

**Designing the New Constitution
for Human Rights Protection for a Reunified Korea**

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Abstract

Scholars anticipate Korean reunification in the near future as a result of North Korea's internal collapse. Thus, serious preparation for Korean reunification is necessary, especially to prevent human rights violations. The Constitution will be a starting point and a key tool for building the cornerstone of a reunified Korea. Therefore, the goal of this thesis is to introduce a new constitution that provides human rights protection to all Koreans in the reunification era. I identify constitutional characters and factors by incorporating a definition of human rights and designing institutional support for the protection of those rights. Furthermore, I explore the current political institutions and cultures of South and North Korea in order to make the constitution practical for the context of a reunified Korea. Ultimately, I take the leading proposed draft of the new constitution for a reunified Korea (proposed by Cheol-Soo Kim), and devise revisions and suggested additions that would strengthen a human rights regime in the post-reunified environment.

Chapter 1: Introduction

1.1 Statement of the Problem and Purpose of the Study

Korea is the only existing divided nation. North Korea is continuing its nuclear threat against international society without providing any kind of protection for its own people. This reign of terror in North Korea, however, also suggests that the authoritarian regime is in an extremely insecure state inside and outside of its territory.

Anticipating reunification of South Korea and North Korea in the near future, South Korea must be realistic about reunification. North Korea has been under dictatorship, in which human rights have been seriously neglected and physically violated by the government. I expect that extreme forms of physical punishment and torture will be immediately removed by the South Korean government as soon as the North Korean regime collapses. But the mere removal of physical punishments alone does not generate complete human rights protection.

For instance, North Koreans could be politically, economically, and socially discriminated against based on ancestry in a reunified Korea. After years of opposition, some North Koreans may unknowingly choose to be unconditionally obedient to the government and neglect their own rights in the process. In a reunified Korea, all Koreans must be equally respected by themselves, others, and the state.

For now, there is no mechanism that can educate all Koreans about the essence and significance of human rights. I propose a constitution as the most effective mechanism to formally and practically bring about a reunified Korea in which every person equally and universally enjoys human rights. However, not all constitutions serve this specific role.

Therefore, my goal in this honors thesis is design a new constitution for a reunified Korea that most effectively protects the human rights of all Koreans.

1.2 Significance of the Study

Emphasis on human rights protection in a reunified Korea is particularly significant because it is one of the most fundamental bases for democracy. However, they are also vulnerable to negligence because they are not self-enforcing.

The constitution is a fundamental document that governs the society. Every state has its own constitution, but a constitution's functions and influences differ by each state. Some constitutions truly govern the society while some constitutions are merely symbolic- that being said, not all constitutions are self-enforcing.

Both human rights and the constitution need to be enforced with systematic approaches and instruments. A widespread concern about economic turmoil and instability in a reunified Korea may create a new constitution that concentrates on empowering the government to curtail economic risks. However, invisible and latent threats that explode within will be more fatal than visible threats.

In addition, international society has been involved in monitoring North Korean human rights issues. Human rights have become a universal and transboundary norm, and thus create room for international intervention. However, a reunified Korea is the only state that has the authority to define and reestablish Korean human rights. Therefore, it is significant to have human rights protected by the constitution. A new constitution should be empowered by its own provisions and institutional support.

The Korean reunification will arrive suddenly as was the case in the German reunification. I am designing a constitution that will be used immediately from the first day of reunification. Human rights cannot be realized immediately just by stressing their importance in the constitution. It is important that human rights appear as a founding principle of a reunified Korea to make human rights a long-term commitment for building democracy.

1.3 Research Design

The constitution should be both ambitious and pragmatic in order to be implemented by the government. The new constitution of a reunified Korea should fill in missing pieces found in constitutions of South and North Korea. Since my thesis focuses on protecting human rights in particular, I will redefine human rights in a reunified Korea. In addition, I will explore the role and efficacy of the constitution in regards to human rights protection, through literature review.

This research will be based on analysis of two constitutions. First, I will analyze constitutional features that made the Basic Law for the Federal Republic of Germany an enduring and a competent document for human rights protection. Secondly, I will analyze a new constitution draft proposed by Kim Cheol-Soo (a prestigious professor and a constitution scholar in South Korea).

Based on the Korean context and analyses, I will make eliminations, revisions, and additions to Kim's constitution. Since a new constitution is expected to be drafted by all Koreans after the society stabilizes, the constitution I design in the thesis may be used as a provisional constitution.

Chapter 2: Background

This chapter prepares the readers with background knowledge of the Republic of Korea (South Korea) and the People's Republic of Korea (North Korea) in three areas: the system of government, the political culture, and the state of human rights. This chapter explores the past and the present of the two Koreas to shape the future of a reunified Korea.

The background knowledge of South and North Korea is significant for building a new constitution in terms of filling in missing spaces in the new constitution that particularly triggered human rights abuse.

2.1 The South: Republic of Korea

Everything, including its democratization, was carried out rapidly in accordance with the leadership in the Republic of Korea. Many political scientists in South Korea believe that South Korea is still in the process of achieving liberal democracy. "Koreans operate on Western hardware and Confucian software."¹ The government structure corresponds to the western-type democracy because strictly complies with the structure of separation of powers. However, South Korean politics is still influenced by "traditional concepts of power and authority", which puts special emphasis on the state leader.² Nonetheless, South Korea continues to evolve through expansion of civic engagements and pro-democracy movements in politics.

¹ David I. Steinberg and Myung Shin, "Tensions in South Korean Political Parties in Transition: From Entourage to Ideology," *Asian Survey* 46, no.4, 2006: 521.

² Ibid., 522.

2.1.1 The Government

The Republic of Korea was proclaimed in 1948. As written in Article 1 of the Constitution of the Republic of Korea, Republic of Korea is a democratic republic in which “sovereignty resides in the people, and all state powers emanate from the people.”³ The Constitution divides the government into three branches based upon the principle of separation of powers: the executive, the legislative, and the judicial.

The Executive Branch: The Blue House

The President of the Republic of Korea is the head of state. The president is “directly elected by simple majority popular vote for a single 5-year term”.⁴ Compared to western democracies, the Republic of Korea has “imperial presidency”.⁵ The presidents are given immense power and influence over the three branches of government.

The president has the power to appoint over the entire government. In the executive branch alone, the president appoints the prime minister (the head of government), members of the State Council, and the ministers of 17 ministries (e.g. the Ministry of Unification).

The State Council- a collegial body of the Prime Minister and cabinet members- employed a mixed system of the cabinet meeting of the United States and the cabinet meeting of a parliamentary government. It was established as a preventive measure against the imperial

³ *The Constitution of the Republic of Korea*, art.1, para.1.

⁴ “Korea, South,” in *The World Fact Book* 2013-14. Washington, DC: Central Intelligence Agency, 2013.

⁵ David I. Steinberg, “The Evolution of the Political Party System and the Future of Party Politics in the Republic of Korea,” in *A Turning Point: Democratic Consolidation in the ROK and Strategic Readjustment in the US-ROK Alliance*, (Honolulu, HI: Asia-Pacific Center for Security Studies, 2005), Chapter 7, 3.

presidential power within the executive branch. However, it transformed into an institution that assists the president. Even without a voting right, it is an indispensable policy-making advisory board for discussing major policies. Moreover, it is a supreme policy-making institution which has the right to participate in the National Assembly.

Each body of the executive branch has considerable power to make major decisions on major state affairs. Nonetheless, the constitutional guarantee for a strong presidential power lead the executive bodies to become more depend on the president. This tendency has been reinforcing the presidential influence in South Korean politics.

The Legislative Branch: The National Assembly

South Korea has a unicameral law-making body. In the National Assembly, there are 300 seats for multiple 4-year terms. Of the 300 members of the Assembly, 253 are directly elected by single-member district. In other words, 253 representatives in the National Assembly represents 253 districts. Remaining 47 are directly elected by national constituency. As of November 2016, majority of seats are occupied by the conservative Saenuri Party (42.67%) and the liberal Democratic Party (40.33%).⁶ The president's party has almost always been the majority party.

The National Assembly has 18 standing committees and 8 special committees to deliberate over detailed policies. The Special Committee for the Improvement of South and North Korean Relations is one of the 8 special committees.

As elected representatives, the members have the right to present bills to the National Assembly, the right to vote on proposed laws, and the right to revise existing laws. Collectively,

⁶ *The National Assembly of the Republic of Korea*, 2016, <http://www.assembly.go.kr/assm/memact/congressman/memCond/memCond.do>.

the National Assembly has the right to veto presidential decisions, audit budgets and administrative procedures, ratify treaties, and impeach government officials of the executive and judicial branch. For most of its procedure, one-third of its members must approve, and the bills must be approved by the president.⁷

The legislature is equipped with comparable constitutional rights to the legislatures of many democratic states. Nonetheless, it is still limited due to serious collision between the two majority parties.⁸ It almost seems like the National Assembly is a stadium where parties compete to win the next presidential election, not a forum where representatives discuss to serve the people. The president's party often makes unconditional supports to the president while the competing parties often make unconditional disagreements.

The Judicial Branch

The Constitution of the Republic of Korea ensures judicial independence, but judges are not sufficiently free from the threat of impeachment, suspension, and salary reduction. The judicial branch includes the Supreme Court, the regional High Court of Justice, district courts, the Patent Court, the Family Court, the Administrative Court, and some more specialized courts. An accumulative 2,900 judges work in the courts. 13 justices and the chief justice of the Supreme Court are appointed by the president for 6-year renewable terms.⁹

The Judicial Research and Training Institute is a subordinate institution to the Supreme Court. It was formed in 1970 for training prospective judges, prosecutors, lawyers, and judicial

⁷ *National Assembly of the Republic of Korea*, 2016, <http://www.assembly.go.kr/views/cms/assm/assembly/asswork/asswork0101.jsp>

⁸ Kim Moo-sung, interviewed by Sohn Suk-hee, JTBC News, JTBC, November 24, 2016.

⁹ *Court of Korea*, 2016, <http://www.scourt.go.kr/judiciary/member/judge/index.html>.

apprentices. The trainees are appointed to the institute by the Chief Justice of the Supreme Court only if they pass the Bar Exam. Trainees are trained for two years and recognized as public servants in special service.

Since Supreme Court justices can be expelled by the President whenever considered incompetent, it is questionable if the judicial branch is entirely independent from the executive branch. Indeed, the South Korean public has significantly less interest in the judicial branch than in other two branches of government. Therefore, it seems like the judicial branch demonstrates less social impact.

The Constitutional Court

The Constitutional Court is a separate independent entity from the judicial branch. It deals only with the constitutional law of the Republic of Korea. There are 9 justices at the Constitutional Court. The president, the National Assembly, the chief justice of the Supreme Court each appoint 3 justices of the constitutional court. The head of the Constitutional Court must retire at age 70, and other justices can serve 6-year renewable terms and must retire at age 65.¹⁰

The Constitutional Court makes decisions on the constitutionality of statutes, the presidential impeachment, party dissolution, jurisdiction disputes, and the constitutional petition. The court was established in 1988 to take charge of politically pending issues. However, the court does not have veto power against the Supreme Court. Section 2 of Article 68 only provides that individuals may submit petition against Supreme Court decisions to the Constitutional Court if the decisions violate the constitution.

¹⁰ Central Intelligence Agency.

The Supreme Court and the Constitutional Court have been in power games because the constitution does not clarify the hierarchy between the two courts.¹¹ Since the state adopted three-stage trial system, in which a national is given authority to receive three trials for a case, decisions by the Supreme Court are final and irrevocable. However, the Constitutional Court has been adjudicating the Supreme Court decisions.

2.1.2 The Political Culture

Regional Basis

South Korean political culture shows high reliance on regionalism. The confrontation between a giant conservative party and a giant liberal party is often designated as a confrontation between Gyeongsang province and Jeolla province and less between policy orientation.¹² The conservative party has been obtaining most of its votes from Gyeongsang province, and the liberal party has been collecting its votes from Jeolla province. Politicians often make elite political pacts based on regionalism. Each province seeks to produce the president so that a large number of politicians of the province moves to the center of power.¹³

¹¹ Jeon, Soo-Young, The Constitutional Court over the Supreme Court (헌법재판소, 대법원 뒤흔들다), Seoul: Ilyo Seoul, 2012, June 18, 2012, <http://www.ilyoseoul.co.kr/news/articleView.html?idxno=62943>

¹² Steinberg, *The Evolution of the Political Party System and the Future of Party Politics in the Republic of Korea*, 5.

¹³ Ibid., 7.

Transitory Parties

From 1945, more than 200 political parties were formed within South Korea. Parties continuously merge, vanish, or naturally disappear. Some parties merely change their names to present that they are reforming their parties to satiate their constituents. Today, South Korea has 14 political parties. Parties are highly transitive because politically influential figures use them as a crucial means to vie for power.

Representatively, Ahn Cheol-Soo, a software entrepreneur who turned into a politician, started his political life as a party member of the Democratic Party in 2011. He attracted many people who were disaffected toward corruption and power competition among mainstream politicians. He promised to bring “new politics” into South Korean politics and announced his intent to run for the 2012 presidential election. However, Moon Jae-In became the presidential candidate of the Democratic Party.

Ahn defected from the Democratic Party and entered the National Assembly without affiliation to any party and formed the People’s Party by attracting his fraction who were in the Democratic Party. Indeed, the political preference and ideology of the Democratic Party and the People’s Party are very similar. Nonetheless, Ahn’s party was formed because “commitment to a political party is rarely made on the basis of ideology or policy, but for ... personal power, special interest, blood relations”.¹⁴ Thus, the rise and fall of a party depends on a powerful political figure and his entourage’s path to win the presidency.

¹⁴ Chulsu Kim, “Parties and Factions in Korean Politics,” PhD. Dissertation, University of Massachusetts, 1973.

Faction Politics: The Zero-sum Game

South Koreans perceive politics as a zero-sum game due to serious political polarity. It has been in place so long as the term politics existed in Korea. Sharing power is equivalent to losing power in Korean politics. The leading conservative party and the leading liberal party were always in power struggle. Serious factionalism has always been one of the worst drawbacks in South Korean politics and obstacles to democratization.

Faction politics, zero-sum game, strong regionalism, and transitory parties remain to a certain degree. Recently, however, South Korean politics has moved another step forward to creating a three-party-system. Parties are becoming more conscious about policies than region or political figure. South Koreans see variation in each policy today than they could in a bi-party system.

2.1.3 State of Human Rights

In the early days of the Republic of Korea, the issue of human rights was neglected by the government and by a considerable portion of the population. The nation tended to make a long and excessive immersion in economic development. This was the case under former president Park Chung-Hee in early 1970s. The Park Administration was autocratic, and President Park peremptorily expelled and jailed individual politicians who disagreed with the president's policy direction.¹⁵ The governmental oppression of human rights was at its very worst moment under Chun Doo-Hwan, a military dictator who took the Blue House through a military coup. In the

¹⁵ Chaibong Ham, "South Korea's Miraculous Democracy," *Journal of Democracy* 19, no. 3 (2007): 131.

Gwang-ju Democratization Movement of 1980, the Chun Administration killed more than 200 civilians who called for a permanent abolishment of martial law. At that time, the martial law was promulgated by President Chun to restrict fundamental human rights and achieve centralization of power to the President.

The president of the Republic of Korea began to be directly elected by the people from 1993 due to increasingly aggressive public demand for a direct presidential election system. The government and politicians became increasingly conscious about fundamental human rights because people could exercise power through election from then on. Ever since President Kim Dae-Jung, the South Korean government has been enthusiastic on providing human rights protection through government institutions and public education. Effort are still in progress to enculturating the entire South Korean society to respect human rights.

In 1998, President Kim Dae-Jung announced a government-sponsored program of creating the National Human Rights Commission of the Republic of Korea. Established in November 25, 2001, the committee was launched to “protect inviolable fundamental human rights and enhance domestic human rights standards to realize human dignity and establish democratic basis.”¹⁶ It is an independent committee from the three branches of government as legislated in the National Human Rights Commission Act of 2001. The committee is responsible for investigating any form of human rights abuse. The committee also investigates the national and local government institutions.

In addition to the National Human Rights Commission, the South Korean government has been improving human rights conditions in South Korean society. The Ministry of Gender Equality and Family was newly organized in the executive branch in 2001 to protect women and

¹⁶ *National Human Rights Commission Act*, art. 1.

children's rights. The ministry has been working for expansion of minority group's participation in South Korean society.¹⁷

In 1990s, the central government led educational reform, and topics on human rights and global citizenship emerged in the official education curricula of ethics and social sciences. The government has been interacting continuously with civil society groups, experts, and international organizations.¹⁸ The efforts encouraged human rights activism within South Korean society. Today, South Korea is regarded as an ideal Asian model of human rights protection.

South Korea has been improving mainly through political institutions and civic organizations, but no noticeable constitutional amendment has been made specifically for human rights protection ever since 1987. Human rights could become a judicial question and a wearily debated topic once Korean peninsula is reunified. The constitution should legally bind the society to protect human rights of all Koreans so that courts can make explicitly clear and appropriate decisions on the topic.

2.2 The North: Democratic People's Republic of Korea

Democratic People's Republic of Korea sought to follow the Soviet model. However, the state is different from other socialist states because it created its own Juche ideology and put the ideology as its uppermost principle. The Juche ideology, ties the entire state with a strong tradition of a cult of personality. North Korea has not made any significant progress for six

¹⁷ Ministry of Gender Equality and Family, http://www.mogef.go.kr/korea/view/intro/intro01_02.jsp.

¹⁸ Rennie J. Moon and Jeong-Woo Koo, *Global Citizenship and Human Rights: A Longitudinal Analysis of Social Studies and Ethics Textbooks in the Republic of Korea* (The University of Chicago Press, 2011), 580.

decades because its ideological assumptions have not changed much since 1948.¹⁹ The government strictly isolated itself from the world and even from the North Korean public because the government is afraid that a flow of information may destroy the autocratic regime. For survival of the state, Democratic People's Republic of Korea is expected to retain its attitudes.

2.2.1 The Government

Due to extreme centralization of power to a single personality, the government is referred to as the Kim Dynasty. However, the Socialist Constitution of the Democratic People's Republic of Korea defines the state as an "independent socialist state" with the system of government based on the principle of democratic centralism.²⁰ The entire power structure of North Korea is formed around the Korean People's Party, and the Kims have been the head of the party.

The Executive Branch

Since its establishment, the Kim family has passed down state power to three generations: Kim Il-Sung to Kim Jung-Il, and then to Kim Jong Un. Kim Jong Un- a young man who became the chief of state at age 29- seized the entire state immediately after his father's death in 2011. Kim Il-Sung and Kim Jong-Il- the former chief of state- respectively hold their prestige as the Eternal President and the Eternal General Secretary. Cabinet members are elected by the Supreme People's Assembly but strictly under the control of the chief of the state. Elections are

¹⁹ Sue Mi Terry, *North Korea's Strategic Goals and Policy towards the United States and South Korea* (Columbia University Press, 2013), 67.

²⁰ *The Socialist Constitution of the Democratic People's Republic of Korea*, art. 1 and 5.

held with only one candidate, and the Supreme People's Assembly are obligated to vote for consent in the elections.

The cabinet is prohibited from participating in military affairs.²¹ Military is a consecrated ground in which only the chief of state could be involved. Although the National Defense Commission is not part of the executive branch, it closely works with the branch in terms of governing. The constitution of 1972 prescribes that the head of state is the head of National Defense Commission.

In fact, Kim Jong-Il started his career at the government as the primary chairman of the National Defense Commission. The commission has the rights to establish major policies; guide general military force and military defense projects; and create and remove national defense agencies.²² This shows the significance of the military commission in governance.

The Legislative Branch: The Supreme People's Assembly

North Korea has a unicameral legislature with only one party: the Korean Workers' Party. Kim Jong-Un- the chief of state- is the head of the Korean Workers' Party. In the Supreme People's Assembly, there are total of 687 seats with 5-year term. Members are directly elected by absolute majority vote. Though there is election, once the Korean Workers' Party selects the candidates, the candidates automatically obtain seats in the legislature.

The Supreme People's Assembly has the rights to appoint a primary chairman of the National Defense Commission, and the chief of state has always been appointed as the primary chairman. Also, it has the rights to enact and interpret the constitution and the legislation.

