population, a concept extended from the traditional principle of harm.

38) For the argument that U.S. bans on mass gathering during the COVID-19 crisis do not infringe on the freedom of religion, even if strict standards of review were applied, see Caroline M. Corbin, *Religious Liberty in a Pandemic*, 70 DUKE L. J. ONLINE 1, 1-28 (2020).

39) *Korematsu v. United States*, 323 US 214 (1945). In 1942, the United States imposed an executive order that forcibly relocated approximately 100,000 Japanese (including Japanese-Americans) living on the Pacific coast inland and detained them in concentration camps,

most rigid scrutiny since this was a case of racial discrimination. However, in this ruling, the Court declared that an order of forced displacement and collective expropriation—an order that was imposed on every Japanese individual, including those with US citizenship, without questioning whether those individuals actually posed a threat to national security and without any appeal procedures—was constitutional.⁴⁰⁾ This decision could certainly be criticized as a *de facto* failure to review the impact of the order on human rights based on the pretext of a national security crisis.⁴¹⁾

In the United States, it has recently been proposed that the “restriction of the fundamental rights with compensation conditions” during a national crisis should be recognized as legitimate. This argument is based on the premise that the court tends to judge violations of basic rights as constitutional during a national crisis, even when these violations of basic rights are obvious, because it finds it burdensome to judge them unconstitutional. Thus, the argument claims that, if there is no choice but to accept the violation of fundamental rights, the liability rule should be applied to allow the restriction of fundamental rights while requiring compensation for these restrictions.⁴²⁾ This is an attempt to extend applications of property rule and liability rule in the area of private law to the area of fundamental rights.⁴³⁾ Regarding disease control, some claim

citing concerns that they might cooperate with Japan (the United States’ adversary) within U.S. territory. The Supreme Court ruled this measure constitutional.

40) *Id.* at 216.

41) Erwin Chemerinsky, *Korematsu v. United States: A Tragedy Hopefully Never to Be Repeated*, 39 *Pepperdine L. Rev.* 163, 168-169 (2011).

42) See, e.g., Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 *STANFORD L. REV.* 755, 755-834 (2004).

43) Property rule applies when an entitlement cannot be restricted without the consent of the holder of the entitlement. Liability rule applies when restrictions to an entitlement can be justified without the consent of the holder of the entitlement if the holder is compensated for the objective value of the entitlement. Systematized by legal economists Calabresi and Melamed, this approach argues that it is socially more efficient to apply the liability rule to entitlements with high transaction costs. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089, 1089-1128 (1972). For a full translation of this article, see Guido Calabresi & A. Douglas Melamed, *Jaesangwon Gyuchik, Chaegim Gyuchik, geurigo Cheobunbulganeungseong: Daeseongdange Daehan Han Gaji Insang [Property Rules, Liability Rules, and Inalienability: One View of the Cathedral]*, 21(1) *KOREAN J. OF LEGAL PHILOSOPHY* 445, 445-494 (2018) (In Korean).

that restrictions to fundamental rights due to forced vaccination or quarantine measures are legitimate, if compensation is provided for any damages.⁴⁴⁾ In the case of the COVID-19 outbreak, some argue that various governmental financial support policies should be considered to offset the restrictions to fundamental rights imposed by stay-at-home orders or administrative orders banning close gatherings.⁴⁵⁾ However, within the context of the Korean Constitution, it is difficult to apply this argument (that is, the argument that restrictions to fundamental rights can be justified if compensation is provided) to any rights other than property rights. The guarantee of continuance supersedes the guarantee of worth, even for property rights, where the value of the property is its core significance. Although this measure may be realistic in light of the reality that judicial review often fails to fulfill its role in times of national crisis, it is unjust to demand that citizens accept violations of their fundamental rights due to difficulties in reality. Instead, reality should be improved by emphasizing the duty of judicial review to guarantee fundamental rights, even during a national crisis.