²¹ 북한이해 2016, Ministry of Unification, 2016, 66.

²² Ibid., 67.

Nonetheless, the authority of Supreme People's Assembly fall short of that of Korean Workers' Party because the head of the party is the chief of state. The Assembly has only been executing decisions made by the Korean Workers' Party.

The SPA Presidium is a smaller group of legislative members who are simultaneously members of Kim's inner circle. They have a special authority to make decisions when SPA is not in a session. In addition, they have the power to open regular sessions whenever they find it necessary.

On a local level, there are the Local People's Assembly and the Local People's Committee. The Local People's Assembly is given a sovereign power to deliberate and approve local affairs including economic plan and local administrative works. The local governments, however, are still strictly under the control of the central government and the Korean Workers' Party, and are mandated to report back to the central government and the Korean Workers' Party.

The Judicial Branch: The Public Procurator's Office and the Procurator's Court

In North Korea, the judicial branch is primarily responsible for protection of the North Korean system of government and its leadership. The branch is comprised of the Central Court, the lower courts of provinces, municipalities and counties, and the Special Court. A trial is led by a judge and 2 lay judges selected by the Supreme People's Assembly. Both the Public Procurator's Office and the Procurator's Court are subordinate to the Korean Workers' Party. Thus, it is incapable of making autonomous judicial decisions.²³

On a local level, the Local People's Assembly selects judges and processes People's trials. In the process, the assembly is given authority to interpret the legislation. The freedom of

²³ Ibid., 70-71.

legal interpretation indicates that judicial justice is regarded the least significant in North Korean society.

2.2.2 The Political Culture

The Juche Ideology

Article 3 of the Socialist Constitution of the Democratic People's Republic of Korea states "the Democratic People's Republic of Korea is guided in its activities by the Juche idea."²⁴ Juche means self-reliance. The idea pursues the following four goals: being a principle agent of the idea, achieving economic independence, obtaining autonomy in domestic and international politics and accomplishing self-defense in military.²⁵

The ideology was created by Kim Il-Sung and once a secretary of the Korean People's Party, Hwang Jang-Yop, in 1955 to be independent from the Soviet's influence. The idea stems from North Korea's nationalistic standpoint which refuses any inflow of capitalism because it may produce ideological tension within North Korean society. Western states are referred to as imperialists by the government through press, and this contributed to formation of anti-American sentiment, which is still present today.

Juche idea is defined as a new unprecedented and people-oriented political philosophy. Human being is the master of all creation and the ultimate decision maker for all creations. It understands human being as a natural, creative, and conscious "social being". However,

²⁴ *The Socialist Constitution of the Democratic People's Republic of Korea*, art. 3.

²⁵ 북한이해 2016, Ministry of Unification, 2016, 38.

individual's creativity and competency are recognized if and only if one lives and contributes as a member of North Korean society.²⁶ After all, community is superior to individuals.

In 1980s, the “fuehrer doctrine” was newly imposed based on Juche idea. It presents the chief of state (or *Suryong*) as “an impeccable brain of the living body, the masses can be endowed with their life in exchange for their loyalty to him, and the Party is the nerve of the living body.”²⁷ Since then, the Kim Il-Sung & Kim Jong-Il ideology (the Military-first Doctrine) overpowered Juche ideology and became the central instrument for maintaining Kim's absolute power.

The Juche idea has not changed much since its creation but the ideology has been amended in favor of Kim's regime. Whenever the idea is modified by the chief of state, every component of the state follows.

The Cult of Personality

After amalgamation of Juche idea and fuehrer doctrine, the personality cult of Kim Il-Sung intensified. The Kim family's monolithic leadership was easily solidified because fuehrer doctrine was absorbed into the already existing hegemonic Juche idea. Kim Il-Sung was consecrated as the Great Father, and the public was forced to be unconditionally obedient to him. This consecration transcended as the father-to-son power succession happened.

²⁶ Myung-Jae Lee, “Juche Ideology,” *Dictionary of North Korean Literature* 북한문학사전, 국학자료원, 1995.

²⁷ Ken E. Gause, “The Role and Influence of the Party Apparatus,” In *North Korea in Transition: Politics, Economy, and Society* (NY: Rowman & Littlefield Publishers, Inc., 2013), 22.

Opposition to the Kim family has been regarded as a treason against the state. The only path to patriotism is being loyal to the Kim family. The “ideological and political indoctrination of the people” is what sustains the North Korean Kim dynasty.²⁸

The Socialist Constitution of DPRK recognizes that the Workers’ Party of Korea runs the socialist state, as it was the case in the Soviet Union. However, compared to other socialist states, members of the Workers’ Party of Korea are given less power due to extreme centralization of power to the chief of state. The Charter of the Workers’ Party of Korea of 2010 explicitly states that the party is “the party of the great Suryong, Kim Jong-Il”.²⁹

The deeply enrooted tradition of indoctrination and personality cult in North Korea is expected to be a serious problem even after Korean reunification.

2.2.3 The State of Human Rights

“Systematic, widespread and gross human rights violations [that] have been and are being committed by [North Korea], its institutions and officials.”

-The United Nations’ Commission of Inquiry on Human Rights

As it is apparent in the political culture of North Korea, a single person holds a dominant position over the entire government institutions and the people. It is explicitly written under its fuehrer doctrine that “without, Suryong, which is the brain ... the masses will remain dead

²⁸ “Juche Ideology”, *Columbia Law*,
http://www2.law.columbia.edu/course_00S_L9436_001/North%20Korea%20materials/3.html

²⁹ *The Workers’ Party Covenant*, Democratic People’s Republic of Korea, 2010.

bodies because they are no more than arms and legs.”³⁰ The fundamental doctrine itself violates human rights in that it regards individuals (the arms and legs) as merely mechanisms to exploit. Moreover, the doctrine implies that people are ineffective and somehow wasteful without Suryeong (the brain).

As North Korean politics and economy continuously dwindles, the state has been increasingly concentrating on strengthening the personality cult. In the process of concentrating all powers to a single personality, the fundamental human rights of the people have been victimized.

Human rights violation in North Korea is incomparably cruel because punishment methods always involve violation of physical integrity. It involves concentration camp and public execution. Kim Il-Sung and Kim Jong-Il used concentration camp to purge his opponents or even the innocent. Kim Jong-Un has been excessively using public execution to raise a sense of fear among the public to eliminate any possibility of public opposition. Below are detailed explanations for each method used in human rights violation in North Korea.

The Concentration Camp

Concentration camp existed from the day North Korea was founded. In fact, the camps existed longer than the Soviet Gulags and the Nazi concentration camps. For consolidation of power, Kim Il-Sung and the founding members killed and jailed opponents and descendants with religious, pro-Japanese, or landowning background. During the time of power succession,

³⁰ Jasper Becker, *Rogue Regime: Kim Jong Il and the Looming Threat of North Korea* (Oxford University Press, 2006), 71.

concentration camps extended. The camps have been “an essential part of the regime’s control over its subjects.”³¹

North Korea has invented inhumane tortures against its own people in the concentration camp. They are: pushing the so called “political prisoners” into experimental gas chambers; drowning children into waste ponds; murdering female prisoners after raping; hanging prisoners upside down and pouring chili-powdered water into their eyes, nose, and mouth; forcing mothers to witness their babies being murdered immediately after birth; and many more. Together with the physical punishments mentioned above, prisoners are forced to work until they die in the prisoner’s camp.

The Public Execution

Just within 2016, 64 high government officials were publicly executed. From 2011, more than 100 senior officials were purged or executed for being disloyal. They were killed with a machine gun firing squad, a mortar round, an anti-aircraft, and a flame thrower.

Kim Jong Un killed his own uncle, Jang Song-Thaek, with multiple anti-aircraft machine guns in front of hundreds of high government officials in 2013. The public was obligated to watch the execution. Death sentences and cruel methods of execution are used to warn the North Korean public about defection and any kind of disobedience to Kim Jong-Un and his party.

As a result, a lack of respect for human rights exist not only among government officials but also among regular citizens. The North Korea public recognize public execution as a

³¹ “The History of North Korea’s Political Prisoner Camps”, *Free Korea*, 2010, <http://freekorea.us/2010/02/24/the-history-of-north-koreas-political-prison-camps-2/#sthash.fnRQokW4.dpbs>.

reasonable means to use even in the People's Courts, the district courts operated by counties that govern regular citizens.

The Military First Doctrine

In addition to Juche Idea, Kim Jong-Il's creation of the Military First Doctrine has seriously violated North Korean human rights. He neglected between 600,000 and 2,500,000 deaths of ordinary citizens caused by serious starvation. The government has been receiving financial, medical, and food aids from international society including the United Nations and the Republic of Korea. However, the government has been secretly pocketing the resources for weapons, nuclear projects, and personal luxuries of the ruling elites.

The idea that military comes before human rights is prevalent in North Korea. Governed by the doctrine, North Korea is suffering from a serious starvation due to government's negligence of ordinary citizens and public welfare for the citizens.

The most important problem is that the government officials- often led by the Kims- have been exploiting laws and the judiciary for justifying their crimes against humanity. No entity has the right to infringe other's inherent right to life. In North Korea, however, the right is given to anyone who has stronger authority and power than victims.

2.3 The Relationship Between Two Koreas

1945 – 1990s: Winter

During the early stage of division, South Korea and North Korea were enemies and competitors to each other. Each state was eager to prove that its ideology and system is superior to those of the other.

The major sphere of competition was over economy. North Korean economy was ahead of South Korean economy until early 1970s. After South Korea experienced a rapid growth in economy, often referred to as the Miracle of Han River, economy no longer became a sphere of competition.

Successive collapse of socialist states in Europe alerted Kim Il-Sung to rather concentrate on securing his political power by isolating North Korea from the international society. Both governments aggressively propelled espionage activities in each other's territory. Mutual distrust, containment, and propaganda flourished within the relationship. North Korea continuously sent armed communist guerrillas to South Korea and even incited assassination of South Korean presidents, which all of them failed.

1997- 2000s: Spring(?)

In 1997, the newly ascended Kim Dae-Jung Administration inaugurated the era of reconciliation. President Kim adopted an engagement policy, the Sunshine Policy, seeking to build a cooperative and friendly relationship with North Korea. The policy also contained a message that South Korea will embrace North Korea from the preparation stage of future reunification. South Korean government gave financial aid and food aid to North Korea.

In effect, the two governments had their first Inter-Korean Summit (since that of 1948) in June, 2000 at Pyong-yang, the capital of North Korea. President Kim and Chairman Kim Jong-Il signed the 6.15 Joint Declaration in which the two Koreas promised on building cooperative relationship for autonomous reunification. In addition, Kaesong Industrial Complex was created to seek economic cooperation between two Koreas in 2002. Sunshine policy was extended to next administration, led by President Roh Mu Huyn.

2006 -: Winter

In 2006, North Korea announces that it conducted a successful nuclear test. The relationship was at serious risk. Despite the crisis, second inter-Korean summit was held in 2007 to discuss further about realization of the previous 6.15 Joint Declaration and solve the North Korean nuclear problem. However, North Korea continued its nuclear experiments.

In 2008, President Lee Myung-Bak was elected as the new president. At the time, North Korea continued attacking South Korean armies and civilians. Moreover, North Korea continued its nuclear experiments and tests. As a response, President Lee introduced a new hardline policy direction toward North Korea. North Korea responded with more frequent nuclear experiment and shot down Cheon-an Navy Ship, killing 40 navy sailors in South Korean territory. The tension in the relationship reached its peak during the time, and no official communication was shared between South and North.

South Korea's hardline policy toward North Korea and cold relationship between two Koreas persist, mainly due to North Korea's expansion of nuclear project.

Chapter 3: The Korean Reunification

North Korea is a closed state. While being reluctant to communication with South Korea and international society, North Korea has been developing nuclear weapons more aggressively. Many experts explain that this is due to instability within the regime. Some experts even say that North Korea will collapse from the inside due to its flawed system, indiscriminate human rights abuse, and massive inflow of information.

Absence of Juche Ideology

As was introduced in *Chapter 2*, Juche ideology has been a strong binding force for the North Korean regime. Three generations of Kim have been highly reliant on the ideology. However, clear definition and concept of Juche ideology is becoming ambiguous, because the Kims have been making frequent changes in its concepts. For example, Kim Jong-Il (second Kim to be in throne) combined Juche ideology with the Military-first Doctrine to centralize all powers to himself. The conceptual ambiguity of Juche ideology signals that the backbone of the nation is shaking and gradually breaking down.

The government is gradually losing control of its people due to absence of Juche ideology. Absence of Juche ideology triggered the public to become more sensitive about North Korea's economic sustainability more than its political ideology. In fact, black market has been flourishing so much that the state inevitably adopted market economy in their plan for economic

reform. The state unofficially allowed its people to open small formal and informal markets called *Jangmadang* near to the Chinese border.³²

The North Korean Elite Society Shake

An accumulation of 30,000 North Korean defectors escaped to South Korea for better quality of life and freedom.³³ Until Kim Jong-Il's regime, majority of defectors were from lower class who were desperate to avoid poverty. Very few intellectuals escaped to South Korea, seeking freedom of expression, and another few group came from the military class feeling betrayed after finding flaws in North Korean system. As Kim Jong-Un came into power, the number of North Korean defectors moving into South Korea fell sharply from 2,500 defectors to less than 1,500 defectors annually because of stricter border controls.³⁴

Despite decrease in numbers, the current defection is more fatal to the regime in that it is now the high government officials who defect from North Korea. This trend is more threatening to the regime in that the high officials hold huge amount of confidential information about the regime and the Kim family. As a result, the state's intentional self-isolation has become impractical. The elites escape North Korea because they do not feel safe under Kim Jong-Un even though they live economically wealthy lives.

³² James Pearson, "North Korea's Black Market Becoming the New Normal," *Reuters*, October 29, 2015, <http://www.reuters.com/article/us-northkorea-change-insight-idUSKCN0SN00320151029>

³³ Sinmo Yoo, "South Korea Reaching 30,000 North Korean Refugees," *Kyunghyang Ilbo*, November 13, 2016, http://news.khan.co.kr/kh_news/khan_art_view.html?artid=201611131600031&code=910303.

³⁴ Alastair Gale, "North Korea's Largest Recent Defector Group Arrives in South Korea," *The Wall Street Journal*, April 8, 2016, <http://www.wsj.com/articles/north-koreas-largest-recent-defector-group-arrives-in-south-korea-1460113227>.

For example, Thae Yong-Ho- a second rank diplomat in London- made an exile to the Republic of Korea in August, 2016. He had been the most trusted man and thus was responsible for managing Kim Jong-Un's secret accounts and funds in Europe. (The Kim family's secret accounts have been vital for maintaining their luxurious personal lives and international agencies of the regime.) Thae decided to defect from North Korea because the young leader is not recognizing the traditional political privileges that elites enjoyed. Instead of the privileges, the elites are easily killed by the young leader.

South Korean officials concluded that defection is "a signal that some of the core elites in the North are losing hope in Kim Jong-Un's regime. Moreover, they are convinced that the internal unity of the ruling class in the North is weakening".³⁵ Thae's defection alone cannot be a signal to massive defection of elites from North Korea, but more senior defections will be observed at a gradual pace.³⁶

The Information Inflow

Although North Korea is known to be a closed state, this is not entirely true due to dissemination of internet among younger generation within North Korea. The regime's "information blockade" is becoming infeasible and the North Korean version of glasnost is expected to be initiated not by the leader but by the people.³⁷

³⁵ Sang-Hun Choe and Rick Gladstone, "North Korea's No. 2 Diplomat in London Defects to the South," *The New York Times*, August 17, 2016, http://www.nytimes.com/2016/08/18/world/asia/north-korea-defector-thae-yong-ho-britain.html?_r=0.

³⁶ Ibid.

³⁷ "A Changing North Korea," *Liberty in North Korea*, <http://www.libertyinnorthkorea.org/learn-a-changing-north-korea/>.

In addition to the expansion of internet use, North Koreans gained more access to foreign media and information via smuggled radio, TV, DVD, USB, hard drives, and mobile phones. The devices and information are mostly smuggled by human rights organizations and individuals from South Korea and China. The devices include contents that were created to educate the North Korean public about flaws found within the North Korean regime, the world outside North Korea, and foreign entertainment medias. Indeed, North Korean defectors confess that North Koreans make trades for South Korean music, dramas, and films. The outside information has been impacting views and attitudes of North Koreans and disentangling North Koreans who were chained by the regime.

3.1 Efforts to Reunification

North Korea agreed in 7.4 Inter-Korean Joint Statement of 1972, 6.15 Inter-Korea Joint Declaration of 2000, and Inter-Korean Joint Declaration of 2007 that it will cooperate with South Korea and make a peaceful march to reunification together. In contrast, North Korea has been using military offense against South Korea, as mentioned in *Chapter 2*. Hence, South Korea has been making efforts toward reunification alone. South Korea has been preparing for not only peaceful but also a strategic reunification by utilizing governmental institutions and civil organizations.

“The President shall have the duty to pursue sincerely the peaceful unification of the homeland”

- *Article 66 of Chapter IV. The Executive of the Constitution of the Republic of Korea*

The South Korean government has been utilizing institutions to seek for policies that will pursue peaceful and natural progress to reunification in the Korean peninsula. As part of institutional efforts, the South Korean government constructed government agencies to propel an actual preparation for the reunification and formed a social atmosphere within the state that values reunification. In effect, civil society institutions were voluntarily formed and developed with and without governmental support.

Representatively, the Ministry of Unification was established in 1969 to “set up a consistent unification policy under an institutional framework” in accordance with the public interest and deliberate discussions on reunification.³⁸ The ministry has been regularly publishing reports and projects pertinent to inter-Korean relations and reunification to raise public awareness, encourage the public participation, reflect public opinions, evaluate proposed policies, and implement inter-Korean relations policies.

In addition, the ministry is also responsible for supervising legal and social protection to dislocated North Korean refugees in South Korea. As the number of North Korean refugees is growing, South Korea has been striving to help North Korean refugees to successfully adapt to South Korean society, especially because it is their first-time experiencing democracy and

³⁸ “Major Duties,” *Ministry of Unification*, <http://eng.unikorea.go.kr/content.do?cmsid=1830>.

market economy. The ministry has been offering government-sponsored trainings and educations for their resettlement and employment in South Korea.

In addition, the South Korean government recognized that South Koreans' stereotypes towards North Korean defectors must be rectified before everything else. Thus, a new designation was created for North Korean defectors: *Sae-teo-min*. The name was selected by the Ministry of Unification so that the image of the defectors is reshaped as people who start a new life in a new nest, not mere escapers.

Giving preferential treatments particularly to Sae-teo-min became a national policy. All universities in South Korea are required to add a special admission policy for Sae-teo-min. This is an effort to provide them with more opportunities for higher education. The policy has been expanding throughout all areas of the entire South Korean society.

In addition to the government, South Korean private organizations have been conducting comprehensive research on North Korea and doing community service for Sae-teo-min. Private organizations (e.g. The Sejong Institute) has been hosting annual training programs, often assisted by the government and education institutions.

3.2 A Reunified Korea and the Prospective Threats to Human Rights

Predictions about how and by whom the Korean reunification will be achieved is significant for predicting what a reunified Korea would look like. The predictions are helpful in terms of grasping what could become sources of serious social conflicts and human rights violations in the post-reunification era. In addition to predicting the prospective threats to human rights, possible solutions for removing the threats will be proposed.

A Reunification led by South Korea

It is highly likely that South Korea will lead construction of a new state because South Korea has been preparing for reunification on both government and civil society levels whereas North Korea has been concentrating on the centralization of power.

South Korea has a wide range of scholars who study specifically about the Korean reunification in government-sponsored and private institutions. Both types of institutions have been enriching the reunification studies. Of the two institutions, however, government-sponsored institutions may be skewed to one perspective due to political influence. Hence, scholars from private institutions must be encouraged to be more actively involved in the process of reunification.

The National Assembly must also participate in the process because it is a branch of government that is composed of elected representatives of the South Korean population. Nevertheless, the National Assembly's role in the reunification process should be reduced, for North Korea-related issues have always caused serious political debates and often restrained any progress in policy making. Having too many people and ideas in a project may create too much dispute and thus may mislead the true meaning of the project.

Sae-teo-min must take a crucial role in shaping a reunified Korea. A reunification that is led by South Koreans will inevitably produce a biased society. This will impose another big threat to Korean human rights. Sae-teo-min had already experienced and observed human rights violations in North Korea, and they are now the most vibrant activists in raising domestic and international awareness. They have been providing North Korean perspectives and realities to

South Korea government, many of which were significantly reflected in the North Korean Human Rights Act.³⁹

Understanding of the fears and concerns that North Koreans feel about the Korean reunification through Sae-teo-min's voices may be necessary. North Koreans watched East Germans losing their lives and jobs after reunification of Germany. Sae-teo-min should contribute to dissolving fears and delivering hope for a better life to North Koreans.

A Strong Executive Power

Both South and North have been giving enormous power to the state leader. It is possible that the leader in a reunified Korea may not be equipped with too much power since both experienced human rights violation due to a strong executive power. Recently, South Korea has been experiencing serious dilemma about its imperial presidency. Specifically, South Korea has been in the middle of national debate about constitutional amendment, and it is believed by the majority that it is necessary. North Korea has been experiencing serious repression under the chief of state and the personality cult.

In a reunified Korea, the executive power should be divided up and distributed more to the legislature and the judiciary. The constitution should make the legislative appear more frequently in decision making processes so that the legislative can play a significant role political processes. The constitution should also equip the judicial branch with a considerable power. For the appropriate power division to happen, the constitution itself must be strongly established.

³⁹ Sung-Min, Kim, "Is Ministry of Unification Investigating on North Korean Human Rights without North Korean Refugees?", *Chosun Ilbo*, September 28, 2016, <http://pub.chosun.com/client/news/viw.asp?cate=C03&mcate=M1007&nNewsNumb=20160921535&nidx=21536>.

Party Politics Remains

Party politics has been a traditional political culture in Korean history. Political pacts have been formed around head figures, and party competitions have been competitions between center figures (the actual party leaders). This political culture does not appear in North Korean politics today, only because the state adopted one-party system. South Korean party politics has been based on regionalism, and it is also highly likely that regional politics appear between southern and northern regions in the post-reunification era.

The regional power game may slow down democratization process in the early phase. Furthermore, political parties may use North Korean human rights as their political propaganda, because the issue stimulates humanitarianism among individuals, which will trigger the individuals to vote for the party.

Moreover, this can lead to region-based class division, which already exists in both parts of Korea. South Korea has an implicit class division between the capital and non-capital regions and an explicit division between Gyeongsang Province and Jeolla Province. North Korea has huge gap between the capital and non-capital regions. In North Korea, individuals play dramatically different political influence by region. Economic and educational gaps are the common major causes for class divisions observed in South and North Korea.

A Reverse Discrimination

The constitution and the government may inflict reverse discrimination to South Koreans, because it is probable that North Koreans will be socially weaker entities. The government will have to provide special support and legal protection for North Koreans to eliminate their past experiences with human rights violations.

As mentioned in *Chapter 2*, the South Korean government has been expanding special treatment policies for North Koreans across the entire society. Although there have been very few complaints from South Koreans, complaints are likely to increase as North Korean population increase. Already, economic concerns- an increase in unemployment rate for younger generation and skewed distribution of tax- are the major reasons for South Koreans' being hesitant about the Korean reunification.

However, the constitution must avoid providing a separate constitutional protection for South Koreans to counter the special treatment for North Koreans. This will cause a serious internal division. A social consensus that 'well-being of North Koreans is a part of a long-term well-being of all Koreans' should be established. But that should not make the constitution focus on protecting North Korean human rights only, because the constitution may become the source of social division and ultimately state division due to inequality inherent in the constitution.

Therefore, the constitution should redefine human rights in a reunified Korea. The definition must provide equal protection of human rights to all Koreans. Furthermore, it should make the human rights applicable to all Koreans.

3.3 Assumptions

Based on the study of past and present of South and North Korea, I came up with three underlying assumptions. The constitution can exercise its influence most effectively in the environment in which the three assumptions are combined.

Assumption 1: liberal democracy is the new system of government for a reunified Korea.

Human rights abuse is inherent in North Korean political system. As far as North Korean system endures, another figure is likely to arise and neglect human rights values. One of the primary purposes for a reunification is protecting civil rights and civil liberties.

I believe liberal democracy is the best form of government for a reunified Korea. Only a government that makes sure that the principal powers of the government are not concentrated to a single subject or branch of government can prevent a reunified Korea from experiencing serious governmental disenfranchisement of all Koreans.

Liberalism argues that a government must be “limited in its powers and its modes of acting ... first by the rule of law ... but ultimately it is limited by the rights of individuals.”⁴⁰ Legitimate government power comes from the consent of individuals who are by nature free and equal, and the individuals live in a society governed by law. Individuals have duty to live by the law and contribute to establishing social order.

Liberalism did not designate democracy as the only system of government to realize liberalism. However, limiting the government with check and balance unequivocally makes democracy the most liberal system of government.

Assumption 2: the annexation of North Korea but with a reform in South Korea

The entire North Korean system will be abolished as soon as the regime collapses. Under Kim’s dictatorship, North Korea’s politics, economy, and protection of individual rights failed.

⁴⁰ Marc F. Plattner, “Liberalism and Democracy: Can’t have One Without the Other,” *Foreign Affairs* 77, no. 2 (1998): 172.

Absorptive reunification led by South Korea is the most ideal approach to reunification. South Korea is considered as one of the most successful East Asian countries to achieve democratization. As Plattner analyzed, “the country that had earlier experience with democracy is more likely to succeed in a subsequent attempt than countries with no previous democratic experience” even if the prior attempt had failed.⁴¹

Building a new reunified Korea is a complex and sensitive matter that should be done quickly and completely.⁴² Traditional reciprocity strategy is not applicable in this case. Finding a middle point and fusing two distinct systems is unrealistic and impossible. The argument that negotiation process between two Korea must be the starting point is absurd especially in regards to human rights protection.

This, however, does not mean that South Korean system is perfect. South Korea also has structural flaws (e.g. the imperial presidency) as observed in *Chapter 2*. South Korea is still a democratizing state and its government must be reformed as well. The reunification must be another starting point for both Koreas. A reunified Korea must reframe its direction to liberal democracy.

Assumption 3: a new constitution must be enacted for human rights protection in a reunified Korea.

South Korea passed the North Korean Human Rights Act to protect the rights to life and civil liberties of North Koreans in North Korean territory. However, the scope of protection is

⁴¹ Ibid., 180.

⁴² Seung-Dae Kim, “Revision of Constitution and Unification of Korea (Verfassungsänderung und Wiedervereinigung),” Korean Academy of Public Law (한국공법학회), 2010: 135.

applied only to North Koreans living under Kim regime. The Act does not bind North Korean regime to implement the North Korean Human Rights Act that is legislated by the South Korean legislature. Moreover, the Act does not provide any pragmatic protection for North Koreans residing in South Korea.

Human rights violations in North Korea were explicit in its form in that it incorporated physical punishments and tortures. In a reunified Korea, human rights violations may be done implicitly. The constitution will be the most effective measure for preventing implicit violations of human rights.

The major theme of the constitution should be human rights protection. The constitution should first be equipped with a new and clear definition of human rights. In addition to a clear definition of human rights, multiple provisions that guarantee human rights protection should be inscribed in the constitution. The document should be both explicit and implicit about the matter.

As Tocqueville wrote, “nothing is more wonderful than the art of being free but nothing is harder to learn how to use than freedom.”⁴³ Adopting democratic system alone cannot bring about freedoms to everyone. People need to learn what freedoms they are given and by what mechanism their rights are protected in reunified Korea. The constitution shall be the most neat and effective document that universally educates the entire nation about human rights.

⁴³ Alexis De Tocqueville, Harvey C. Mansfield and Delba Winthrop, *Democracy in America* (Chicago: University of Chicago Press, 2000).

Chapter 4: Literature Review

This chapter explores existing studies on the constitution, human rights, and human rights in the constitution. In *4.1 The Constitution*, I will introduce some academic debates over effects of the constitution to properly understand the role of constitutions. In *4.2 Human Rights*, I will explore debates over definition of human rights and pick a definition that is most suitable for a reunified Korea. In *4.3 Human Rights in Constitution*, I will comprehend the scope of legal protection that the constitution most effectively protects human rights. In *4.4 Human Rights in the Constitution of Reunified Korea*, I will apply general findings that I found in the three preceding sections into a post-reunified Korean context.

4.1 The Constitution

Many constitutional scholars, including the US Founding Fathers, agree that constitutions ought to serve both positive and negative functions. Positive function refers to demanding the government to provide social goods and services, and negative function is about limiting government power so that the government does not interfere with individual rights.⁴⁴ Western democracies tend to rely on negative function after experiencing a long history of monarchy and state interference. The separation of powers shows people's strong will to become an independent entity, specifically from state authorities.

⁴⁴ Cesare Pinelli. "The Combination of Negative with Positive Constitutionalism in Europe: The Quest of a 'Just Distance' between Citizens and the Public Power," *European Journal of Law Reform* 13, no.1, 2011: 31.

President Roosevelt and New Dealers, however, perceived the positive function of the constitution more crucial than the negative function. New Deal was a federal program which allowed the government to make aggressive actions and rescue the United States from the Great Depression (1929-39). To President Franklin D. Roosevelt, the system of checks and balance was an obstacle because the constitution required the executive to go through exhaustive procedures to get things done. Hence, the president rejected the constitutional commitment to checks and balances.

The President increased the executive power, and the Congress agreed to give more policymaking authorities to the administrative agencies. This was regarded as “the affirmative duties on government” because it would ultimately redistribute benefits to the people and recover the country.⁴⁵

Sunstein acknowledges the beneficial outcome that New Deal has produced, because the United States has a common law that favors social interests.⁴⁶ However, he is skeptical if positive characteristics of the constitution (characteristics that are derived from a common law) exists purely for positive rights- pursuing social benefits and realizing public goods. Positive rights are subjective in that the term is high dependent on the public’s “acceptance, as a baseline, of the existing distribution of benefits and burdens”.⁴⁷ But constitutional values cannot be determined with subjective standards.

Negative constitutionalism demands the government to defend institutional structure and operate strictly within the structure set by the constitution. In negative constitutionalists’ view,

⁴⁵ Cass Sunstein, “Constitutionalism after the New Deal,” *101 Harvard Law Review* 421, 1987: 503.

⁴⁶ *Ibid.*, 423.

⁴⁷ *Ibid.*, 503.

welcoming integration of socially constructed norm with constitutional principles is an attempt to shake the entire constitution. Specifically, the concept of limited government should not be modified in any form to any degree. The founding document loses its meaning when it is vulnerable to frequent changes because the constitution can easily be exploited by the government as a shield against its people.

Positive constitutionalists agree that limited government is necessary for the protection of individual rights, for it is the nature of state to seek political dominance. However, they view negative constitutionalists' understanding of a state as an outdated version. Negative constitutionalists, who were influenced by Max Weber, recognize the state as "a human community that claims the monopoly of legitimate use of force within a given territory".⁴⁸ Barber criticizes that Weber's definition of the state is identifying democratic states with dictatorial states.⁴⁹

Democracy pursues government of the people, by the people, and for the people. Negative constitutionalism restricts states from benefitting its people which is anti-democratic.⁵⁰ Relationship between the state and individuals is not limited to a political sphere. McIlwain argues that limited government is a legal mechanism that was created in modern constitutionalism, only to ensure that the state acts in the interests of its members.⁵¹ The

⁴⁸ Max Weber. "Politics as a Vocation," *Essays in Sociology* (New York: Oxford University Press, 1946), 78.

⁴⁹ Nicholas W. Barber, "Constitutionalism: Negative and Positive," Oxford Legal Studies Research Paper, no. 7, 2015: 3.

⁵⁰ Ibid., 6

⁵¹ Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Liberty Fund Inc., 2010), Chapter 4.

constitution “was not solely concerned with limiting the power of the state, but was mindful of creating an institutional structure that facilitates the state to successful function.”⁵²

While positive constitutionalists and negative constitutionalists disagree on why and how far the constitution limits the government power, they seem to agree on the fact that constitution must guarantee protection of individual rights. Both state and individuals should cooperatively decide which of the two characteristics of constitution- positive or negative- will bring more benefits to the country.

Regardless of the true nature of the constitution- obligating the government to benefit the country and the people (positive constitutionalism) or limiting the government (negative constitutionalism)- the de facto effect of the constitution does not always follow its reason for being. One of the Founding Fathers, James Madison was a constitutionalist and a skeptic towards the constitution. He was concerned that constitution could be a mere “parchment barriers”, for there is no guarantee that government will be limited in its powers to provide genuine protection for its people.⁵³

Indeed, statistical researches show no significant correlation between existence of constitutional rights and respect for human rights.⁵⁴ Law’s statistical analysis, which spans 729 constitutions adopted by 188 countries between 1946 and 2010, shows that states with less constitutional promises perform better in respecting individual rights including women’s social rights and minority rights.⁵⁵ The highest correlation with the existence of constitution rights was

⁵² Barber, *Constitutionalism: Negative and Positive*, 9.

⁵³ James Madison, “Federalist No.48”, In *The Federalist Papers*, Ed. Clinton Rossiter (New York: New American Library, 1961).

⁵⁴ Linda Camp Keith, C Neal Tate, and Steven C, “Is the Law a Mere Parchment Barrier to Human Rights Abuse?” *The Journal of Politics* 71, no. 2, 2009.

⁵⁵ David S. Law and Mila Versteeg. “Sham Constitution,” *California Law Review* 101, no. 4, 2013: 886, 913.

found in personal integrity rights and political freedoms. But the correlation coefficient was still as low as 0.33.⁵⁶

Despite the discouraging results, no camp regards the constitution unnecessary. Some may simply say that it is better to have one than to not have one. Madison asserted that the constitution is valuable because it provides “political truths declared in that solemn manner” to “counteract the impulses of interest and passion”.⁵⁷

As Madison believed, constitution is meaningful not only because of its limitation of government power but also because of “adaptability of its great principles to cope with the current problems and current needs”.⁵⁸ The constitution is a document that articulates “norms to which the regime aspires”.⁵⁹ In this sense, the constitution is the founding document that organizes the state’s priority. Constitution provides the head guideline to the government institutions, civil society, and individuals. Being the only document that can be universally accepted, the constitution shapes “the expectations of the public, promoting the development of a rights consciousness among the people.”⁶⁰

⁵⁶ Ibid.

⁵⁷ “The Papers of James Madison,” Ed. Wiliam T. Hutchinson et al, The Founders’ Constitution 1, Ch. 14, Doc. 47, 1977: 298-299.

⁵⁸ William J. Brennan, Jr, “The Constitution of the United States: Contemporary Ratification,” U.C. Davis Law Review 19, no. 1, 1985.

⁵⁹ Linda Camp Keith. “Constitutional Provisions for Individual Human Rights (1977-1966): Are They More than Mere Window Dressing,” Political Research Quarterly 55, no. 1, 2002: 113.

⁶⁰ Ibid.

4.2 Human Rights

Immediately after the Second World War, human rights protections have come to the fore to prevent human suffering by any means. Many scholars and political leaders including President Franklin D. Roosevelt have been emphasizing the need for protection but none of them has precisely defined what human rights are. Even the Universal Declaration of Human Rights proclaimed by the United Nations General Assembly on 10 December 1948 does not precisely define the term.⁶¹ Indeed, the UN General Assembly declares merely a list of rights without explaining where the rights come from. The list of human rights declared by the Universal Declaration of Human Rights can be categorized into two types: personal integrity rights and socioeconomic rights.

Personal integrity rights are concerned about the rights to life and freedoms. It provides protection from physical harm and social deprivation. The major personal integrity rights are: the right to equality (Article 1); the right to life, liberty, personal security (Article 3); freedom from torture, degrading treatment (Article 5); freedom from arbitrary arrest and exile (Article 9); freedom from interference with privacy, family, home and correspondence (Article 12); and freedom from belief and religion (Article 18).

Socioeconomic rights are concerned about satisfaction level, which is a rather ambiguous and subjective concept. It obligates the state to provide decent environment to people and assist humans with living a satisfactory life by obligating the state to provide a decent environment in which to live. The major socioeconomic rights are: the right to desirable work (Article 23), the

⁶¹ Jatindra Kumar Das, *Human Rights Law and Practice* (Delhi: PHI Learning, 2016), 2.

right to rest and leisure (Article 24), the right to adequate living standard (Article 25), and the right to education (Article 26).

Despite separate attribute of personal integrity rights and socioeconomic rights, it is believed that every human being is entitled to both rights. It is debatable whether such wide-ranging rights *can be* and *should be* allocated universally. Making sense of the source of human rights is indispensable to determining territory of human rights protections.

The ubiquitous understanding of human rights is that human rights come from human dignity. Immanuel Kant viewed that every human being is born with “an intrinsic worth” that makes them valuable “above all price” and as “an end”.⁶² This traditional view stems from transcendental experience and argument without reason. It relies on moral theory. Influenced by the traditional value of human rights, Wellman assures that human rights have “a certain degree of urgency” which claims that an individual’s human rights come before sovereignty of legitimate states.⁶³ For example, if State A fails to protect a single citizen, regardless of motive and due process of law, State B has a good cause to make intervention.

He claims that he does not devalue sovereignty of legitimate states, because he believes that intervention is justified only as a last resort. However, there is a bigger fallacy within Wellman’s theoretical scenario. The state and an individual are the only players in his scenario. An equally important but forgotten player is the group of remaining members of the society. Emphasis on the natural rights of an individual should never depreciate rights given to each component of society because natural rights must be universally applied. Hence, Nickel

⁶² Immanuel Kant, *Lecture on Ethics* (Hackett Publishing Company, Inc., 1980).

⁶³ Christopher Heath Wellman, “Debate: Taking Human Rights Seriously,” *The Journal of Political Philosophy* 20, no. 1, 2012: 122.

supplements this irony with an argument that human rights are universal “in the sense that they extend to everyone living today”.⁶⁴

Today, an increasing number of scholars find the source of human rights in between morality and politics, and we call this social justice approach.⁶⁵ The social justice approach thinks that the traditional human dignity approach put human rights at a hegemonic position and obscured the concept of social contracts between the state and individuals.

Beitz takes social justice approach to define human rights as “entitlements to the satisfaction of various human interests that would be guaranteed to members of a group by principles of social justice appropriate to the social group”.⁶⁶ Individuals are not expected to regard themselves merely as rights recipients.

The fundamental question that social justice approach raises is what makes human a human. The social justice approach says that “all rights to be deserved and preserved came from duty well done.”⁶⁷ Human rights are more than rights. They are duties to respect the principle of the rule of law and due process for the sake of keeping social order and state legitimacy, which are closely associated to human rights protection. If citizens do not obey to the law enacted by the state, the state has no power to provide legal protection for its people.

In addition, human rights are obligations to create value and benefits for the society. Human rights are “route for human development and realization of the full potential of each

⁶⁴ James W. Nickel, *Making Sense of Human Rights* (Wiley_Balckwell, 2007), 11.

⁶⁵ Frederic Megret, *International Human Rights Law Theory*, 2010, 5,
<https://ssrn.com/abstract=1539591>

⁶⁶ Charles R. Beitz, *The Idea of Human Rights* (New York: University Press, 2011), 59.

⁶⁷ Das, *Human Rights Law and Practice*, 6.

individual, which in turn leads to augmentation of the human resources with progress to the nation”.⁶⁸ Therefore, everyone has horizontal duties to each other.

If we were to recognize human dignity as the only source of human rights, both personal integrity rights and socioeconomic rights can be recognized as fundamental human rights that can be and must be distributed to every human being. As approach to human rights become more realistic, however, it is certified that socioeconomic rights are subsidiary rights that should be strived when human dignity and social obligations are both respected.

In the social justice approach, social justice is coercing more responsibilities and duties to the state while failing to enlighten individuals about what makes them valuable as human being. This blocks individuals from developing their own personality and community, which goes directly against Article 29 of the UDHR: “everyone has duties to the community in which alone the free and full development of his personality is possible”. Promising for rights to individuals in every department of their life will make humans incompetent. Thus, it is better to avoid surprisingly ambitious and specific promises.