3. Standards of Review and Their Significance

Easing standards of review by emphasizing the scientific expertise justifying infection control measures and other approaches to crisis situations highlights concerns that the judiciary may misjudge and nullify measures that are necessary to control the spread of an infectious disease. However, the principles of excessive prohibition and proportionality must be applied to reviews of restrictions to fundamental rights. Applying these principles balances such judgements: The views of experts and the urgency of the crisis can still be considered in individual cases without relaxing the standards of review. While there may be criticism that such consideration in individual cases comprises a relaxation of review standards, this approach should be differentiated from applying the same standards of review by considering expert opinions and the urgency of the individual

44) *Supra* note 42, at 825-826.

45) Craig Konnoth, *Narrowly Tailoring the COVID-19 Response*, 11 CALIF. L. REV. 193, 193-208 (2020).

case. If the standards of review are uniformly relaxed due to an expert's decision or because of a national crisis, most cases where violations of fundamental rights become problematic will not be subjected to effective judicial review. Even opportunities to demand proof of the legitimacy of measures that are implemented in the name of disease control will *de facto* disappear.⁴⁶⁾ On the other hand, when applying ordinary judicial standards of review, the court can demand persuasive evidence to validate the necessity of infection control measures. Thus, this approach can limit indiscreet measures and excessive restrictions to fundamental rights. Institutions that establish and implement infection control policies will not be able to avoid judicial review merely because those policies are recommended by experts during a national crisis; therefore, these institutions will take care to avoid implementing unnecessary restrictions to fundamental rights.

V. Fundamental Social Rights and the Duty to Protect Fundamental Rights

1. *The Right to Health*

1) *Grounds*

Article 36, paragraph 3 of the Constitution, which is particularly noteworthy in times of pandemic, states that "the health of all citizens shall be protected by the state." Health care literally means protecting health, so this provision means that the state is responsible for protecting the health of all citizens. Since security of life and body is the premise for the exercise of all fundamental rights and the state is obliged to guarantee those fundamental rights under the second sentence of Article 10 of the Constitution, the state has a duty to protect the people from infectious diseases, even without Article 36, paragraph 3. If the fundamental right to

⁴⁶⁾ For an argument that addresses this claim and suggests that applying a sliding scale that can adjust the intensity of review based on individual cases, rather than applying the reasonableness test, is more valid, see Gostin, *supra* note 21, at 143-144.

safety implies that the state has a duty to protect citizens' safety,⁴⁷⁾ this implies that citizens have a fundamental right to safety from infectious diseases as well. However, in our Constitution, the right to health protection from the state does not need to be based on the general provisions (art. 10, para. 2) or on a theoretical extension of the right to safety, because Article 36, paragraph 3 stipulates this right specifically and explicitly.

The next question is whether Article 36, paragraph 3 of the Constitution only stipulates the state's obligations or defines a fundamental right. The Constitutional Court has recognized it as a fundamental right in several rulings, stating that "the public's right to health care [is] stipulated in Article 36, paragraph 3 of the Constitution" and that "the right to health care" "refers to the right of citizens to demand national benefits and consideration necessary to maintain their health."⁴⁸⁾ In addition, legal theorists generally recognize the "right to health," the "right regarding health care" or the "right to health care" as a fundamental right based on Article 36, paragraph 3.⁴⁹⁾ In short, Article 36, paragraph 3 of the

47) See, e.g., Seok-Yoon Song, *Gibongwoneuroseoui Anjeongwone Gwanhan Sironjeok Yeongu [Right to Safety as a Fundamental Right]*, 8(1) EWHA L. J. 1, 1-32 (2003) (In Korean); Boo-Ha Lee, *Saengmyeong Sinchee Daehan Anjeongwone Daehan Heonbeobjeok Gochal [A Constitutional Study of the Right to Safety of Life and Body]*, 25(2) L. & POL'Y REV. 119, 119-142 (2019) (In Korean); Kwang-Seok Cheon, *Gugminui Anjeongwongwa Gukgauri Bohouimu [The Right to Safety and the State's Obligation to Protect It]*, 8(3) J. HUM. RTS. & L. EDUC. 143, 143-157 (2015) (In Korean).