Unlike the Universal Declaration of Human Rights, in which social obligation is mentioned only in the second to last Article, the International Covenant on Civil and Political Rights gives substantive weight to both inherent human dignity and social duties. Hence, I consider ICCPR’s interpretation of human rights more sound, progressive, and enduring:

Human rights “derive from the *inherent dignity* of the human person ... considering the obligation of States under the Charter of the United Nations to promote *universal respect* for, and observance of, human rights and freedoms ... realizing that the individual, having duties to other

⁶⁸ J. S Verma. “Human Rights Redefined: The New Universe of Human Rights,” *Journal of the NHRC* 1, 2002.

individuals and to the community to which he belongs, is under a *responsibility* to strive for the promotion and observance of the rights recognized...”⁶⁹

4.3 Human Rights in the Constitution

Human Rights are internationally recognized as “common good”. The term human rights flourish in almost every state’s constitution. The more recently constitutions are reformed or created, the more frequent the term human rights appears in the constitution. In case of Austria, its parliament transformed its human rights convention into a constitutional law after rigorous debate over the necessity of the transformation.⁷⁰ Many states including those in Western Europe concluded that human rights treaties and conventions are more effective when enforced through domestic legal system because constitution is ultimately the supreme law of a state and a legally binding contract.⁷¹

Constitution is surely a democratic safeguard to individuals. Since individual rights are not self-enforcing, they must be clearly written in the constitution. Regardless of how well the state respects its constitution, every state’s constitution specifies sovereignty and legitimacy of the state. If a state were to neglect constitutionally guaranteed individual rights, this signifies that its constitution is futile. Hence, the state’s sovereignty and legitimacy become fragile. If that were to be the case, the state loses any kind of protection from any kind of revolution.

⁶⁹ “International Covenant on Civil and Political Rights,” *United Nations Human Rights Office of the High Commissioner*. December 16, 1966.

⁷⁰ Thomas Buergenthal, “Modern Constitution and Human Rights Treaties,” *Columbia Journal of Transitional Law* 36, no. 211, 1997: 219.

⁷¹ Adam Chilton and Mila Versteeg, “Do constitutional rights makes difference?”, University of Chicago Coase-Sandor Institute for Law & Economics Research Paper 694, 2014.

States are increasingly adding human rights clauses in their constitution due to three major reasons: to present their dependency and intimacy to international norm, have a history of serious confrontation and is seeking reconciliation,⁷² and finally because there has been empirical study that shows constitution indeed “serves its role” of protecting *some* human rights.⁷³

Many constitution scholars, noticeably Cingranelli-Richards (CIRI) Human Rights Data Project, have been identifying constitutional provisions that directly or indirectly contribute to actual human rights protection. They are provisions about: (1) a public and fair trial, (2) organizational freedoms, and (3) judicial independence, (4) regulation of state of emergency clause.

The Right to a Public Trial and the Right to a Fair Trial

Dominance being an inherent nature of government, the right to fair trial constructs a strong legal defense for individuals. The right to a fair trial is internationally recognized as one of core human rights. Every government has a duty to maintain order of the whole society, and this duty authorizes the government to hold people accountable for committing crimes. This requires the government a great sense of responsibility from the government because convicting someone of a crime is depriving the person of liberty.

The right to a public trial emerged to equip individuals with rights to resist any kind of secret proceedings, which was used by many governments in the past. While the rights to a fair trial is absolute, the right to a public trial is not absolute. Nonetheless, it is still fundamental, for

⁷² Colin J. Beck, Gili S. Drori, and John W. Meyer, “World Influence on Human Rights Language in Constitution,” *International Sociology* 27, no. 4, 2012: 485.

⁷³ Keith.

it forces governments to be transparent by disseminating information to the public. The information creates opinions among public and press, and the collective ideas curb repressive behavior of governments.⁷⁴

Keith found the right to a public and fair trial statistically significant in her global cross-national study on the impact of constitutional provisions on state behaviors in human rights. She explained that trials are more controllable and tangible tools compared to other factors that are believed to affect state behaviors in human rights.⁷⁵ The two rights are expected to continuously provide feasible measure to human rights protection.

Organizational Freedoms

Numerous research shows that constitutional protection of organizational freedoms was found especially effective for impacting the government to respect human rights.⁷⁶

Organizational freedoms are freedom of assembly, freedom of association, the right to establish political parties, and the right to unionize. Arendt puts special emphasis on organizational freedoms because power “belongs to a group and remains in existence only so long as the group keeps together”.⁷⁷ Indeed, organizations provoke changes in society more effectively than individual actions. Humans enlighten each other when they are together. Throughout the course of history, the rise and fall of a state were often determined by people’s change of awareness and movement through association.

⁷⁴ Keith, 117.

⁷⁵ Keith, 134.

⁷⁶ Chilton and Versteeg, 3.

⁷⁷ Hannah Arendt, *Crises of the Republic: Lying in Politics, Civil Disobedience, on Violence, Thoughts on Politics and Revolution* (Harvest Books, 1972), 143.

Additionally, Benson finds alliance as the most quintessential mechanism to protect minorities from being marginalized in politics. Minorities may sometimes lose in political battles but “they do not lose them all, because they can form alliances with other groups to advance their interests.”⁷⁸ This is what makes social rights evolve persistently.

Judicial Independence

Despite statistical findings that show effectiveness of some individual rights assured by the constitution, many experts have been arguing that securing individual rights alone is not enough for human rights protection. Representatively, James Madison assured that an “effectual safeguard to the rights of the minority” must be accompanied by “a basis and structure of the government itself”.⁷⁹ Strengthening authority of the judiciary is significant, especially because it is often considered as the weakest branch of government in many countries.

An independent judiciary must have the authority to review other branches of government, and its political security must be preserved when exercising its right to review. Researchers set specific indicators to test what makes the judiciary truly independent. First, judges must be free from any threat of removal. Second, the judiciary’s final decisions cannot be nullified without an appropriate procedure for legal appeals. Third, courts are competent to make judicial decisions independent from other branches of government. Fourth, courts have jurisdiction over all judicial issues. Fifth, courts are independent from the executive or the legislative branch. Sixth, courts have hierarchical system. Seventh, courts have the right to

⁷⁸ Josh Benson, The Past Does Not Repeat Itself, but It Rhymes: The Second Coming of the Liberal Anti-Court Movement,” Law & Social Inquiry 33, 2008: 1083.

⁷⁹ James Madison, Speech in Virginia Convention, December 2, 1829.

review administrative actions of the executive and the legislative.⁸⁰ When the seven conditions are kept, the judiciary can be considered independent.

Melton's research shows substantial importance of institutional effort. She found no aggregate effect of constitutional rights but found the effect of judicial independence in regards to strong enforcement of law.⁸¹ In contrast, Keith, Tate, and Poe found no significant effect from judicial independence. Keith, Tate, and Poe claimed that structural features are not as manipulative, and thus unlikely to be exploited for making the constitution a window-dressing.⁸² Yet, I find Melton's research result more convincing in that the separation of powers becomes a meaningless principle, if Keith, Tate, and Poe's research result were to be true.

Regulating the State of Emergency Clause

When state of emergency is declared, the government (mostly, the president) is given legally authorized power to suspend constitutional procedures and make arbitrary decisions. The executive branch is given immense power because the president is the supreme commander. Often, the state of emergency is declared when existence of the state is threatened. It is a period during which infringement of human rights may be authorized by law. Hence, the International Court of Justice stresses that conditions for state of emergency must be clearly specified in the constitution.

The International Court of Justice recommends giving primary responsibility to the legislature during the period. Hence, no power is concentrated to the executive branch even when

⁸⁰ Keith, Tate, and Poe, 649-650.

⁸¹ James Melton, *Do Constitutional Rights Matter? The Relationship between De Jure and De Facto Human Rights Protection* (London: University College London, 2014).

⁸² Keith, Tate, and Poe, 659.

the state of emergency is declared. There is a possibility that the government unites to exercise enormous power against ordinary people. Hence, reason and time for termination should be clearly described. Finally, the constitution can provide specific inviolable rights such as the right to life and freedoms from inhumane treatment.

Keith, Tate, and Poe found regulation of state of emergency clause more effective than constitutional provisions on individual freedoms and judicial independence. If judicial independence were function as an indirect method of restraining executive and legislative branch, regulating the state emergency clause functions as a direct method of checking and balancing the entire government.

The constitution is not a document that is built to bring immediate effects. It is an intricate product of history, culture, economy, and numerous other motivations. The existing results from empirical studies and statistical analysis lack substantive understanding of all these variables. Moreover, no clear standards are set for study method, sample size, and variables. As a matter of fact, some variables are not measurable (e.g., the level of judicial authority). Each study has its own distinct measurement which causes difficulties in assessing comparative studies based on the existing studies.

External factors (e.g. economic wealth) are also known to affect efficacy of human rights. For example, country's level of economic wealth is the major determinant of making constitution effective.⁸³ Though it has nothing to do with types of constitutional provisions, countries with more money have more opportunity to spare time and money on human rights protections.

⁸³ Law and Versteeg, 922.

4.4 Human Rights in the Constitution of Reunified Korea

In a reunified Korea, mutual respect and coexistence should be primary goals for the constitution. The constitution will be used as a strong unifying force for the nation, especially because two Koreas lived under contradicting environment.⁸⁴ The constitution will be the first set of orders that two Koreas will share for self-governance.

People from North Korea are used to living under cult of personality. It is possible that they dedicate themselves to follow political authorities as they are used to, especially because North Koreans are not fully aware of their rights. In democracy, autonomous agents govern their own society “by presenting and responding to reasons, or by demanding that their representatives do so, with the aim of justifying the laws under which they must live together”⁸⁵ In this sense, the constitution will be the most challenging yet the most fundamental education tool.

Once referred to as the powder keg of Europe, Serbia and Bosnia experienced grave genocide and serious human rights violation committed by Bosnian Serb forces in 1995. To amend the conduct, the Serbian and Bosnian constitutions include the highest number of the term, human rights. Now recognized as the guardian of human rights, Germany uses the word ‘human rights’ 8 times in the constitution. What we learn from this empirical evidence is that the number of appearances of the term in the constitution is irrelevant to efficacy of the constitution.

As predicted in Chapter 3, major potential threats to human rights after reunification are (1) reverse discrimination, (2) strong executive power, and (3) polarization due to party politics.

⁸⁴ Cheol-Soo Kim, interviewed by EBS (Educational Broadcasting System), *국가는 국민을 위해 존재한다* (State Exists for the People), November 19, 2016.

⁸⁵ Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press, 2004), 3-4.

The new Korean constitution should be equipped with clauses that are particularly designed to neutralize the threats.

A Reverse Discrimination

South Korea has special policies designed for Sae-teo-min, a group of North Korean refugees who are resettling in South Korea. As of 2016, North Korean refugee population reached 30,000, which is only 0.58% of the entire South Korean population. Preferential allocation of resources to 0.58% of the entire population has not caused serious animosity among South Koreans. This becomes a completely different story if North Korean population segment increases to 33% of the entire population after reunification.

Some preferential policies for North Korean resettlement is inevitable in reunification era. It is a process that a reunified Korea must tolerate for coexistence. Nonetheless, South Korean population may consider special benefits that are arranged for North Koreans as a reverse discrimination (a phenomenon in which the majority group is disadvantaged due to minority groups. The issue over reverse discrimination will appear most frequently in the employment setting.

Reverse discrimination may be soluble by employing strict scrutiny.⁸⁶ Strict scrutiny examines whether policies “serve a compelling governmental interest” and whether the policies are “narrowly tailored” to achieve the interest.⁸⁷ The strict scrutiny tests prompt both the state

⁸⁶ Gullett Carlos Ray, “Reverse Discrimination and Remedial Affirmative Action in Employment: Dealing with the Paradox of Nondiscrimination,” *Public Personnel Management* 29, no. 1, 2000.

⁸⁷ 488 U.S. 469 (1989), 109 S.Ct. 706.

and the people to design and evaluate their plans more carefully in a sophisticated manner because it tests both the end and the means.

Since remedial employment policies are justified under equal protection clause and it is the court that is in control of strict scrutiny tests, more responsibility is shifted to judges at the court. To give more constitutional clarity to the judiciary, I believe that it is important for reunified Korea to include a clear and detailed set of essential freedoms in the constitution, such as:

- (1) freedom from discrimination by gender, race, ethnicity, or religious belief
- (2) freedom to develop and realize one's human potential
- (3) freedom from injustice and violation of the rule of law
- (4) freedom of speech; freedom to participate in decision making process and form associations

A Strong Executive and a Weak Judiciary

North Korea is at the extreme end of dictatorship. South Korea also delegates enormous decision making power to the president over politics and economy. Although South Korea has been amending the constitution to curtail presidential power, revival of this political culture among individuals and within South Korean society has been unavoidable. Hence, it is vital that the new constitution strictly regulates the executive power.

Another method to limit executive power would be strictly regulating state of emergency clause as was explained in *4.3 Human Rights in the Constitution*.

For reinforcement of the judiciary, clear constitutional provisions on judicial independence must be present. For judicial independence, judges and law-decision-making

authorities must be immune from external power political threats that are often imposed by the other two branches of government.

In case of South Korea, even the justices at the Supreme Court are not given lifetime tenure. This makes them be concerned about their life after the term in office. Majority of judges set up private law firms. The law firms receive preferential treatment for being law firms of predecessors. Considering that the executive and the legislative determine distribution of power and capital to law firms, judges may conform with the two branches and make skewed decisions. Incumbency and salary of judges should be fixed to a higher degree and immune from unreasonable governmental influences.

Polarization Due to Party Politics

Looking back upon the Korean War (1950-53), it all started from a debate over what is best for the country. Communists believed that communism will make the Korean peninsula a paradise where everyone will enjoy equal distribution of wealth and happiness. Democrats believed that democracy will form stable political and economic circumstances through separation of powers and market competition.

After reunification, not every Korean will be satisfied. Those who had better standard of living before reunification (e.g. the North Korean elites and South Korean middle class population) will miss the old days. Any kind of political, economic, or social divisions may expand to a serious regionalism between North and South. Regionalism is a political culture that already exists in South Korea. If separatist movements due to serious regionalism intensify, we cannot exclude the possibility of re-division.

If the reason for secession stems from a serious abridgement of civil rights and civil liberties, the right to secede must be seriously considered. However, if the reason stems from economic interests, the reason cannot be justified. Instigating arguments over which subunit makes more economic contribution should be considered as an attempt to impede coexistence.

Sunstein argues that the right to secede should be recognized in the constitution because it coincides with political morality of democracy. If secession is what majority people want, the state should secede. Nevertheless, he acknowledges that secession produces even more costs if a secession were to happen merely for the economic interests of subunits. He recommends including “a secession provision that would be limited to specified causes”- economic interests cannot be one of the eligible causes.⁸⁸ This will extend deliberation, and perhaps provide people with opportunities to find a momentum for further improvement in democracy- learning to endure each other and find a middle point.

⁸⁸ Cass R. Sunstein, *Designing Democracy: What Constitutions Do*, (New York: Oxford University Press, 2002), 113.

Chapter 5: Germany and the Basic Law

From 1933 to 1949, Germany was the perpetrator of crimes against humanity. Under Hitler, Germany became a fascist state and committed the Holocaust, an atrocity against European Jews. From 1949 to 1989, Germany was a divided country. Its capital, Berlin, was a symbol of the Cold War. In the 20th century, Germany was a land of human rights abuse and political conflict. Today, it has a high reputation for being the strongest democratic state in Europe. Moreover, Germany has steadily been ranked as the number one state for respecting human rights by the *Freedom House*.

Many constitutional scholars concur that the Basic Law for the Federal Republic of Germany is the source of the nationwide respect for human rights. The Basic Law has been an exemplary constitution for many developing states that are accountable for past human rights violations- most notably, the Republic of South Africa. In this chapter, I will dissect the Basic Law for the Federal Republic of Germany to ascertain what constitutional factors make the German constitution so effective in terms of human rights protection.

There will be three levels of analysis. The first-level analysis will be based on the original text that directly deals with human rights. The second-level analysis involves institutional structures that supplement actual implementation of human rights provisions. The third-level analysis is about identifying constitutional provisions that indirectly protect human rights.

5.1 First-Level Analysis: Human Rights Provisions

While the Weimar Constitution (1919 - 1933) contributed to building a structure for the first parliamentary democracy in Germany, it did not give sufficient attention to basic rights. German citizens' fundamental rights and duties only start to appear from Article 109. After the Third Reich, the Nazi regime, Germany determines to upgrade its constitution.

The Nature of the Basic Law

The Preamble of the Basic Law stresses that Germany is determined to be born again and “promote world peace as an equal partner in a united Europe”.⁸⁹ Respect for human rights is recognized as one of the most essential and effective factors that contribute to world peace. Thus, the German framers chose to put basic rights provisions in the first chapter of the constitution.

In Article 1, it is explicitly mentioned in the first paragraph that “human dignity shall be inviolable”.⁹⁰ Then, the third paragraph of Article 1 designates that “the basic rights bind legislature, the executive, and the judiciary as directly applicable law”.⁹¹ It is explicitly setting basic rights as the political and moral principle to which the entire state must adhere.

From Article 1 alone, it seems basic rights is the most prioritized principle. The term “human dignity” on the surface suggests that the Basic Law embraces the human dignity approach's definition of human rights- the traditional view that human rights are above all values. The Universal Declaration of Human Rights is the typical example that takes the traditional view.

⁸⁹ *The Basic Law for the Federal Republic of Germany*, Preamble.

⁹⁰ *Ibid.*, art 1, (1).

⁹¹ *Ibid.*, art 1, (3).

On the contrary, it is the social justice approach's definition of human rights that is manifested in the Basic Law. The framers defined human dignity as a fusion of individual rights and social responsibilities in the German constitution.⁹² For example, in Article 14, individuals have guaranteed rights to personal property and inheritance, but "property entails obligations" to serve the public weal. As duties are granted to the state, individuals are also given duties to serve the community. As the state is not given imperial power, individuals are not given imperial power.

In the Basic Law, freedom is "restrained by certain political values, community norms, and ethical principles".⁹³ As opposed to typical contemporary constitutions, the Basic Law promotes a relation of coexistence between the state and the people before a relation of checks and balances. When a person is in the military, one has a duty to prioritize public peace over individual rights. In this case, freedom of expression, freedom of assembly, freedom of movement, and the inviolability of the home may be restricted.

Abusive use of basic rights with an intent to demolish democratic order and constitutional order is unconstitutional. Any German convicted of this attempt will forfeit his basic rights. In this sense, it becomes clearer that Germany finds the source of human rights in both human nature and social responsibility. The first step to exercising social responsibility is performing the principles that the constitution established.

Article 20 contains the three principles of the Basic Law. They are: 1) the establishment of democratic and social federal state, 2) respect for human rights, and 3) the preservation of constitutional order. Article 1 (Human Dignity) and Article 20 (Constitutional Principles) are

⁹² Donald P. Kommers, "German Constitutionalism: A Prolegomenon," *Scholarly Works*, Paper 98, 1991: 855.

⁹³ *Ibid.*, 873.

protected from any legal amendments by the “eternity clause” in third paragraph of Article 79. Since the principles last so long as Germany lasts, the constitution seeks to balance the three principles. Nonetheless, human dignity still comes first in that the two Articles protected by eternity clause- Article 1 and Article 20- speak about human dignity.

The Format of the Basic Law

The Basic Law puts objective value over subjective rights.⁹⁴ The objective values are the three principles mentioned before. Among the three principles, a clear hierarchy of values is visible. Human dignity is the foundation as it is suggested in the first Article of the Basic Law.

Contrary to the expectation that the German constitution will be comprehensive about human rights provisions like the Universal Declaration of Human Rights, the Basic law for the Federal Republic of Germany is limited. For example, the socioeconomic rights that are guaranteed by the Universal Declaration of Human Rights are not exhibited under basic rights. The constitution does not hold the state accountable for delivering economic well-being to all Germans.

Socioeconomic rights are positive rights that require the government to provide goods and services to the citizens. Due to scarcity of resources, positive rights are harder to uphold. People and the government should “progressively realize” social and economic rights instead of requiring the government to immediately realize the rights for the people.⁹⁵

Sharing this view, the German framers seem to have intentionally refused to include any illusory constitutional promises because illusory promises debilitate authority of the constitution.

⁹⁴ Ibid., 859.

⁹⁵ Law and Versteeg.

If this were to happen, all other important rights may be held in contempt. If human rights were slighted, the entire constitutional order collapses. Indeed, countries with too many constitutional promises often fail to fulfill the promises and perform worse than countries that refuse to make many constitutional promises.⁹⁶

Therefore, the Basic Law explicitly guarantees the most fundamental human rights as it is apparent below:

Article 1: Human Dignity- Human Rights

Article 2: Personal Freedoms

Article 3: Equality Before the Law

Article 4: Freedom of Faith and Conscience

Article 5: Freedom of Expression, Arts, and Conscience

Article 6: Marriage-Family- Children

Article 7: School System

Article 8: Freedom of Assembly

Article 9: Freedom of Association

Article 10: Privacy of Correspondence, Posts, and Telecommunications

Article 11: Freedom of Movement

Article 12: Occupational Freedom

Article 12a: Compulsory Military and Alternative Civilian Service

Article 13: Inviolability of the Home

Article 14: Property- Inheritance- Expropriation

⁹⁶ Ibid., 913.

Article 15: Socialization

Article 16: Citizenship- Extradition

Article 16a: Right to Asylum

Article 17: Right of Petition

Article 17a: Restriction of Basic Rights in Specific Instances

Article 18: Forfeiture of Basic Rights

Article 19: Restriction of Basic Rights- Legal Remedies

Human dignity, personal freedoms, equality before the law, freedom of faith and conscience, freedom of expression, arts and sciences, freedom of assembly, freedom of association, freedom of movement, occupational freedom, and right to citizenship are commonly seen in constitutions of almost all contemporary democratic states. The basic rights Articles do not provide special human rights protection that distinguishes Germany from other states. If so, does each Article provide specific description of the fundamental human rights?

In fact, the language describing guaranteed rights are general rather than specific. The general language is used to suggest general principle that governs Germany. For example, Article 2 talks about personal freedoms in only three sentences. The key terms that directly protects human rights are “free development of his personality”, “the right to life and physical integrity”, and “freedom of the person shall be inviolable”.⁹⁷

The general language allows further evolution and expansion of the scope of human rights protection that each right provides. By controlling excessively specific language, the

⁹⁷ *The Basic Law for the Federal Republic of Germany*, art. 2.

constitution avoids frequent amendment of the constitution, which reinforces and develops human rights to further extent.⁹⁸

The language becomes very specific when describing limitation of rights. The specific rules strictly limit the government's power to interfere individual rights. The third paragraph of Article 9 is the longest paragraph in the Article and talks about the circumstances in which freedom of association can be restricted by the government.

The government can limit freedom of association only if a person under compulsory military period (Article 12a), if the state is suffering from disaster and in need of government assistance (paragraphs 2 and 3 of Article 35), and if the state is under internal emergency (Article 91).

No right in the Basic Law is absolute. Every right is conditional right. This balances constitutional order. Limitation of rights do not weaken human rights because it uses specific language to limit government power even in certain circumstances when the Basic Law gave the government an authority to restrict individual rights.

Moreover, the limitations give direction to government actions. It educates the government to think as the supreme law commands. For example, in Article 14 (Rights to Property and Inheritance), the circumstance in which expropriation is permissible is written with detailed language and longer length compared to other rights provisions. The limitation encourages the government to seriously consider the nature and extent of compensation, public interest, possibility of dispute over compensation, and legal recourse.

⁹⁸ A.E. Dick Howard, "The Indeterminacy of Constitutions," Wake Forest Law Review 31, 1996: 384.

In addition to clear description of certain circumstances, the Basic Law plainly makes references to other Articles in the constitution and other related federal or state laws. This not only seeks to strengthen protection of human rights but also “law” itself. The Basic Law and other German laws refer to each other. Each law cannot be fully interpreted nor be understood without others. Solidarity between laws strengthens the rule of law, and respect for human rights is law in Germany.

Substantial number of “pursuant to a law” clause is contained in the constitution. The clause appears in Article 2 (Personal Freedoms), Article 8 (Freedom of Assembly), Article 12 (Occupational Freedom), Article 12a (Compulsory Military and Alternative Civilian Service), Article 16 (Citizenship-Extradition), and many more. The state cannot indiscriminately infringe the conditional basic rights because it is hard to reach the conditions in which individual rights can be restricted. The constitution connects German laws, and it becomes harder for the government to breach the web of laws.

“Human dignity and personal freedom derive from the rights and duties laid down in law. Law is the guide to freedom and right living.”⁹⁹ In the Basic Law for the Federal Republic of Germany, human dignity is truly a legally binding force not an abstract norm.

5.2 Second-Level Analysis: The Institutional Structures

It is true that wide scope language made the German Basic Law an enduring constitution throughout generations. However, it is also due to the wide scope language that human rights

⁹⁹ Kommers, 850.

provisions alone cannot make the constitution binding especially in regards to basic human rights. The constitution calls for institutional cooperation and support.

The Federal Constitutional Court of Germany

The major institution that directly complements the Basic Law is the Federal Constitutional Court of Germany. It was established by the Basic Law as an institution that makes final and supreme judicial interpretation. Non-specificity of basic rights provisions demand the most up-to-date judicial interpretation to the Federal Constitutional Court. The Basic Law is also challenging the court to clearly demonstrate their rulings to the public, the task of which the Basic Law is incapable. It is the Federal Constitution Court that makes the constitution more concrete.¹⁰⁰

Strengthening the political power and influence of the Federal Constitutional Court is directly relevant to constitutional protection of human rights in that the court is the only political institution with authority to make judgements on human rights. If the Federal Constitutional Court has weak political influence, its decisions on human rights become null. Indeed, a nation is safer from future undemocratic repression when “rights that establish institutions with the ability to preserve those rights in the future” are enshrined in the constitution.¹⁰¹ As the guardian of the constitutional order, the Federal Constitutional Court has undisputable authority in Germany.

In Article 18 (Forfeiture of Basic Rights), the Basic Law grants full authority to the constitutional court for deciding forfeiture of rights. Additionally, Article 19 (Restriction of Basic Rights- Legal Remedies) encourages individuals to directly bring their complaints to

¹⁰⁰ Ibid., 851.

¹⁰¹ Chilton and Versteeg, 35.

courts when their human rights are violated by public authority. The Basic Law once more strengthens the Federal Constitutional Court in Article 115g (Federal Constitutional Court) by requiring approvals from a majority of the judges present, if the Joint Committee (an emergency parliament) were to amend law governing the Federal Constitutional Court.

At the same time, Article 94 of the Basic Law gives the Bundestag and the Bundesrat the authority to elect members of the Federal Constitutional Court, which is a rare case even in other democratic states. Although legislative decisions involve political calculation, Germany's method of appointing judges is still meaningful in that representatives of citizens elect judges who make supreme decisions on human rights issues.

The Federal Constitutional Court's constitutional interpretations have enlarged the influence of the Basic Law within German society. In effect, Germans have developed "constitutional patriotism".¹⁰² The Germans are bound to law, and it is a natural German phenomenon for them.¹⁰³ Hence, they are more conscious about human rights because they are recognized as fundamental principle of the Basic Law and ultimately "the law" of the society.

The European Court of Human Rights

Another institution that provokes the Basic Law to respect human rights is the European Court of Human Rights. A common sentiment that arose in Europe after two world wars was respect for human dignity and preservation of world peace. Hence, Europe has a separate European Court of Human Rights in Strasbourg, France. Based on the European Convention of

¹⁰² Dieter Grimm, "The Basic Law at 60: Identity and Change," *German Law Journal* 11, no. 1, 2010: 44-45.

¹⁰³ *Ibid.*, 44-45.

Human Rights, the European Court of Human Rights is the “pan-European regime of human rights protection”.¹⁰⁴

Europe developed a strong and unique supranational system. The European Union’s judicial decision takes dominant position over each member state’s judicial decision. The European Union Court of Justice ensures that interpretation of law is uniformly applied in each EU member state. Like the decisions made by the European Court of Justice, the decisions made by the European Court of Human Rights.

In Article 24, the German Basic Law acknowledges that the legislature may consent to transfer sovereign powers to supranational institutions, primarily to the European Union and its subordinate institutions, if it is for the sake of “mutual collective security” for the lasting peace in Europe and the world. Article 25 integrates international law with federal law. Moreover, international law precedes over the laws in Germany. Jutta Limbach, the president of the Federal Constitutional Court of Germany in 1996, was concerned that the transfer of sovereignty may impair human rights at home.

International standard of human rights tends to be higher than domestic human rights law because it is influenced by the Universal Declaration of Human Rights. It is also unlikely that judgements made by the European Court of Human Rights consider the situation in Germany specifically. Most importantly, the Treaty of Maastricht- the treaty that created the European Union - was ratified without referendum but was given power to override the German constitution.¹⁰⁵

¹⁰⁴ John L. Murray, “The Influence of the European Convention on Fundamental Rights,” *Fordham International Law Journal* 33, no. 5, 2011.

¹⁰⁵ Ingolf Pernice, “Constitutional Law Implications for a State Participating in a Process of Regional Integration: German Constitution and Multilevel Constitutionalism,” *German Reports on Public Law*, 1998: 52.

Providing human rights protection to European citizens with codes that are not approved by the citizens seems to be a contradiction. But referendum alone cannot justify the Maastricht Treaty overriding the constitution because the constitution is not something people's will can decide. Constitutional issues must be solved with the constitution itself.

Respect for human dignity is the foundation of all guaranteed rights in the Basic Law.¹⁰⁶ Therefore, a threat against the Basic Law is a threat against human rights in Germany. Although the principle of subsidiarity promises that the European Union may act only where each member state is insufficient, the term 'insufficient' could be exploited due to its ambiguity and subjectiveness.

To counter the supranational threat, Article 23 fortifies the Basic Law by reorganizing the relationship among the European Union, protection of basic rights, and the principle of subsidiarity. The Article underscores that the federal government's exercises in the European Union must be consistent with the "responsibility of the Federation for the nation as a whole" in a very specific manner. Bundestag and Bundesrat are invited to actively and thoroughly assist the federal government in European Union affairs.

In the first paragraph, the European Union is defined as an institution that supplements the Basic Law. The amendments and supplements from the EU must be "subject to paragraphs (2) and (3) of Article 79".¹⁰⁷ They must be approved by two thirds of the Bundestag (the House of Representatives) and two thirds of the Bundesrat (the Senate), essentially do not go against the three principles of the Basic Law, and do not affect division of German federation.

¹⁰⁶ Kommers, 855.

¹⁰⁷ *The Basic Law for the Federal Republic of Germany*, art. 28.

The second paragraph of Article 23 permits the legislature to challenge the European Union if it infringes the principle of subsidiarity. The third paragraph mandates the federal government to keep the Bundestag and the Bundesrat informed “comprehensively and at the earliest possible time”.¹⁰⁸ The fourth paragraph requires the federal government to “take the position of the Bundestag into account during negotiations”.¹⁰⁹ The fifth paragraph encourages the Bundesrat to participate in the decision-making process of the federation. The sixth paragraph requires the government to respect the Bundesrat with the greatest possible respect in EU-related decision-making process.

It is the longest Article with a very detailed description about manner, method, and time to which the federal government must conform. Indeed, the Federal Constitutional Court reiterated in its famous Maastricht case that the Germany is in a cooperative relationship with the European Union and the Treaty of Maastricht is constitutional. However, the court neglected to adopt European Court of Justice’s decisions if they contain different view on the fundamental rights issue. The court assured that “it will continue to ensure the unalienable standards of human rights protection”.¹¹⁰

If Germany is aware of the possible threat from the European system, why does it still choose rely on the European Court of Human Rights? As analyzed in the first-level analysis, human rights provisions are in general language, and the state is less experienced in making human rights decisions. In contrast, the European Court of Human Rights accepts human rights cases that arise from the European continent, and thus more experienced. The European Court of

¹⁰⁸ Ibid., art. 29.

¹⁰⁹ Ibid.

¹¹⁰ Pernice, 21.

Human Rights has been an effective expert to whom the Federal Constitutional Court of Germany can consult to in regards to human rights issues.

Germany recognizes that the Basic Law could be imperfect in protecting human rights and asks for international cooperation and containment. In effect, Germany became more likely to uphold the rights guaranteed in its constitution because the constitution functions as eyes of domestic community and international treaties and institutions function as eyes of the international community.¹¹¹

5.3 Third-Level Analysis: Semi-Human Rights Provisions

What roles should the constitution play when it is created to protect human rights? Stopping the existing human rights violations is the most apparent role. Another role that the constitution must play is creating a secured environment where human rights cannot be threatened. The constitution must be equipped with both suspension and prevention effects, if it were to truly be a constitution that protects human rights.

A State of Defense

The Basic Law for the Federal Republic of Germany separates itself from constitutions of other states in that it uses an entire chapter to describe state of defense. State of defense is same as state of emergency. As introduced in Chapter 4, state of defense is the period during which government's violation of human rights could be justified. Hence, Germany's effort to dedicate a

¹¹¹ Law and Versteeg, 920.

chapter solely on the state of defense implies its effort to protect human rights beyond crisis of state.

Steps to declaration are strictly organized in each paragraph of Article 115a. While some democratic states designate the president for declaring the state of defense, Germany primarily requires two-thirds majority of vote “by the Bundestag with the consent of the Bundesrat”, the people’s voice.¹¹² If immediate action is required but the Bundestag and the Bundesrat do not meet the quorum, the Joint Committee makes the determination. Then, the determination by either the Bundestag and the Bundesrat or the Joint Committee must be “promulgated by the Federal President”.¹¹³ If the Bundestag, the Bundesrat, and the Joint Committee are not available, the Federal President can finally announce a state of defense.

Likewise, the political authority of the Bundestag and the Bundesrat are protected from the federal government. Article 115h does not allow dissolution of Bundestag during a state of defense. Furthermore, the urgent bills must be “forwarded to the Bundesrat at the same time as they are submitted to the Bundestag” even in a state of defense.¹¹⁴ The second paragraph of Article 115d even encourages “debate” between the Bundestag and the Bundesrat. The urgent bills must be consented by majority of both the Bundestag and the Bundesrat. This seems to be a containment strategy against the Federal Chancellor’s power to command for Armed Forces. No power is concentrated to a single state authority in any circumstances, which makes it harder for a state authority to infringe human rights.

Moreover, it is also the Bundestag and the Bundesrat that ends the state of defense. “Any measures taken by the Joint Committee or by the Federal Government to avert a danger shall be

¹¹² *The Basic Law for the Federal Republic of Germany*, art. 115a (1).

¹¹³ *Ibid.*, 115a (3).

¹¹⁴ *Ibid.*, 115d.

rescinded if the Bundestag and the Bundesrat so decide.”¹¹⁵ The Bundestag and the Bundesrat examine the federal law and determine if conditions for state of defense no longer exists.

Germany shows a strong will to protect its constitution. In any case, the Basic Law must endure. It must continue to govern the entire German society. Protection of the Basic Law is the protection of constitutional principles and ultimately the protection of human rights. Amendment or abrogation of the Basic Law as a whole or in part by the Joint Committee is strictly prohibited under Article 115e. Moreover, “neither the constitutional status nor the performance of the constitutional functions of the Federal Constitutional Court or its judges may be impaired” under Article 115g.¹¹⁶ Authority of the judges at the Federal Constitutional Court remains the same even in the state of defense because they are guardians of constitutional principles.

The Basic Law puts limitations on the duration and effect of emergency provisions. Laws enacted during a state of defense cannot suspend the earlier laws, and law enacted during the period of emergency will lose its effect “no later than six months after the termination of a state of defense”.¹¹⁷

As Germany’s constitutional principle was building a democratic state, the Basic Law retains the system of checks and balances and the system of rule of law even when the state is in emergency. This directly provides shield for domestic human rights. In addition, this strengthens the constitution’s position within the society, and the constitution is the guardian of human rights. Ultimately, Germany is shaping itself as a society in which human rights cannot be infringed by any state authority.

¹¹⁵ Ibid., 115l.

¹¹⁶ Ibid., 115g.

¹¹⁷ Ibid., 115k.

Chapter 6: Proposal for the New Constitution

As mentioned in Chapter 3, South Korea has been systematically preparing for Korean reunification. Specifically, South Korea has the Ministry of Unification, its politicians take into consider the inter-Korean relationship when drafting international policies. Most importantly, it is written in the third paragraph of Article 66 of the South Korean Constitution that “the President shall have the duty to pursue sincerely the peaceful unification of the homeland.”¹¹⁸

As part of preparation for reunification, Kim Cheol-Soo, the leading constitutional scholar in South Korea, has been publishing research paper and proposals on the new constitution in a reunified Korea.

In section 6.1, I will analyze Kim’s proposal of the new constitution. In section 6.2, I review some lessons from the Basic Law for the Federal Republic of Germany to improve some deficiencies that are found in Kim’s version.

6.1 A Proposal by Kim Cheol-Soo

Kim’s 2015 proposal seems to be heavily influenced by the Basic Law for the Federal Republic of Germany, for he refers to the German case frequently. Kim’s proposal retains some constitutional features of the South Korean constitution in addition to characters of the German Basic Law. Kim also seems to be attempting to use the constitution to prevent problems that may arise after the reunification.

¹¹⁸ The Constitution of the Republic of Korea, art. 66 (3).

Feature 1: Concerned about Human Rights

Concerned about human rights protection, Kim chose to begin his constitution with the rights and duties of citizens. Article 1 to Article 50 all talk about basic rights of Korean citizens, which is almost a third of the entire constitution. The first section of the first chapter is about human dignity. Everyone has inviolable human dignity (Article 1 (1)); the right to happiness (Article 1 (2)); the right to life (Article 2 (1)); the right to be protected from moral, physical, insulting, or inhumane treatments or torture (Article 3); the right to develop a personality, the right to citizenship, the right to privacy, and the right to speak (Article 4); and the right to be secure from natural, economic, and social threats (Article 5).

The human dignity section of Chapter 1 includes the right to be secure from social and economic threats as one of the basic features of human dignity. It appears that Kim's version of the constitution adopted the Universal Declaration of Human Rights, and thus the traditional human dignity approach introduced in *Chapter 4*.

Of the 50 basic rights articles, approximately a third of the articles deals with socioeconomic rights. Below are some examples:

Article 20: Every person has economic freedom- freedom to choose an occupation and freedom to participate in economic activities, and freedom to a choose workplace.

Article 23: (2) Any person has the right to receive state's financial support for maintaining basic standard of living.

Article 26: Every person is guaranteed family dignity in social and economic policies. Families experiencing economic hardship have the right to receive special protection from government institutions.

Article 35: Every person has the right to live in a healthy and appropriate living condition.

Article 37: Every person has the right to live in a comfortable and clean environment.
every person has the right to live in a healthy and appropriate environment.

The socioeconomic rights provisions in Kim's constitution often impose duties on the government. Although it is true that the government has a duty to provide service and support for its people, the government's practical and economic capacity must be considered as well. It is dangerous for governments to make "illusory constitutional promises then rely upon the courts to excuse their noncompliance"¹¹⁹ Reducing some constitutional promises on socioeconomic rights may be necessary to help the government to allocate resources by necessity and priority.

All rights are written in detail and at the same time absolute in Kim's constitution. In this aspect, Kim adopted characteristics of the South Korean constitution. Despite the name of Chapter 1- Rights and Duties of Citizens- most of the basic rights are not restricted by conditions, and the conditions are constructed with specific language and components.

For example, the second paragraph of Article 1 guarantees the right to freedom. The right to happiness could be restricted by adding a clause, 'if the freedom does not disrupt the happiness and freedom of others and the existence of the state' as is the case in the German Basic Law. By restricting rights, the German framers tried to educate the people that one must respect others' human rights together with his own right.

Another example could be Article 9 which guarantees that everyone has freedom to privacy. Based on this constitutional guarantee, individuals may not respond to the government's

¹¹⁹ Law and Versteeg, 878.

investigation for the public goal. Even if there is another clause that requires citizens to respond to the government's investigation, it is still necessary to make the article a conditional right to highlight that one must respect others' human rights as well as his own human rights. This right could also become a conditional right if the clause 'if the freedom of privacy does not intrude on others' rights or offend against the constitutional order' were added.