48) Constitutional Court [Const. Ct.] 91Hun-Ba11, Apr. 20, 1995 (7-1, KCCR, 478, 491) (S. Kor.); Constitutional Court [Const. Ct.] 2007Hun-Ma734, Nov. 26, 2009 (21-2(B) KCCR 576, 597) (S. Kor.); Constitutional Court [Const. Ct.] 2010Hun-Ma204, Sep. 26, 2013 etc. (25-2 (B), KCCR, 1, 19) (S. Kor.); Constitutional Court [Const. Ct.] 2011Hun-Ma123, Feb. 23, 2012 (24-1(A), KCCR, 365, 371) (S. Kor.); Constitutional Court [Const. Ct.] 2015Hun-Ma1181 May 31, 2018 (30-1(B), KCCR, 238, 246) (S. Kor.); Constitutional Court [Const. Ct.] 2017Hun-Ma103, Apr. 23, 2020 (32-1(A), KCCR, 403, 420) (S. Kor.).

49) YOUNG-SUNG KWON, HEONBEOBHAKWOLLON [CONSTITUTIONAL LAW] 711-712 (2010) (In Korean); HA-YURL KIM, HEONBEOBGANGUI [CONSTITUTIONAL LAW] 745 (2020) (In Korean); NAK-IN SUNG, HEONBEOBHAK [CONSTITUTIONAL LAW] 1541 (2020) (In Korean); JONG-SUP CHONG, HEONBEOBHAKWOLLON [CONSTITUTIONAL LAW] 832 (2018) (In Korean); SOO-WOONG HAN, HEONBEOBHAK [CONSTITUTIONAL LAW] 1083-1084 (9th ed., 2019) (In Korean); YOUNG HUH, HANGUKHEONBEOBLON [KOREAN CONSTITUTIONAL LAW] 473-474 (2017) (In Korean). On the other hand, for the argument that art. 36, para. 3, of the Constitution stipulates the obligations of the state but not fundamental rights, see Mun-Sik Jeong, *Anjeone Gwanhan Gibongwonui Heonbeobsang Geungeowa Wiheonsimsai Gijun [Constitutional Basis for Fundamental Rights to Safety and Standards for Constitutional Review]*, 7(1) J. L. & POL. RES. 217, 222 (2007) (In Korean).

Constitution indicates that the state must take necessary measures to protect citizens' health from infectious diseases, as this health is a fundamental right.⁵⁰⁾ The term "right to health" is clearer than "right to health care" or "right regarding health care," as this phrase more clearly indicates the nature of this individual right.

2) Content

The content of the right to health has also been defined. The Constitutional Court has said that the state has an active duty to establish and implement policies to promote public health. This goes beyond the passive duty to not infringe on the health of the people.⁵¹⁾

This interpretation reveals that the Constitutional Court includes the right to freedom in the right to health. However, since health violations by the state are already protected by the right to life or personal liberty,⁵²⁾ the

50) Some derive the obligation to protect the health of the people from infectious diseases from the Constitution, art. 34, para. 6; e.g., Gun-Bo Kwon, *Gamnyeombyeong Wigi Daeunggwwa Jeongboingwon [Preventive Measures Against Infectious Disease and Information Rights]*, 21(3) PUBLIC LAW JOURNAL 3, 14-15 (2020) (In Korean); Mun-Sik Jeong, *Gamnyeombyeongui Daeyuhaenge Isseoseo Uiyakpum Bujok si Uiyakpum Jegonggijune Gwanhan Heonbeobjeok Jeongdangseong [Constitutional Justification for the Standard of Medicine Provision in the Event of a Shortage of Medicines in the Pandemic of Infectious Diseases]*, 13(1) THE KOREAN SOCIETY OF L. & MEDICINE 155, 161-163 (2012) (In Korean). However, as explained later, art. 34, para. 6, does not directly state the state's obligation to protect people's health, but rather its obligation to protect the people from the social and economic damages of disasters. Meanwhile, some also find grounds for the right to health in art. 36, para. 1, and art. 34, para. 1 (the right to a humane livelihood), indirectly in art. 10 (the right to human dignity), and art. 35, para. 1 (right to a comfortable environment) (Joo-Kyung Kim, *Geongangwonui Heonbeobhakjeok Naeyonggwageu Silhyeon [The Concept and Contents of the Fundamental Rights to Health]*, 23(4) YONSEI L. R. 89, 90-93 (2013) [In Korean]) or from the Preamble to the Constitution; art. 10 (human dignity); art. 12 (freedom of movement); art. 21 (right to know about health); art. 34 (right to a humane livelihood); art. 35 (right to a comfortable environment); art. 36, para. 3, or art. 37, para. 1 (Sung-Ryul Kim, *Heonbeobsang Geongangwonui Naeyonggwageu Sikpumanjeonui Bojang [The Contents of Right to Health in Constitution and Guarantee of Food Safety]*, 22(3) CONS. L 147, 155-156 (2016) [In Korean]).