Restrictions of rights and duties of citizens are written separately from basic rights. Restrictions of rights are written from Article 51 to Article 54. Restriction of rights is permissible only in pursuant to the law and when it is for national security, maintenance of a free and democratic basic order, the public good, and protection of others' basic rights. The essentials of basic rights are inviolable. Duties of citizens are written from Article 55 to Article 63. Basic duties are the duty to obey the law and protect the constitution (Article 55). Every person has a duty to not abuse the freedom and rights guaranteed by the constitution (Article 56). Every person has a duty to pay tax (Article 57) and serve in the military (Article 58), duty to labor (Article 60), duty to contribute to the society, and duty to fulfill public weal (Article 61).

Although general disagreement exists over specific and detailed language in constitutional promises exists, I found it necessary in some cases. The German Basic Law also used specific language when limiting power of the government in the State of Defense chapter. Similarly, Kim's constitution uses a section under Chapter 1 (Rights and Duties of Citizens) to thoroughly explain constitutional protection of human rights in judicial proceedings.

Historically, human rights have been violated with cruel and inhumane punishments in judicial proceedings. The inhumane treatments were justified in the name of justice. Article 44 to Article 50 explicitly limits government actions and confirms individuals' basic rights in judicial proceedings. For example, everyone is protected from arrest, imprisonment, seizure, search,

interrogation, physical punishment, or detention, unless in pursuant to the law or appropriate proceedings in Article 44. The article also guarantees prohibition of self-incrimination. In Article 47, if a prisoner at the bar is proven to be innocent, he can claim compensation to the state in pursuant to law.

As observable in the above example, another characteristic in Kim's constitution is that the Korean context is reflected in the constitution. There could be some acquired or inherent aspects of Korean political cultures that disrupt human rights protection. Article 6 (Right to Equality) states that no one shall be discriminated against ancestry, race, gender, age, language, social position, lifestyle, political, religious, and philosophical beliefs, or physical and mental disabilities. Of the many factors mentioned above, ancestry, lifestyle, and political, religious, and philosophical beliefs were intentionally included to solve social problems that may come to the fore due to decades of division.

First, North Koreans who have strong communist ancestry may be treated inappropriately. Second, there will be big discrepancies in the lifestyles of South Koreans and North Koreans due to North Korea's extremely poor economy. Third, political, religious, and philosophical beliefs will differ greatly because South Korea has been under a multi-party system while North Korea was under a single-party system. True equality is achieved when the nation overcomes the three obstacles.

Moreover, an additional provision seems to have been included under Article 6 due to a common and perhaps inherent aspect of both Koreas: special treatment for the privileged class. The fifth paragraph of Article 6 clearly states that a privileged class shall never be established nor approved in any form. In South Korea, power-holders in the economy and politics

confidentially or even officially trade favors with each other. For example, many CEOs of South Korean conglomerates have been receiving special pardons despite committing economic crimes.

Feature 2: Weak Constitutional Principles

Cheol-Soo Kim suggests two constitutional principles in Article 180: the establishment of a free democratic republic and the protection of basic rights. But in the same proposal paper, he narrates that 1) popular sovereignty, 2) separation of powers, 3) rule of law, 4) respect for basic rights, 5) cultural nationalism, 6) international peace and cooperation, and 7) a just society and welfare state should be the constitutional principles. He needs to make clarification to avoid public confusion. Compared to Germany, the constitution involves many constitutional principles, but the constitutional principles seem very weak due to their nonrepetitiveness. Of course, redundancy is unnecessary. However, I believe moderate redundancy is useful as a mark of emphasis.

Constitutional principles in the constitution plays as a topic sentences in a paragraph. They are the most fundamental and eternal concepts ruling the entire Korean society. However, Kim's constitution does not seem to particularly prioritize the seven constitutional principles above everything else because Kim does not repeatedly classify nor clarify them in separate constitutional provisions as the core principles that govern the society. He may have believed that the number of basic rights articles and specific language of each article make sufficient emphasis on constitutional protection of human rights.

Chapter 2 of Kim's constitution is about the general principles and orders of the state. The chapter talks about the system of government, election, popular sovereignty, geography, flag, national anthem, official language, capital, basic national tasks, and international relations.

Spending an article that collectively and comprehensively summarizes the constitutional principles would have elevated the authority and influence of constitutional principles over entire Korean society.

Constitutional principles can also be regarded as specific aspirations of the state. Weak constitutional principles blur national aspirations that the constitution ought to present to Koreans. In addition, a respect for human rights remains fragile, insignificant, and vulnerable in the society, if the concept of constitutional principles is fragile.

Feature 3: A Strong Presidential Power Remains

Both South and North Korea have strong executive power. This phenomenon is natural in North Korea's authoritarian regime. In case of South Korea, its strong presidential power has been a problem considering that South Korea has a democratic regime. Even slight concentration of power to a single branch of government can cause human rights violation.

In Kim's constitution, the chapter the National Assembly precedes the chapter about the executive branch of Korea. The government branch that is constituted with people's representatives. The order of the constitution accords with democracy.

Nonetheless, the privileged sense that South Korean presidents enjoy is still reflected in the constitution. The following are some of the rights provided for the president.

Article 109: (1) The President can issue orders with legal effect within the limited scope of fiscal and economic decision, under a domestic or international conflict, natural disaster, or fiscal and economic risks, only if there is no time to wait for the assembly of the National Assembly.

Article 110: The President may declare Martial Law only if it is necessary to public order and peace, if the president finds that the state is under state of emergency.

Article 112: The President can order pardon, commutation, and reinstatement in pursuant to law.

Article 118: The President shall not be criminally persecuted during office, unless the president commits rebellion or international conflict.

Article 119: The President's position and honorable treatment to the president is legislated into law.

Although Article 109 gives the president a right to make fiscal and economic decisions alone, the president can exercise this right only when the National Assembly is not available. Also, the decisions are limited to "minimal" fiscal and economic decisions. Moreover, if the legislature does not pass the order, the order immediately loses its effects, and any laws that were abolished due to presidential orders under the written circumstances, automatically recover their legal effects. Hence, I consider Article 109 a good example that appropriately calls for presidential power when the state is under risky circumstances but with appropriate limitation of presidential power.

In contrast, Article 110 seems to give too much power to the president in that the president alone can declare Martial Law without majority approval of the legislature. The president is required to notify the legislature after declaration of Martial Law. At this stage, the National Assembly is unilaterally notified by the president. The last paragraph of the article requires the president to lift the order if majority of the legislature demands so. However, the fact

that the legislature is exempted from making such an important decision in the first place, permits enlargement of presidential power.

Article 112 also gives space for presidential corruption. Politics and economy are always tightly and deeply related to each other. Presidents may use their rights to order pardon, commutation, and reinstatement for people who exercise big power in economy. In return for pardon, commutation, and reinstatement, presidents may confidentially receive political or economic profits. If this continues, equality before the law collapses, which damages constitutional order and ultimately basic rights.

Necessity of Article 118 is debatable. Article 6 clearly states that everyone has right to equality. Everyone must be treated equally regardless of social, economic, or any form of privileged class. Constitutionally sheltering only the president from criminal persecution during office is going against the constitutional order. As the case of South Korean presidential impeachment showed in 2017, the president could avoid her criminal responsibility (e.g. bribery charges, abuse of presidential authority, and divulgence of secrets related to the performance of official duties) due to the presidential right. The president may force individual to act or pay as the president demands, which is violation of human rights and the constitution.

Article 119 plainly strengthens presidential power as the term “honorable treatment” implies. The idea that a leader must be respected with honor stems from Korea’s long history of Confucianism. However, if Korea were to truly establish a society in which everyone is free and equally respected, the perhaps innate idea must be abolished. Presidents are honored and respected when they serve the country and the people well not merely due to the position.

6.2 Lessons from the Basic Law for the Federal Republic of Germany

I made specific analysis of the Basic Law for the Federal Republic of Germany in Chapter 5. Here, I will present the German Basic Law in a bigger picture. Bigger-picture analysis will provide some underlying ideas or inherent natures that distinguishes the German constitution as the most fitted constitution for respecting human rights.

Lesson 1: Anyone Can Be a Perpetrator

Many constitutions, including that of the United States and South Korea, perceive the state as the powerful and threatening perpetrator and individuals as the weak victims. In contrast, the Basic Law for the Federal Republic of Germany seem to have acknowledged the possibility of individuals becoming perpetrators to the state and the nation.

This seems to be why the German framers made rights and duties go together for individuals as well as for the government. Individuals have inviolable human dignity that derives from natural law, and thus are given basic rights. Simultaneously, an individual's basic rights cannot be used for disrupting others' human dignity or the survival of the state. Every individual has an obligation to take care of the community because it provides social benefits to them, given that the obligation can never infringes human dignity. Because rights and duties go hand in hand, rights become conditional rights. Rights come when duties are served.

This unique understanding of the state seems to have combined negative functions and positive functions of the constitution for the German Basic Law. The German Basic Law gives some space for the government to efficiently and (relatively) freely perform its duties within the

bounds of the law. For example, the right to privacy can be transgressed in a circumstance where government investigation is essential for maintaining social order.

In contrast, Kim's constitution begins to talk about restriction of rights and duties from Article 51. Citizens' duties are separately handled in Section 8 of Chapter 1. The mutual relationship between rights and duties seem to be detached from each other.

In Kim's constitution, it is ambiguous how Kim perceives the relationship between the state and individuals. The absolute rights signal that the state is regarded as the perpetrator and individuals are regarded as victims. However, the fact that he states restrictions of rights and duties of citizens at the end of Chapter 1 shows that he does acknowledge that individuals are not always the innocent victims if they are given unconfined rights.

Nonetheless, state is still considered as a more threatening subject than individuals are. This explains why the German constitution uses very specific language and context when limiting basic rights as it was analyzed in Chapter 5. Specific language and context in limitations avert the government's attempt to exploit the conditional rights and infringe on basic rights of Germans.

Lesson 2: It's the Institutions, Stupid!

As repeatedly mentioned, the language used in the German constitution is not too specific. Rather, it seems general. Hence, the role of the institutions that interprets and executes law becomes more significant. Therefore, Federal Constitutional Court inevitably plays enormous influences and roles in Germany.

The Basic Law for the Federal Republic of Germany recognizes the significance of the role of the constitutional court and gives the Federal Constitutional Court the power to be the supreme authority in the judiciary. For example, the Federal Constitutional Court is the only

federal court that can interpret the Basic Law for the Federal Republic of Germany, rule on constitutional complaints, and make judicial decisions over conflicts between individual states or between the federation and a state.

Most importantly, the German Basic Law compels the constitutional court to get involved in the lives of citizens by constitutionally authorizing direct communications between ordinary citizens and the constitutional court. Paragraph 4a of Article 93 permits any person to file constitutional complaints directly to the Federal Constitutional Court if his basic rights have been infringed by a government authority. It also compels the citizens to invite the constitutional court. It is a system in which citizens can more actively claim for their rights, and the system certainly necessitates the constitutional court's role.

Due to strong influence that the constitutional court practices in the society, composition of the constitutional court is prudently drafted in the third Article of the Judiciary chapter of the constitution. Half of the judges are elected by the Bundestag and another half is elected by the Bundesrat, and no members of the constitutional court is a member of the Bundestag nor the Bundesrat.

Although the legislature is also a political entity, it is composed of plural interests and point of views thanks to plural party system, while the executive is leaned towards a single interest. Hence, the court also becomes a political institution that accepts diverse perspectives and thus more capable of defending the diverse interests of citizens.

In addition to empowering the constitutional court, the Basic Law for the Federal Republic of Germany empowers the legislature by incorporating the Bundestag and the Bundesrat in every corner of political process. No final decisions can be made without their

consent. For example, even the judges at the Federal Constitutional Court are elected by the Bundestag and the Bundesrat not by the executive leader.

Kim's constitution seems to give less power to the National Assembly and courts. The legislative consent comes as a secondary requirement in some cases, including declaration of a state of emergency.

Speaking of practicality, "though penned with the greatest technical skill, and passed on the fullest and most mature deliberation", all laws are "considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications".¹²⁰

In the end, it is the institutions that develop, stabilize, and realize the constitution and the constitutional principles. Therefore, empowerment of the institutions that represent plurality of the society- the legislative and the judicial branch- is important so that the institutions can properly go through this process. The German framers seem to have understood this nature.

Lesson 3: A Law for a Law

As analyzed in Chapter 5, the "in pursuant to law" phrase in the Basic Law for the Federal Republic of Germany shows tight relationship between German laws. This relationship has been complicating the process of violating human rights.

In addition to the internal element of the German constitution, Germany has been stressing authority of the law in German society by refusing to ignore the legitimacy of the East German constitution immediately after the German reunification. Rather, it used the East

¹²⁰ James Madison, "Federalist No.37", in *The Federalist Papers*, Ed. Clinton Rossiter (New York: New American Library, 1961).

German constitution to rule illegitimacy and unconstitutional actions of the East German government, as the West German constitution articulates that any unconstitutional action is subject to punishment.

Specifically, the East German constitution guarantees equal rights before law in Article 6. In Article 8, “liberty, inviolability of the home, secrecy of the mail, and the right to take up residence at any place are guaranteed”. Article 9 guarantees that all citizens have right to “express their opinion freely and publicly and to hold unarmed and peaceful assemblies for that purpose”, and “no one shall be discriminated against for exercising this right”.¹²¹

In contrast to what the constitution promised as basic rights of citizens, the state was strictly controlled by the communist government. Under the system, there was no liberty, mails were censored by Stasi, opinion could not be freely expressed, and formation of assembly was strictly regulated by the police force. The individual rights were written merely for a good-looking appearance of the East German constitution. The communist government and its communist party rule above law.

By legitimizing the East German constitution, using the constitution to rule unconstitutionality of the communist government, and punishing the government, the authority of law was reaffirmed in the entire German society. Law cannot be recklessly written or be neglected by anyone in any form.

¹²¹ *The Constitution of the German Democratic Republic.*

Chapter 7: Suggested Revision and the Way Forward

7.1 A New Constitution

The literature review on human rights, the constitution, and human rights in the constitution; an analysis of the Basic Law for the Federal Republic of Germany; and an analysis of the new constitution proposed by Kim Cheol-Soo presented definition and the significance of human rights and the constitution. Moreover, it has furnished designing the new constitution for reunified Korea with important constitutional features that make the constitution effective for protecting human rights.

In this chapter, I will propose some revisions and additions that I find necessary in Kim's proposal of a new constitution for a reunified Korea based on the collective analyses and studies about Korea presented in the previous chapters.

Chapter 7 will focus on showing a pathway to changes by describing characteristics that should be added, removed, or edited. The specific revisions and additions will be marked in red in Appendix A. I recommend the readers to refer to Appendix A as reading through this chapter since this chapter focuses on explaining why and for what the changes are proposed instead of simply accepting the new constitution proposed by Kim.

7.1.1 The Constitutional Principles

As Kim suggested, constitutional principles should be included in the preamble of the constitution because it “enshrines symbols and values that are meant to reflect the identity of the

political community members, history or narratives, and the common goals that [the community] strives to achieve”.¹²² We should remember that constitution is a document of aspiration in addition to a document of limiting government.

I suggest four essential constitutional principles for a reunified Korea. They are: 1) protecting human rights, 2) solidifying national unity, 3) establishing a democratic state, and 4) establishing a constitutional order. The four constitutional principles were chosen due to following reasons.

First, I am introducing a constitution that inherently respects human rights, and thus protecting human rights must be one of the core founding principles. People are not merely components of the state but sovereigns of the state. If rights of the sovereigns are not protected, sovereignty of the state becomes fragile because the source of the state sovereignty is fragile.

Second, it is the constitution that is to be used in reunified Korea. The government cannot pay attention to human rights protection if the society is segmented due to diverse political, economic, and social interests. To prevent the government from playing political games between segments, the constitution must obligate the government and the whole nation to seek national unity.

Third, democracy finds its legitimacy and sovereignty from individuals. It is the best form of government that restricts government power for the protection of civil rights and civil liberties. It is the form of government that has the highest incentive for protecting human rights. Moreover, rule of law is identified as one of the major principles in democracy. For building a

¹²² Doron Shulztiner and Guy E. Carmi, “Human Dignity in National Constitutions: Functions, Promises, and Dangers,” *The American Journal of Comparative law* 62, no. 2, 2014: 473.

society that provides inviolable legal protection of human rights, democracy is the best form of government.

Fourth, mere presence of the constitution is not enough for defining a state and its goals. The constitutional order must be established so that government institutions and even the individuals understand norms, aspirations, and customs about the constitution and act accordingly. Human rights being one of the constitutional principles, establishment of constitutional order is significant to make the constitution be naturally absorbed in the lives of Koreans.

I suggest deleting the term nationalism from the constitution and the specific term ‘March 1 Movement of 1919’. Of the seven constitutional principles proposed by Kim, I am skeptical of seeking national unity through cultural nationalism. Nationalism is meaningful in terms of maintaining self-governance and sovereignty. However, it can also be a risky idea in terms of keeping international peace, which is another constitutional principle that Kim proposed. In such a globalized world, reunified Korea may be isolated from international society and may even discourage international peace and cooperation if nationalism overgrows, especially because it is supported by the fundamental document.

Refer to the <Preamble> for specific changes made.

I suggest creating a separate article under Chapter 2, which is a chapter about the sum and substance of the state and basic order. To emphasize the importance of the principles, it is necessary to add them in the first article of Chapter 2.

Refer to <Chapter 2: The General Principles and Orders of the Republic of Korea> for specific changes made.

7.1.2 Defining Human Rights in a Reunified Korea

Human rights must be redefined in a reunified Korea so that every person enjoys equal level of human rights under unified definition of human rights. The word, human rights, appears in constitutions of both Koreas. However, degree and scope of human rights protection have been interpreted and applied differently. I anticipate a new constitution will achieve national unity, first by unifying a notion of human rights.

The definition of human rights in reunified Korea will be based on the social justice approach, which finds the source of human rights in between morality and politics. Human rights are more than inherent rights; they are also duties to respect principles of the rule of law, social obligation to produce profits and create value for the society and the people.

In summary, human rights are “route for human development and realization of the full potential of each individual, which in turn leads to augmentation of the human resources with progress to the nation”.¹²³ Since the Universal Declaration of Human Rights fails to give clear definition of human rights and human rights is defined in numerous perspective, the term human right will be a more concrete target that the nation must seek together, if the constitution unifies definition of human rights specifically for reunified Korea.

I suggest adding an article that clearly defines definition of human rights in reunified Korea. My claim here is subject to controversy in that it could restrain evolution of human rights definition in the future. Nonetheless, I anticipate that the definition will contribute to achieving national unity by helping individual citizens develop human personality for both themselves and the community.

¹²³ Verma.

Refer to Article 1 (2) of <Chapter 1: The Basic Law> for specific changes made.

I suggest removing some socioeconomic rights parts in Section 4 of Chapter 1 (The Right to an Adequate Standard of Living) of Kim's constitution, considering the human rights definition in reunified Korea.

Many specific provisions pertinent to economic activities are written under Section 4 of Chapter 1. Enacting a separate Labor Act of Equal and Fair Economic Activity Act could be better since socioeconomic rights face many circumstantial variables and are subject to frequent changes. The constitution must be a fundamental and enduring document. Frequent changes are likely to diminish constitutional authority. If constitutional authority diminishes, the constitutional principles shake, which becomes a threat to human rights protection.

I agree that it is the state's responsibility to protect and provide financial aid to anyone who is destitute and incapable of self-support. However, a provision such as, "anyone has right to financial aid for living an adequate standard of living that is worthy of human being", is a definite promise while the language used for the promise is vague.¹²⁴ Criteria for adequate standard of living is subjective, and hence applying absolute right to a rather subjective matter is preposterous.

Such constitutional promises on economic rights could be realistic and effective if it were written only for South Korea. However, applying such permanent and specific rights to Korea immediately after reunification may cause the government and the entire country to fall into

¹²⁴ Cheol-Soo Kim, "A Research on the Reunification Constitution Draft," *The National Academy of Sciences* 54, no. 2, 2015: 50.

financial trouble. The government will have to run the country with taxes collected from limited number of South Korean taxpayers and allocate the resources to a larger population.

Furthermore, North Korean territory is underdeveloped that even its domestic electricity supply is sporadic and unreliable. The government will have to put a huge portion of its budget into building new infrastructure in North Korean regions so that people in the region can ordinarily perform social and economic activities. Such definite promises on economic rights seem illusory.

Refer to Section 4 of <Chapter 1: The Basic Rights> for specific changes made.

I suggest lowering the level of specificity and frequency of socioeconomic rights in the new Korean constitution. Passing legislative acts that specifically deals with free, fair, and equal economic activities. Acts can be more responsive devices to fluctuating economic circumstances. It is important to remember that the Basic Law for the Federal Republic of Germany could endure through its early stage of reunification and survive as the fundamental document today because the constitution established ruling principles not subjective rights.

Refer to the entire articles that are revised in <Chapter 1: The Basic Rights>.

7.1.3 The Basic Rights

Both Kim's constitution and the Basic Law for the Federal Republic of Germany recognize that duties and limitations of rights must be included in the constitution. However, they have different format. The German constitution writes guarantee and limitation of rights together in a provision. For example, Article 2 states that everyone has right to free development

of personality “insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.”¹²⁵ Kim’s constitution put together limitation of rights under Section 7 and duties under Section 8.

I suggest following the German format for the new constitution. When rights and restriction of the rights are written together, it indicates that enjoyment of rights must accompany certain limitation of rights and social duties. It is the constitution’s role to set this norm among people so that people can develop themselves as a more responsible being.

Listing rights and restriction of rights together in individual provisions provides a controlled leeway for the government to exercise its power to actively produce and bring social goods to the people. This helps the constitution do its positive functions. If the government is too strictly limited in every way, it can do nothing and may not even try to do something.

Expansion of the government as a result of an excessive guarantee of social rights is another aspect of concern. People cannot enjoy rights merely because it is written in the fundamental document. The rights are properly delivered to the individuals when the government put the constitutional promises into action. Hence, guaranteeing rights to individuals could be understood as imposing duties to the government. To keep the duty, the government is likely to become an active government.

Refer to <Chapter 1: The Basic Rights> for specific changes made.

I suggest reducing the number of rights listed in Chapter 1 of Kim’s constitution and establishing general principle instead of specific subjective rights. Moreover, it is questionable if segmentation of rights give significant effect to the constitution compared to just having general

¹²⁵ *The Basic Law for the Federal Republic of Germany*, art. 2.

principles in the constitution. After all, the fundamental document sets general principles and specific legislation and policies that build on the general principles do exist, like the Labor Act. I am concerned that the constitution may be degraded as a book of combination of rights.

For example, Article 27 (rights of teenagers), Article 28 (rights of seniors), and Article 29 (rights of the disabled) all fall under Article 6, which promises that everyone has right to be treated equally before the law. Article 27 assigns children and teenagers the right to pursue happiness, be protected, and be respected. Public and private actions related to children and teenagers shall prioritize benefitting them. Article 28 gives seniors the right to live an independent and respected life and participate in social and cultural activities. They shall never be unfairly discriminated. Article 29 gives the disabled the identical right described in Article 29.

Children, teenagers, seniors, and the disabled all belong to the “everyone” written in Article 6. Furthermore, descriptions of rights are identical in the three articles. It seems like Kim tried to stress that the reunified Korea must aspire to be a welfare state where everyone is equally provided with a good quality of life. However, I am still skeptical about complicating the deep but concise message that the constitution ought to clearly deliver to ordinary citizens with unnecessarily segmented descriptions of rights.

Another similar example would be Article 36 and Article 37. Article 36 states that everyone has the right to healthy life. Article 37 states that everyone has the right to live in a pleasant environment. These two articles fall under the most important and the first article of the constitution: everyone has inviolable human dignity and the right to happiness.

Refer to <Chapter 1: The Basic Rights> for specific changes made.

I suggest being attentive to examining whether specific basic rights do not conflict with other constitutional principles- building national unity, establishing a democratic state, and establishing the constitutional order. In this respect, Article 35, which vouch for a healthy and appropriate living condition to “everyone”, should be removed. This article forces the government to provide a welfare to a degree of communism, which contrasts with democracy. Welfare has advanced democracy in part, but “universal” supply of welfare is a contentious sphere in democracy.

I respect the ardor for human rights protection but designing the constitution requires more practical and systematic approach. I understand that Kim is a philanthropist who genuinely hopes to create a state in which everyone can live happily. Nonetheless, the degree of support should not blur the boundary between democracy and communism.

Refer to Article 35 of <Chapter 1: The Basic Rights> for specific changes made.

7.1.4 The Presidential Power

Imperial presidency of South Korea and dictatorship of North Korea must not repeat. The presidential power can violate human rights not only to an individual-level but also to a community-level. In regards to equal protection of human rights, the nation should be more concerned about what rights are constitutionally promised for individuals than for the president. The president is an equal citizen before the law.

I suggest shortening the length of the chapter about the Presidential Power to deemphasize the typical executive privilege that Koreans take it for granted. List of special rights

allowed to the president is what makes Chapter 4 a lengthy chapter with 36 articles. For this to happen, some rights that contain exceptional presidential privilege must be removed.

Refer to <Chapter 4: The Executive Branch> for specific changes made.

I suggest removing the right to independently decide and declare the martial law (Article 110); the rights to order pardon, commutation, and reinstatement (Article 112); the right to be immune from criminal prosecution (Article 118); and the right to receive respectful treatment (Article 119). There has been no clear explanation of why the president must enjoy the listed rights above. The rights seem to have originated from a sense of entitlement, and this contradicts to the constitutional principle that everyone must enjoy equal basic rights.

Refer to Articles 110, 112, 118, and 119 of <Chapter 4: The Executive Branch> and <Chapter 7: State of Emergency> for specific changes made.

I suggest opening the chapter about the presidential power with an article that clearly states that the president has a duty to protect the constitution by showing willingness to carry out the constitutional principles that shall govern the society. In the existing article, it only talks about the duty to protect and carry out the constitutions and make genuine efforts to establish national unity.

Refer to Article 99 (2) of <Chapter 4: The Executive Branch> for specific changes made.

7.1.5 The State of Emergency

The state of emergency has been used as a strong and abusive weapon by presidents who were in office in the early stage of democratization and economic development in South Korea. But at the same time, declaration of the state of emergency and martial law is crucial for state defense because a single decisive, swift, and organized actions are more effective when survival of the state is at stake. Hence, the best option is to recognize and strictly regulate the government's right to declare martial law under the state of emergency.

I suggest adding a separate chapter that solely deals with a state of emergency immediately after chapters about the system of government. In Kim's constitution, only Article 110 is used for the state of emergency and martial law. I suggest adding the chapter after Chapter Ordering indicates significance. The ordering signifies that the reunified Korea considers guarding national security and human rights together as the factors that are most directly linked with the survival of the state.

In case of the German Basic Law, the state of defense chapter appears in Chapter 10. Considering that chapters about the system of government finishes at Chapter 8, it seems like Germany was also concerned about the martial law's potential to infringe human rights of the whole nation. But finance and apportionment of national budget seem to have been a more serious factor.

Refer to the entire <Chapter 7: State of Emergency>.

I suggest revising Article 110, which is about the president's right to independently decide and declare martial law under the state of emergency and rearranging the article under the

State of Emergency Clause. The revision should involve all three branches of government in the process of deciding and declaring the state of emergency and martial law.

Although the purpose of the state of emergency and martial law is permitting the government to make fast and decisive actions, the permission comes completely from the people. People are transferring their rights to the government. Thus, the three branches of government must carefully and thus collaboratively proceed the approval and initiation processes.

Specifically, the state of emergency and martial law must be approved by the majority of legislature prior to declaration by the president. The judicial branch must judicially assist constitutionality of the actions until termination of the state of emergency and martial law.

In addition, the article must clearly state when, how, and by whom the state of emergency must be terminated. The Basic Law for the Federal Republic of Germany makes a perfect illustration of the termination. It is good to follow as it is written in the German constitution.

Refer to <Chapter 7: State of Emergency> and <Chapter 4: The Executive Branch >.

7.1.6 The Right to Secede

Both the Basic Law for the Federal Republic of Germany and Kim's constitution do not explicitly talk about the right to secede. However, the German Basic Law alludes that Germany is highly reluctant to experiencing another separation by stipulating that parties which aim to endanger the existence of the Federal Republic of Germany as unconstitutional in Article 21. The framers seem to have put the article as a preventative measure against potential for re-division of Germany due to political, ideological, or even economic discrepancy.

I suggest including an article restricting the right to secede under Chapter 2: The General Principles and Orders of the Republic of Korea. Division of the state is a great risk to human rights protection. State is a potential infringer but also the fundamental supplier of human rights protection to all citizens. Moreover, since one segment of the country has a legacy of serious human rights violation, the same legacy may repeat.

The article should give a general standard of circumstances in which the right to secede can be considered by the court. It should clearly state that economic reason cannot be accepted as a reasonable ground for secession. They must include serious violation of human rights that

The article should also explain the judicial and political process to secession. First, the cause of secession must be examined and judged as constitutional by the constitutional court of reunified Korea. Second, secession must be approved by the absolute two thirds majority of the legislature. Two thirds majority in this process is better than mere absolute majority because the number of the local member of the legislative body in northern and southern segments are identical due to identical administrative districts. If one of the two segments unite and vote for secession, majority is easily achieved. Third, secession must pass the referendum by two thirds majority of the entire voting population. The two thirds majority is applied in this stage because of population gap. The population of South Korea is twice that of North Korea. Absolute majority easily arrives if two thirds of South Korean segment unites for secession.

Refer to <Chapter 2: The General Principles and Orders of the Republic of Korea>.

7.1.7 The Judicial Hierarchy

Based on the two assumptions in Chapter 3, the reunified Korea will adopt the South Korean system of government. Thus, the Constitutional Court of Korea and the Supreme Court will coexist. The Supreme Court will be highest institution in the judicial branch and the Constitutional Court of Korea will be considered a fourth branch of government that regulates the government power and keeps it in check. The problem observed in the existing South Korea judicial system is that the judicial hierarchy between the two is not completely established, and thus is still open to controversy.

Setting a clear hierarchy between the Supreme Court and the Constitutional Court for the expansion of constitutional influence is necessary. This is to help the two courts concentrate on their distinct role as judicial interpreters and keep their distance from competition for stronger judicial power and the sphere of influence.

I suggest adding an article in Chapter 5: The Judiciary an article that clarifies that Constitutional Court has stronger judicial authority. It is the only institution that makes decisions on constitutionality, while the Supreme Court makes decisions based on laws that are enacted by the legislature and approved as constitutional by the constitutional court.

Refer to Article 146 (2) of <Chapter 5: The Judiciary> for specific changes made.

I suggest revising the method of appointment of judges at the Supreme Court and the Constitutional Court. In Kim's constitution, the Supreme Court judges are elected by recommendation by the chief justice of the Supreme Court, then by approval from the legislature,

and then appointment by the president. The role of the chief justice of the Supreme Court should be eliminated in the appointment process because this makes the Constitutional Court a political institution. To get into the supreme court, judges or prospective judges may form political lines within the court. But the constitutional court must remain neutral because it is an institution that deals with the politically neutral document, the constitution.

The constitutional court must be kept as the fourth branch of government that is independent and neutral. Creation of political lines in the constitutional court is a threat to equal protection of human rights. Once the supposedly neutral institution that deals with human rights protection becomes political, it is possible that human rights fall to become a political means to achieve political goals.

Refer to <Chapter 5: The Judiciary> for specific changes made.

7.2 The Process to Ratification of the New Constitution

The Basic Law for the Federal Republic of Germany is a provisional constitution. Article 146 states that the duration of the Basic Law for the Federal Republic of Germany “shall cease to apply on the day on which a constitution freely adopted by the German people takes effect”.¹²⁶ This was included in the last article of the constitution because the constitution was not ratified by entire German’s approval.

The German Basic Law leaves a room for reenactment of the constitution, if citizens find the constitution unfit to the reunified society or biased to West German’s point of view. This is

¹²⁶ Ibid., art. 146.

based on the belief that the constitution must gain its legitimacy from the people who are governed by the document.

My suggestion is first forming a committee that is constituted with politicians with law background and constitutional scholars. They will evaluate each provision, the organization, the applicability, the effectiveness and many more significant factors.

Second, the draft should be sent to the constitutional court for review. The court's proof reading is important to make sure that the new constitution does not violate the basis of democracy (e.g. the separation of powers) or neglect human dignity. The constitutional court should continue to monitor if the entire ratification process proceeds constitutionally, and should have power to rescind or cease the ratification process if anything is found unconstitutional.

Third, the constitution should be approved by two thirds majority of the legislature. The legislature is not merely a group of representatives. Many of them are professionals who have expertise. Also, it is an institution with the highest plurality, and thus is capable of reflecting and presenting diverse perspectives and interests. Hence legislative approval followed by series of comprehensive and deliberate discussions is important.

Fourth, the new constitution must be put to a referendum. People should be given authority to choose the constitution that governs the society they live in. The constitution should be agreed by absolute majority of the entire voting population.

Fifth, the president should promulgate the new constitution.

The five-step ratification process involves all three branches of government and the people, which I believe is sufficiently democratic.

7.3 Future Research

The research on designing the new constitution for reunified Korea is still at its earlier stage of development. This honors thesis analyzed only the Basic Law for the Federal Republic of Germany because Germany is an exemplary case that achieved both reunification and human rights protection. The research method is limited in that it only analyzed and made reflection on single constitution.

The research will progress as the Constitution of the Republic of South Africa is analyzed together with the Basic Law for the Federal Republic of Germany in the future research. South Africa sought to solve Apartheid through its new constitution. It is written in the preamble of the constitution that the purpose of the constitution is to “heal the division of the past and establish a society based on democratic values, social justice, and fundamental human rights” and its constitutional court is empowered specifically to ensure human rights protection.¹²⁷ The South African constitution will be a perfect example of the constitution that provides protection of fundamental human rights and plays as a unifying force of the once conflicted nation.

In addition, the future research should introduce the structure of government institutions that will most effectively carry out constitutional protection of human rights. As was observed from Germany, institutions cannot be detached from the constitution because they are the ones who actualize the fundamental document to a living fundamental document that governs the society.

There are two options to consider in terms of institutions. First option is giving the Constitutional Court the right to monopolize human rights cases because human rights protection

¹²⁷ *The Constitution of the Republic of South Africa*, Preamble.

is the constitutional principle that the reunified Korea aspires. Second option is building a separate Human Rights Court in Korea.

Option 1: The Constitutional Court's Monopoly of Human Rights Cases

The constitutional court deals with many constitutional issues. Human rights may be treated just as one of the many constitutional issues. Hence, I think the future research should seek for ways to prevent human rights from not receiving sufficient attention from the constitutional court.

Option 2: The Human Rights Court

In case of Germany, the German judicial system does not have a separate Human Rights Court. However, each German citizen can directly file a complaint to the Federal Constitutional Court. Furthermore, Germans can appeal to the European Court of Human Rights because Germany is a member of the European Union.

An advantage is found in Germany's employment of two-court system for protecting human rights. First, the fact that citizens can directly file human rights complaints to the constitutional court. The European Court of Human Rights has been used not only as decision maker in pan-European human rights issues but also as a powerful entity that unifies diverging definition and treatment of human rights under one set of human rights norm.

In reunified Korea, there is no supranational institution that reinforces human rights protection across Asia. Hence, the state needs to be responsible for building a strong institution that specifically ensures human rights protection. The constitution should equip the Human Rights Court with incentives and powers to do its job. Since it is creation of a new institution, the

future research should give sufficient attention to the organization of the court and give rights that do not overlap or conflict with other courts.

I believe option 2 better- building a separate specialized human rights court. The Constitutional Court will be dealing with many other cases especially in the early stage of reunification because they need to examine constitutionality of new legislative acts. Hence, human rights issues may not receive sufficient attention from the constitutional court, but human rights protection should start from the first day of reunification.

Since human rights is one of the four constitutional principles, I suggest making the human rights court a subordinate court to the constitutional court. How a new constitution should regulate structure and order of the human rights court and its hierarchical relationship with other courts ought to be explored in the future research.

Appendix A.

Here, I made revisions, eliminations, and additions on the new constitution proposed by Cheol-Soo Kim. Please use this appendix as a reference for specific changes that I suggested and explained in Chapter 7.

Marks

Added/Revised

~~Removed~~

Explanations on the Changes

<Contents>

- I. The Basic Rights
- II. The General Principles and Orders of the Republic of Korea
- III. The National Assembly
- IV. The Executive Branch
- V. The Judiciary
- VI. The Constitutional Court
- VII. The State of Emergency*
- VIII. The Finance
- IX. Transitional and Concluding Provisions

<Preamble>

We, the Korean people, with a long history and tradition declared establishment of the Republic of Korea through the March 1 Movement of 1919. We succeed the spirit of independence and solidify the national unity by the guidance to justice for re-establishing an independent and democratic reunified Korea. We seek to give individuals equal opportunity across all areas within politics; economy; society; and culture and encourage individuals to raise their capability to the highest degree by breaking down evil social customs and establishing democratic system. We are determined to complete our responsibilities and duties of achieving even improvement in domestic national life and striving for maintaining a permanent international peace for securing security, freedom, and happiness of us and our descendants. For all the stated reasons, we enact this constitution as of (specific date).

We, the Korean people, declare the establishment of the Republic of Korea: an independent and democratic reunified state. We seek to heal the division and conflict of the past and unify the nation based upon fundamental human rights, democratic value, and social justice. We, the nation, are determined to protect fundamental human rights, solidify the national unity, establish a democratic state, and establish the constitutional order. This Constitution of the reunified Korea will apply to the entire Korean people.

<Chapter 1: The Basic Rights>

Section 1: The Human Dignity

Article 1:

(1) Every person has the right to human dignity, *and it is inviolable. All Korean people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace, and justice in the world.*

(2) *Human rights derive from the inherent dignity of the human person. They must be universally respected, and every person, as a responsible citizen, has duties to other individuals and to the community to which one belongs.*

**Added a clear and unified definition of human rights in a reunified Korea in paragraph (2).*

~~(3) Every person has the right to pursue happiness.~~

**The term 'happiness' is rather an emotional term for the constitution.*

Article 2:

(1) Every person has the right to life.

~~(2) The life of human embryo and fetus are protected from the date of pregnancy.~~

(3) Capital punishment is abolished

Article 3:

- (1) The moral and physical integrity of every person is not violated.
- (2) No person shall suffer from physical punishment; atrocity; or the inhuman or degrading treatment or punishment.
- (3) Arrest, imprisonment, and detention require a warrant from a judge.*
- (4) Slavery and human trafficking are prohibited.

Article 4:

- ~~(1) Every person has the right to personal identity, the right to develop personality, the right to citizenship, the right to honor and reputation, the portrait rights, the right to speak, the right to private life, and the right to be protected on confidence of family life.~~

Every person has the right to free development of his personal identity and personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

** Paragraph (1) displays too many subjective rights. Including a clear definition of human right will be more effective in terms of establishing general principle about human rights.*

- (2) Methods to prevent and regulate provision and abuse of information about an individual or family that violates human dignity shall be made into law.
- (3) Human dignity and genetic identity shall be protected by law in regards to invention, development, utilization, and experiment of technology.

(4) Human cloning or an experiment on a human body is prohibited.

~~Article 5:~~

~~(1) Every person has the right to be secure from natural, economic, and social threat.~~

~~(2) Every person has the right to be free from disaster and be secure as individuals as well as in group.~~

~~*Not every person can be immune from natural, economic, and social threats, and the government cannot always provide equal protection for every person who are under natural, economic, and social threat. The article is rather idealistic to be written in the constitution.~~

Section 2: The Right to Equality

Article 6:

- (1) Every person has the right to be treated equally before the law. Every person shall not be discriminated against ancestry; race; gender; age; language; social position; lifestyle; religious, philosophical, or political beliefs; and mental disabilities.
- (2) Male and female are given equal rights. The state must actualize legal and practical equality of the two genders in regards to family, education, and labor.
- (3) No one is discriminated against mental or physical disabilities.
- (4) Creation or formation of privileged class shall not be recognized in any form.