51) See the Constitutional Court decisions listed in *supra* note 48.

52) Personal liberty includes not only the freedom of movement, but also the stability, safety, or integrity of the body. Constitutional Court [Const. Ct.], 92Hun-Ga8, December 24, 1992 (KCCR 4 853, 874) (S. Kor.) (stability); Constitutional Court [Const. Ct.], 2001Hun-Ma153, December 18, 2003 (KCCR 15-2 562, 576) (S. Kor.) (safety). Constitutional Court [Const. Ct.], 2013Hun-Ga9, December 23, 2015 (KCCR 27-2 391, 403) (S. Kor.) (integrity).

existential meaning of Article 36, paragraph 3 should be understood as the right to demand national benefits and considerations; that is, the right to health is a fundamental social right. Just because the right to health is prescribed alongside the articles on marriage and family life, it is not necessary to limit this right to health problems related to family life or to emphasize its character as a right to freedom.⁵³⁾

This then raises the question: Based on Article 36, paragraph 3, what can individuals demand the state do to protect their health from infectious diseases? Are these demands limited to the establishment and execution of policies to prevent and control infectious diseases, or can individuals demand specific benefits such as the provision of medical services or supplies? If the latter, to what extent can these benefits be demanded? These questions apply to fundamental social rights in general. More specifically, are fundamental social rights abstract rights or specific rights?⁵⁴⁾ First, the state is obliged to establish and implement necessary policies, such as enacting and enforcing the Prevention and Control Act, to protect the health of citizens from infectious diseases. The Infectious Disease Control and Prevention Act and the Quarantine Act are examples of such laws,⁵⁵⁾ and other laws related to the provision of medical services have also been enacted and implemented.⁵⁶⁾ Therefore, an approach that

53) It is common to find the origins of art. 36, para. 3, in art. 119 of the German Weimar Constitution of 1919 (The State's Obligation to Support Family Purity and Health) and in art. 20 of the Constitution of 1948 ("Marriage is based on the equality of men and women, and the purity of marriage and the health of the family are specially protected by the state."). See Kwon, *supra* note 49, at 711; Han, *supra* note 49, at 1083. However, art. 36, para. 3, of the Constitution differs from the Weimar Constitution of Germany and the provisions of the Constitution of 1948 in that it stipulates the "health" of "all citizens."

54) For an explanation of the theory on the legal nature, effect, and practical application of fundamental social rights, see Bok-Ki Kim, *Sahoejeok Gibongwonui Beobjeok Seonggyug-Ingandaun Saenghwaleul Hal Gwonlileul Jungsimeulo- [The Legal Nature of Fundamental Social Rights]* 3(1) Soc. Sec. L. Rev. 111, 111-138 (2014) (In Korean).

55) The purpose of the Quarantine Act (Act No. 17068, Mar. 4, 2020) is to maintain and protect public health and prevent the spread of infectious diseases at home and abroad by stipulating quarantine procedures at borders and measures to prevent infectious diseases. See Quarantine Act, art. 1.

56) For example, laws such as the Medical Service Act (Act No. 17069, Mar. 4, 2020), the Medical Care Assistance Act (Act No. 14697, Mar. 21, 2017), the Framework Act on Health and Medical Services (Act No. 17472, Aug. 11, 2020), the Public Health and Medical Services Act (Act No. 17194, Apr. 7, 2020), the Guarantee of the Right to Health and Access to Medical

views the right to health as an exclusively abstract right fails to fully utilize the purpose of our Constitution, which stipulates the right to health as an independent fundamental right through explicit constitutional provisions. For the right to health to have a more substantial meaning, it should be understood to empower citizens to demand specific benefits from the state.

Regarding the right to a humane livelihood, the Constitutional Court has recognized that the specific duties of the state in this area can only be determined by legislation. However, the Court has also stated that “the right to demand a provision necessary for the minimum material life” can be derived directly from the provisions of the Constitution without any additional legislation.⁵⁷⁾ Applying this ruling to the right to health implies that, although the state’s obligations around protecting citizens’ health from infections can only be determined via acts on healthcare and the prevention of infectious disease, the state can be expected to provide specific medical services or preventive products based on the right to health defined in Article 36, paragraph 3, without any additional legislation, depending on the circumstances. For example, the Infectious Disease Control and Prevention Act obliges the state and local governments to establish and enforce vaccination plans and to reserve medicines, etc. (art. 4, paras. 2, 3, and 10). The Act also stipulates that citizens have the right to receive diagnosis and treatment and that the expenses should be borne by state and local governments. These provisions specify the content of the right of health through specific legislation. However, under certain circumstances, individuals can call on the state to diagnose and treat infectious diseases, to vaccinate, and to supply medicines or preventive products, even if these provisions did not exist. Based on this specific payment obligation, the state’s failure to provide these benefits would violate Article 36, paragraph 3 of the Constitution and infringe on the people’s right to health.

However, the specifics of the benefits that derive directly from the right to health are difficult to determine theoretically and *a priori*. They should be

Services for Persons with Disabilities Act (Act No. 13661, Dec. 29, 2015), and the Support for Catastrophic Health Expenditure Act (Act No. 15349, Jan. 16, 2018) have already been enacted and implemented.

57) Constitutional Court [Const. Ct.], 93Hun-Ga14, July 21, 1995 (KCCR 7-2, 1, 30-32) (S. Kor.).

determined based on the specific circumstances of epidemics, considering factors such as the risk to health, the existence of means of prevention or treatment, the difficulty of procuring medicines or preventive products, and the financial status of the government.⁵⁸⁾ It may therefore be difficult to determine under what criteria the state should provide benefits that include providing medical supplies such as vaccines, medicines, or preventive products. This question involves not only the right to health but also the issue of equal rights.⁵⁹⁾

2. Social Disasters Caused by Infectious Diseases and the State's Duty of Protection

A pandemic of an infectious disease not only threatens health, but also causes social and economic damage.⁶⁰⁾ Prevention and control measures to block the spread of an infectious disease, such as restrictions on movements, prohibitions on gatherings, and facility closures, directly damage economic activities, thus threatening the livelihood of socially vulnerable groups, such as small business owners and temporary or day

58) For reference, the European Court of Human Rights (ECtHR) recognizes the state's active responsibility to protect individuals' lives, but it also allows member countries significant discretion regarding the degree of governmental responsibility to prevent the spread of infectious diseases, applying the "margin of appreciation" approach. DAVID HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 214-215 (2018). For ECtHR cases on the state's violations of its duties to protect the people's life and health, see Sung-Jin Kim, *Gukgawa Gukmin Anjeonbojangeuimu- Yureobingwonjaepanso Pallyeul Jungsimeuro [Right to Safety of the People: Lessons from the European Court of Human Rights]*, 52 *KANGWON L. REV.* 163, 180-181 (2017) (In Korean).

59) For more on this issue, see Mun-Sik Jeong, *supra* note 50, at 174-190. For an explanation of fair distribution of limited medical resources, or the issue of justice in the medical field, see also Jun-Hyuk Kim, *Corona19ro Inhan Eunggeup Sanghwangeseo Euiryojawon Bunbae mit Baeksin Jeopjongeui Useonsunwi Gyeoljeong [Setting Priorities for Medical Resource Allocation of Emergency Treatment for and Vaccination Against COVID-19 in South Korea]*, 4(1) *BIO, ETHICS & POLICY* 67, 67-96 (2020) (In Korean).

60) In 2020, economic growth in South Korea was -1.3% in the first quarter and -3.3% in the second quarter. These are the lowest growth rates since the 1998 financial crisis. See Hokyong Shin, *Corona Chunggyeok 2 Bunki Seongjanglyul -3.3% ... 22nyeoniae Choejeo [The Second-Quarter Economic Growth Rate is at -3.3%, Marking the Lowest Record in Twenty-Two Years]*, YEONHAP NEWS AGENCY (Jul. 23, 2020), <https://www.yna.co.kr/view/AKR20200723021500002>.

laborers.⁶¹ In such a case, the state has a duty to protect people who suffer from the pandemic and from the economic damage caused by prevention measures, and Article 34, paragraphs 1 and 6 of the Constitution provide the basis for this duty.

Article 34 of the Constitution establishes “the right to a humane livelihood” in paragraph 1 and goes on to specify the state’s duty to guarantee a humane livelihood in paragraphs 2 through 6.⁶² Paragraph 6 establishes the duty to prevent disaster and protect the people’s humane livelihoods. Since a pandemic qualifies as a disaster, guaranteeing the people’s humane livelihoods from the spread of an infectious disease and from the social and economic damages caused by prevention and control measures is the state’s duty under Article 34, paragraph 6 of the Constitution. The Framework Act on the Management of Disasters and Safety, which specifies the state’s duties under Article 34, paragraph 6 defines the spread of an infectious disease as a social disaster (art. 34, subpara. 1b) and stipulates that the state must provide financial support to people and businesses who suffer losses due to the disaster. Measures implemented during the COVID-19 pandemic, such as the Emergency Disaster Relief Fund and the Emergency Employment Stability Support Fund, were based on these provisions.

Meanwhile, Article 34, paragraph 6 of the Constitution stipulates that “the State shall endeavor to [protect the people’s humane livelihoods].” This wording differs from the establishment of the right to health in Article 36, paragraph 3, which stipulates that “[the health of] all citizens shall be protected by the State.” This raises the question of how this difference

61) In March, before the government implemented measures such as emergency financial assistance, 195,000 fewer people were employed than in the previous month, temporary and day jobs decreased by 593,000, and credit card spending in Seoul decreased by 14.7% compared to the previous year. See Jae-Yoon Lee, *Corona19 Hwak-san Eokjereul Wihan Bongsuwaejochi Silsi Hyeonhwang mit Sisajeom [Implementation Status of Measures to Prevent the Spread of COVID-19 and Their Implications]*, 1702 ISSUES AND POINTS (NATIONAL ASSEMBLY RESEARCH SERVICE) 1, 1-4 (2020) (In Korean).

62) For more on the argument that art. 34, paras. 2-6 of the Constitution specify or describe the means for the purpose stipulated in para. 1 (the right to a humane livelihood), see Kwang-Seok Cheon, *Sahoejeok Gibongwon I-ronui Hyeongseonggwa Jeongae – Ingandaun Saenghwareul Hal Gwonlileul Jungsimeuro – [Formation and Development of the Theory Concerning Fundamental Social Rights]*, 29 CONST. REV. 143, 198-200 (2018) (In Korean).

should be interpreted. The wording “shall endeavor to” cannot be understood to deny the state’s duty of protection entirely. Rather, this phrase acknowledges the duty itself while reflecting the fact that the state has extensive discretion in how that duty should be implemented.

This is because the scope of disasters referred to in this article is indeed broad, and there are countless ways to prevent various disasters and protect the public from their impacts.⁶³⁾

3. *Criteria for Judging the Right to Health and the Duty to Protect Health*

Since most constitutional social rights consist of active demands for benefits from the state, the realization of these rights depends on the state’s active fulfillment of its obligations. In other words, fundamental social rights and the state’s duty to protect these fundamental rights are in a relationship resembling double sides of the same coin. Therefore, there is no difference between the judging criteria for violations of fundamental social rights and the judging criteria for violations of the state’s duty to protect these fundamental rights. The Korean Constitutional Court has stated that the judging criteria for the right to health is “examining whether the state’s duty to establish and implement policies for public health in response to the people’s right to demand national benefits and considerations necessary for maintaining health has been violated.”⁶⁴⁾

However, the principle of prohibiting under-protection, which the Constitutional Court currently uses as a criterion for judging the state’s duty to protect fundamental rights, states that “there is a violation of the Constitution only if the state has not enacted any legislation on the

63) For example, the state can provide direct benefits to people affected by disasters, but there is also a plan to grant special legal status to these people through the enactment or revision of laws and regulations. In Germany, on March 3, 2020, early in the COVID-19 outbreak, a legal amendment granted consumers and small businesses the right to temporarily refuse benefits or to suspend their obligations and to temporarily limit the termination of lease contracts. Jinwoo Kim, *Dogirui Coronagyeyakbeob: Uri Ibbeobe Daehan Sisajeomeul Deosbutyeo* [Germany’s Corona Contract Act: Implications for our Legislation], 37(1) J. PROPERTY L. 119, 119-148 (2020) (In Korean).

64) Constitutional Court [Const. Ct.], 2017Hun-Ma103, April 23, 2020 (KCCR 32-1 Sang 403, 421) (S. Kor.).

protection of the fundamental rights or the content of the legislation is significantly unreasonable that it clearly deviates from the scope of discretion permitted under the Constitution.”⁶⁵) This statement hardly functions as a *de facto* judging criteria since it allows the state excessive discretion regarding its fulfillment of the duty to protect fundamental rights. Today, there are very few states that have not enacted any legislation related to the realization of fundamental social rights, and it is hard to find any legislation with remarkably unreasonable content.

Therefore, it has been argued that the criteria for judging the duty to protect fundamental rights should be individualized or categorized according to the object of protection so that the stringency of judicial review can vary by specific cases. For example, the dissenting (unconstitutional) opinion in a case regarding the Former Act on Special Cases Concerning the Settlement of Traffic Accidents (which is considered the leading Constitutional Court case defining the duty to protect fundamental rights) accepts the principle of prohibiting under-protection but states that the degree of control exercised by the Constitutional Court depends on the importance of the fundamental rights and the interests involved, the severity of the violation, the frequency of the violation, whether the violation of the duty of protection is clear, whether the protection proposed by the legislator is persuasive, and whether strict control over the content of the legislation is necessary.⁶⁶)

Another case involved whether the Ministry for Food, Agriculture, Forestry, and Fisheries violated the state’s duty to protect people’s lives and bodies by relaxing the import requirements for US beef despite safety concerns related to mad cow disease. In that case, the dissenting (unconstitutional) opinion stated that intensity of review should vary according to the protected interests and the nature of the risk, strongly emphasizing the need for stricter judging criteria when a subordinate

65) Constitutional Court [Const. Ct.], 94Hun-Ma33, May 29, 1997 (KCCR 9-1 543, 555) (S. Kor.).

66) Constitutional Court [Const. Ct.], 90Hun-Ma110, etc., January 16, 1997 (KCCR 9-1 90, 131) (S. Kor.) (opinions of Jinwoo Kim, Jaehwa Lee & Seung-Hyung Jo). In this case, the Court ruled for strict control over the content of legislation due to the importance of the legal interests of body and life and the immediacy, seriousness, and relatively high probability of the risks. For an additional explanation, see Seokyeon Song, *supra* note 47, at 22-23.

statute, rather than one issued by the National Assembly, directly determines the degree of protection for fundamental rights (in this case, the decision was made by the Ministry for Food, Agriculture, Forestry, and Fisheries).⁶⁷⁾

The Constitutional Court has recently determined that allowing individuals campaigning for public office to use loudspeakers without regulating the maximum noise output and the place and time of use violate the right to live in a comfortable environment.⁶⁸⁾ In this decision, the Constitutional Court stated that whether a case fails to meet the principle of prohibiting under-protection should be determined by comparing “types of relevant legal interests and their status in the constitutional order, types and degrees of infringements and risks, and the meaning of conflicting legal interests, etc.”⁶⁹⁾ This decision accepted the content of a dissenting opinion in a previous decision on the constitutionality of the same provision.⁷⁰⁾ The previous decision stated that, since the right to live in a comfortable environment is closely related to the safety of life and body, the immediacy, severity, and irreversibility of risks should also be reviewed, and stricter control over the content of legislation is necessary.⁷¹⁾

The arguments above, which aim to increase the stringency of judicial reviews of the principle of prohibiting under-protection, are convincing enough in themselves, but they also have important implications for the right to health and the state’s duty to protect citizens’ health. The degree of the state’s duty of protection cannot be said to be the same for all fundamental social rights, and this duty may even differ even among various applications of the right to health, depending on whether it involves protection from a minor disease or from a dangerous disease with

67) Constitutional Court [Const. Ct.], 2008Hun-Ma419, etc., December 26, 2008 (KCCR 20-2 Ha 960, 993-994) (S. Kor.) (dissenting opinion of Duhwan Song).

68) Constitutional Court [Const. Ct.], 2018Hun-Ma730, December 27, 2019 (KCCR 32-1 Ha 315) (S. Kor.).

69) Constitutional Court [Const. Ct.], 2018Hun-Ma730, December 27, 2019 (KCCR 32-1 Ha 315, 322) (S. Kor.).

70) Constitutional Court [Const. Ct.], 2006Hun-Ma711, July 31, 2008 (KCCR 20-2 Sang 345, 364-365) (S. Kor.) (dissenting opinion of Heewok Kim, Jongdae Kim, Hyungki Min, and Youngjoon Mok).

71) *Id.*

a high fatality rate. Therefore, the state's duty to protect fundamental social rights is generally recognized at an abstract level, and broad discretion is allowed in its implementation. However, in specific circumstances, this discretion may be reduced, and only a specific duty to protect may be recognized. The scope of discretion in the application of this duty may also vary depending on the importance, risk, and degree of infringement on the legal interest.⁷²⁾ The state's duty to protect the right to health is very important when it involves the safety of citizens' lives and bodies, and in specific cases, the immediacy, seriousness, and irreversibility of risks to citizens' health may impact the interpretation of this duty.

Therefore, when the case involves a dangerous infectious disease that poses a significant threat to citizens' lives and bodily health, the state's protection duties should be broader than in other cases where the risks are less severe.

VI. Conclusion

The recent COVID-19 has pandemic raised issues about the impact of infection control measures on the fundamental rights of individuals in the face of a crisis caused by the emergence and spread of new infectious diseases. Most prevention and control measures imposed by the Infectious Disease Control and Prevention Act place restrictions on individuals' liberty and rights. The restrictions to fundamental rights imposed by measures such as bans on gatherings, closings of private/public facilities, mandatory diagnostic test requirements, mandatory hospitalizations or quarantines, and disclosures of patients' movements are not negligible. While these prevention and control measures can be justified in the name of protecting the health and safety of the members of the society, not all restrictions on individual rights can be upheld.

Expertise based on medical knowledge is crucial to establishing and enforcing disease control policies. This need for expertise means that a substantial portion of the disciplinary authority over disease control is

72) Kwang-Seok Cheon, *supra* note 47, at 148-150.

delegated to administrative agencies. However, the state's infection control policies cannot be determined solely by the scientific judgments of experts. Since one effect of infection control policies is to restrict individuals' fundamental rights, members of society should be able to determine such policies for themselves via democratic decision-making processes. That is, citizens should be able to determine how effective they want infection control policies to be and what level of restriction on which specific rights they are willing to endure in exchange for infection control. This is why democratic control over the delegation of disciplinary authority to administrative agencies that establish infection control policies based on scientific expertise is still necessary.

Some might argue that it is necessary to relax the judging criteria for infection control policies due to the crisis caused by the pandemic and the level of professional expertise required to establish appropriate infection control policies. However, scientific judgments about disease prevention cannot replace normative judgments on whether individual rights have been infringed by such policies. Furthermore, uniform relaxing of the judging criteria is unnecessary since appropriate conclusions can readily be drawn if the courts consider the unique factors of individual cases. Moreover, to prevent excessive restriction of individual rights in the name of public health, relaxing the criteria for judicial review is undesirable.

In the pandemic era, it is necessary to reexamine fundamental social rights and the state's duty to protect these fundamental rights.

Article 36, paragraph 3 of the Korean Constitution identifies the right to health as an independent, fundamental right. Therefore, individuals have the fundamental right to demand that the state protect their health. Moreover, the state must protect citizens whose basic or humane livelihoods are threatened either by the spread of an infection or by measures to prevent and control the spread of a contagious disease. These fundamental social rights and the state's duty to protect them should be judged according to the same criteria. Since positive action by the state is necessary to protect citizens' health in the pandemic era, the judging criteria for fundamental social rights and state's duty to protect these fundamental rights should be further reinforced.