Section 3: The Right to Freedom

~~Article 7:~~

~~(1) Every person has the right to freedom of action and the right to freedom of physical and mental activities.~~

~~*This article is too general and does not establish constitutional principles nor specific rights.~~

Article 8:

~~(1) Every person has the freedom of physical integrity.~~

~~*Overlaps with paragraph (1) of Article 3.~~

~~(2) Arrest, imprisonment, and detention require a warrant from a judge.~~

~~*Moved to paragraph (3) of Article 3.~~

Article 9:

(1) Every person has freedom to privacy. *The right may be interfered with only pursuant to law.*

**The privacy rights became conditional rights by adding the clause.*

(2) The privacy of correspondence, posts, and telecommunications is inviolable. Censorship is prohibited.

(3) Restrictions may be ordered only pursuant to a law. If the restriction serves to protect the free democratic basic order or the existence or security of the state, the law may provide that the person affected shall not be informed of the restriction and that recourse to the courts shall be replaced by a review of the case by agencies and auxiliary agencies appointed by the legislature.

**The restriction of rights immediately follows the rights provision to ensure that an individual's right may be restricted for public good, if the purpose is genuinely for state security and public weal. This implies social justice approach's definition of human rights in the constitution. Additionally, the right became conditional right due to the addition.*

(4) Every person has the right to be protected from improper use of personal information.

~~Article 10:~~

~~(1) The privacy of correspondence, posts, and telecommunications is inviolable. Censorship is prohibited.~~

** Moved to paragraph (2) of Article 9.*

Article 11:

~~(1) Every person is not fringed upon the freedom to choose one's residence.~~

(1) Every person has freedom to choose one's own residence, except when particular facts justify the suspicion that any person has committed an especially serious crime specifically defined by law.

(2) Interferences and restrictions otherwise shall otherwise only be permissible to avert a danger from the public or from the life of an individual, to confront an acute danger to public safety, or to protect young persons at risk.

*The absolute language incapacitates the government from regulating criminals or suspects particularly when conducting investigation. Restriction (paragraphs (1) and (2)) on the freedom of residence is necessary.

Article 12:

(1) Every person has the right to reside freely throughout the internal and external territory.

(2) Every person has the right to move, enter, and leave freely.

(3) The rights may be interfered when particular facts justify the suspicion that any person has committed an especially serious crime specifically defined by law.

(4) Interferences and restrictions otherwise shall otherwise only be permissible to avert a danger from the public or from the life of an individual, to confront an acute danger to public safety, or to protect young persons at risk.

*The absolute language incapacitates the government from regulating criminals or suspects particularly when conducting government investigation. Restriction (paragraphs (3) and (4)) on the freedom of movement is necessary.

Article 14:

- (1) Every person has the right to freedom of religion and of conscience.
- (2) Every person has the right to freely choose religious and philosophical beliefs and actualize the beliefs individually or in groups.
- ~~(3) Every person has the right to join or be affiliated with religion and the right to receive religious education.~~
- ~~(4) No one shall be forced to believe or receive education about a specific religion.~~
~~*These are already included in paragraph (1) of this article. It is unnecessarily specific~~
- (5) There shall be no state religion, and church and the state are separated.

Article 15:

~~*Article 15 and Article 17 are intermingled as the following, because the two articles overlap and both talk about freedom of expression, arts, and sciences.~~

- ~~(1) Every person has intellectual and artistic freedom.~~
 - ~~(2) The rights of authors, inventors, engineers, and artists shall be protected by a law.~~
-
- ~~(1) Every person shall have the right to freely express and disseminate one's opinions in speech, writing and pictures.~~
 - ~~(2) Every person shall have the right to inform oneself without hindrance from generally accessible sources.~~

(3) The rights shall find their limits in provisions for the protection of young persons and in the right to personal honor.

(4) The rights shall not release any person from allegiance to the constitution.

**Kim's constitution had no separate article that generally talks about the freedom of expression but had description of specific rights in Articles 15 and 17. Hence, I combined the two articles and created a separate Freedom of Expression article that talks about both guaranteed rights and restriction of the rights.*

Article 16:

- (1) No one owes a duty to reveal one's personal information except in the case determined by a law.
- (2) Public institution cannot obtain, collect, or allow others to access information on the citizens, unless it is necessary for building a democratic state governed by law.
- (3) Every person has the right to access to public document and collected data about oneself.
- (4) Every person has the right to request for revision or removal of information that is fake, incomplete, or obtained against the law.
- (5) Collection of information, the access policy, and process are determined by law.

~~Article 17:~~

- ~~(1) Every person has the right to share opinion, acquire information, and spread the information.~~

~~(2) Every person has the right to freely receive information, acquire information that is generally approachable, and circulate the information.~~

~~(3) Every person has the right to circulate information through publishment, radio, television, and any form of communication.~~

~~(4) Censorship is prohibited~~

~~(5) The source of the information is protected.~~

*Article 17 is moved to Article 15, which is about freedom of expression, arts and sciences because the two articles overlap.

Article 18:

(1) Every person has the right to participate in a peaceful rally.

(2) Every person has the right to organize a rally and freely participate or not participate in the rally.

Article 19:

(1) Every person has the freedom of association.

(2) Every person has the right to organize, register, and participate in associations.

(3) No person shall be forced to register or be part of associations.

(4) If purposes or activities of associations violate the constitution and the law, the association is prohibited. The court approves the registration of associations and determines prohibition of association.

(5) The type, procedure, and supervision of associations are determined by law.

*This article is a good example of conditional rights which states both guaranteed rights and restriction of rights.

Article 20:

(1) Every person has economic freedom.

~~(2) Freedom of economy is comprised of freedom to choose career and freedom to economic activities.~~

~~(3) Every person has freedom to choose career freedom to job performance, and freedom to choose workplace. Escape clauses are determined by law.~~

Every person shall have the right to freely choose their occupation or profession, their place of work, and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law.

*Combined paragraph (2) and (3) of the article because they are merely lists of specific economic activities.

(4) Regular employment of children under age 16 is prohibited. Permissible form and type of employment are determined by law.

(5) The level and method of minimum labor wage are determined by law.

Article 21

- (1) Every person has the right to ownership, the right to own property, and the right to inherit.
- (2) Every person receives equal legal protection in regards to ownership, property, and inheritance.
- (3) The right to ownership shall be restricted only in pursuant to a law, and the restriction shall not violate the essentials of the rights.

**This article is a good example of conditional rights which states both guaranteed rights and restriction of rights.*

Section 4: The Right to Have Basic Standard of Human Life

Article 22:

- (1) Every person has the right to live up to basic standard of human life.
- (2) The state shall strive for social security and promotion of social welfare.
- (3) Every person has the right to receive notification about social security system.

~~Article 23:~~

- (1) Any one in need or incapable of self-support has the right to receive the state's assistance and protection.

~~(2) Any one has the right to receive state's financial support for maintaining basic standard of living.~~

**The state should clarify that not everyone is eligible for financial support for just being a human who lives under basic standard of living. This absolute promise for financial*

support for everyone living under basic standard of living seems to be an idealistic and illusory promise by a socialist state.

Article 24:

(1) Every person has the right to receive social security if one is suffering from disease or physical disability.

~~(2) Every citizen has the right to receive social security if one is involuntarily at the state of being out of work.~~

*The state should clarify that not everyone who “involuntarily” lost job is eligible for state’s financial support. Even a person who is incompetent involuntarily loses a job. This absolute promise for financial support for everyone who is involuntarily unemployed seems to be an idealistic and illusory promise by a socialist state.

Article 25:

(1) Gender equality shall be guaranteed in all areas of employment, labor, wage, and welfare.

(2) The state must guarantee that marriage and family life is established and maintained based upon the dignity of every individual and gender equality.

(3) No one shall be discriminated against pregnancy, childbirth, and childrearing. The state shall strive for maternity protection.

~~Article 26:~~

~~(1) Every person shall have family dignity in regards to social and economic policies.~~

~~Families who face material and social difficulties—families with multichild or sole parents—shall receive special protection from public institution.~~

~~(2) Mothers at perinatal period shall receive special protection by public institution within the scope of law.~~

*The article is a combination of two general principles described in Article 22 and Article 25, and too specific. The content should be implemented by policies.

Article 27:

~~(1) Children and Teenagers have the right to be protected and receive attention for their own happiness. All relevant public and private actions shall prioritize interests of children and teenagers.~~

~~(2) Children and teenagers are independent personalities. Their autonomy shall be respected, and they shall have the right to freely express their opinions and be respected.~~

(3) Parents have the right to choose appropriate childcare method.

(4) Parents have the duty to raise their children. The duty includes providing school education.

~~Article 28:~~

~~(1) Seniors have the right to live an independent and respected life and participate in social and cultural activities. They shall not be discriminated in all areas.~~

~~Article 29:~~

~~(1) Disabled persons have the right to live an independent and respected life and participate in community life. They shall not be discriminated in all areas.~~

*Paragraph (1) and (2) of Article 27, Article 28, and Article 29 are redundant, for paragraph (1) of Article 6 already prohibits discrimination by age, gender, and mental or physical disabilities. In addition, social welfare is provided by the state to the people in need as promised in paragraph (2) of Article 22 and Article 23.

Article 30:

- (1) Every person has the right to evenly receive education according to one's competency.
- (2) Compulsory education shall be free.
- (3) The state shall promote lifetime education, vocational education, civic education, and social education.
- (4) The autonomy, professionalism, political neutrality, and independence of universities shall be guaranteed. Details are determined by law.
- ~~(5) The system of education and its management, education finance, and teacher status are determined by law.~~

~~*It is not a general principle nor a subjective right but a mere reference.~~

~~Article 31:~~

- ~~(1) Every person has consumer rights.~~

~~*It is an unnecessarily specific provision. This happens automatically in democracy where market economy is already in place.~~

~~(2) The state shall lead healthy consuming behavior and guarantee consumer movements for improving the quality of production as determined by law.~~

*In market economy, economy flourishes by invisible hands not by the state. This provision is socialistic in that it requires government's control in an economic activity.

This contradicts with the third constitutional principle: establishing a democratic state.

~~Article 32: Labor Rights (Labor Welfare)~~

~~Article 33: Labor Rights (Cooperation and Group Activity)~~

~~Article 34: Labor Rights (Group Activity and Labor Union)~~

*The constitution is a document of general principles not subjective rights. Labor rights should be dealt in separate Labor Acts legislated by the legislature.

~~Article 35: The Right to Live in a Healthy and Appropriate Living Condition~~

~~Article 36: The Right to Healthy Life~~

~~Article 37: The Right to Live in a Comfortable and Clean Environment~~

*The rights overlap with Article 22.

Section 5: Political Rights

*The section should be used as it is written. The section educates Koreans to take a good advantage of voting right and the right of initiative, and thus develop democracy.

Article 43:

(1) Every person has the right to file complaints *directly and indirectly* to public institutions.

(2) Public institutions shall accept complaints, judge, and notify results of the complaints to petitioners.

(3) No one shall receive any disadvantage for exercising this right.

*Article 43 must be added in the new constitution so that people can take an active part in claiming for and developing their own rights.

Section 6: Rights in the Judicial Proceedings

*The section should be used as it is written. In case of South Korea, people suffered from physical punishment and were forced to respond during the judicial proceedings before democratization. In case of North Korea, human rights are always brutally violated and neglected in the judicial proceedings.

Section 7: Restriction of Rights and Its Limitations

Article 51:

*Article 51 must be added in the new constitution to emphasize that human rights protection is the first and most prioritized constitutional principle.

(1) Human dignity, freedom, and rights shall not be neglected for not being specified in the constitution.

(2) Every person's human dignity, freedom, and rights shall be respected as the supreme norm of the society.

Section 8: Duties

*This section should be removed and mingled with the rights described throughout the chapter. It is to present rights and duties must go together.

<Chapter 2: The General Principles and Orders of the Republic of Korea>

Section 1: The General Principles

Article 64:

- (1) The Republic of Korea is a democratic ~~and social~~ state.
- (2) Its sovereignty comes from the Korean people, and the people shall exercise their sovereignty through representative agencies formed by election or referendum.
- (3) All state authorities exercise power for the people. *If a state authority has infringed basic rights, citizens may individually or in groups file a complaint to the Central Personnel Committee or a lawsuit to the court.*

Article 69: Following are the basic tasks of the reunified nation.

- ~~(1) Guaranteeing state independence and construction of political, economic, social, and cultural environments to promote state independence.~~
- ~~(2) Guaranteeing basic rights and freedoms and respecting principles of democratic state based on the rule of law.~~
- ~~(3) Protecting democracy and promoting citizens' participation in democracy.~~

~~(4) Promoting welfare, high quality of life of the Korean people, and practical equality for the people. Promoting changes in economic and social structure and effectively improving economic, social, cultural, and environmental rights.~~

~~(5) Protecting and strengthening the nation's cultural heritage, protecting and preserving the nature and natural resources, and establishing appropriate town and country planning.~~

~~(6) Guaranteeing education, sustainable development of personal ability, and cultural development.~~

~~(7) Promoting gender equality.~~

(1) Protecting fundamental human rights and freedoms of all Koreans.

(2) Constructing national unity for sustainable development in all areas.

(3) Building democracy and promoting all Koreans' participation in democracy.

(4) Establishing constitutional order and the rule of law.

**Lists of constitutional principles.*

Article #: [The Right to Secede]

(1) Secession is impermissible if the major reason for secession is economic hardship or discrepancy.

(2) Secession is permissible if and only if a serious human rights violation occurred mainly due to reunification or the violation is inherent in the system.

(3) The cause of secession and its constitutionality must be evaluated by the Constitutional Court, approved by the absolute two thirds majority of the legislature, pass the referendum with two thirds majority, and promulgated by the President.

<Chapter 4: The Executive Branch>

Section 1: The President

Article 99:

- (1) The President is the chief of state and represents the state to foreign states.
- (2) The President has duties to protect *fundamental human rights*, independence, territorial integrity, state continuity, and the constitution.
- (3) The President is obligated to strive for national unity.

Article 102:

- (1) The President take the oath of office as the following: “I do solemnly swear before the people that I will faithfully execute the duties of the President by observing the Constitution, defending the State, promoting the freedom and welfare of the people, and endeavoring to develop national culture.”

**This Article must be added in the new constitution.*

Article 109:

- (1) The President can issue orders with legal effect within the limited scope of fiscal and economic decision, under a domestic or international conflict, natural disaster, or fiscal and economic risks, only if there is no time to wait for the assembly of the National Assembly.

- (2) The President shall issue legally effective orders only when urgent action is required to defend the state, and the meeting of the National Assembly is impossible.
- (3) After making the orders described in paragraphs (1) and (2) of this article, the President must report to the legislative for its approval without delay.
- (4) If paragraph (3) is not realized, any administrative measure or order immediately lose their effect. In this case, any laws that were amended and abolished due to the administrative measure or order recover their effects.
- (5) The President must promulgate reasons for paragraph (3) and (4) without delay.

*A good example of balancing the President's power with that of the legislature.

~~Article 110:~~

- ~~(1) The President may declare Martial Law only if it is necessary to public order and peace, if the president finds that the state is under state of emergency.~~
- ~~(2) There are emergency martial law and security status martial law~~
- ~~(3) In case of emergency martial law, the President can take extraordinary measures to curb warrant system, the freedom of expression, the freedom of assembly, the freedom of association, and governmental and court authorities.~~
- ~~(4) The President must immediately notify the legislature at the time of declaring martial law.~~
- ~~(5) The President must withdraw martial law under the request of majority of the legislature.~~

~~Article 112:~~

- ~~(1) The President can order pardon, commutation, and reinstatement in pursuant to law.~~

- ~~(2) The President must be consented by the legislature on giving general pardon. The President must be consented by the Chief Justice of the Supreme Court on giving special pardon.~~
- ~~(3) Details of pardon, commutation, and reinstatement are determined by law.~~

~~Article 118:~~

- ~~(1) The President shall not be criminally persecuted during office, unless the president commits rebellion or international conflict.~~

~~Article 119:~~

- ~~(1) The President's position and honorable treatment to the president shall be legislated by law.~~

Article 121:

- (1) The President keeps the Commission of National Unity for deliberating policies in regards to social conflict adjustment and national unity.
- (2) The following details must pass the deliberation by the Commission of National Unity.
1. A master plan for social conflict adjustment and national unity
 2. Important policies related to social conflict adjustment and national unity
 3. The President's sue for dissolution of parties
 4. Conferment of marks of honor
 5. Pardon, commutation, and reinstatement
 6. Further important details related to social conflict adjustment and national unity

(3) The President shall be the chairman of the Commission of National Unity, and the Vice President shall be the vice chairman of the commission.

(4) Configuration and operation of the commission shall be determined by law.

**This article encourages President to make actual actions to assist the nation with constructing the national unity.*

<Chapter 5: The Judiciary>

Article 135:

(1) The judicial power is with the court which is comprised of judges.

(2) The court is composed of the Supreme Court and the lower courts.

(3) The justiceship is determined by law.

Article 138:

~~(1) The Chief Justice of the Supreme Court is appointed by the President with the consent of the legislature.~~

**It is moved to paragraph (1) of Article 139.*

(2) The Justices at the Supreme Court are recommended by Chief Justice of the Supreme Court based on the recommendation by the Central Personnel Committee and appointed by the President with the consent of the legislature.

(3) The rest of the judges at the Supreme Court are appointed by the Chief Justice of the Supreme Court with the consent of the Supreme Court Justices Conference.

Article 139:

~~(1) The tenure for the Chief Justice of the Supreme Court is limited to 6 years, and reappointment is prohibited.~~

~~(2) The tenure for the Justice of the Supreme Court is limited to 6 years, and reappointment is prohibited.~~

(1) All Supreme Court Justices shall have lifetime tenure and be provided with full salary while in office. The Chief Justice is determined by seniority.

(2) Justices at the Supreme Court are appointed permanently to full-time positions, but may be involuntarily dismissed, suspended, transferred or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws.

**The revision is made to reinforce judicial independence.*

(3) Judges at lower courts shall serve for 10 years, and reappointment is permitted.

<Chapter 6: The Constitutional Court>

Article 145:

(1) The Constitutional Court is comprised of 9 Constitutional Judges including the Senior Constitutional Judge.

~~(2) The Senior Constitutional Judge shall be appointed by the President with the consent of the legislature.~~

The Senior Constitutional Judge is determined by seniority.

**Frequent involvement of the President and the legislature in the process may induce political influence within the supposedly-neutral institution.*

- (3) The rest of the Constitutional Judges shall be recommended by the Central Personnel Committee, consented by the legislature, and appointed by the President.

Article 146:

- (1) The Constitutional Court takes charge of the following.

1. If one third of the legislature submits a claim or courts submit a request on constitutionality of the law.

2. Human Rights.

**If no separate Human Rights Court is established, the Constitutional Court will monopolize and be responsible for human rights issues.*

3. Impeachment.
4. Dissolution of parties.
5. Conflict between government institutions, between government institution and local governments, and between local governments.
6. Decision on impossibility of the President's performance of duties requested by the Prime Minister.
7. Decision on constitutional appeal.

(2) The Constitutional Court has the right to review constitutionality of the decisions made by the Supreme Court, if complaints on constitutionality of the decisions are directly filed to the Constitutional Court.

* The paragraph was added to clearly arrange relationship and hierarchy between the Supreme Court and the Constitutional Court.

Article 147:

~~(1) The Senior Constitutional Judge's tenure is limited to 6 years, and reappointment is prohibited.~~

~~(2) The Constitutional Judge's tenure is limited to 6 years, and reappointment is permitted by pursuant to law.~~

(1) The Constitutional Judges have lifetime tenure and full salary.

(2) Judges at the Constitutional Court are appointed permanently to full-time positions, but may be involuntarily dismissed, suspended, transferred or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws.

*The revision is made to reinforce independence and neutrality of the Constitutional Court.

(3) The Constitutional Judges cannot be a member of a party nor participate in politics.

- (4) The Constitutional Judge is not removed from office unless impeached or sentenced to imprisonment.

<Chapter 7: The State of Emergency>

Article #: [Declaration of State of Emergency]¹²⁸

- (1) Any determination that the territory is under attack by armed force or imminently threatened with such an attack shall be made by the legislature. Declaration of a state of emergency requires two-thirds majority votes cast.*
- (2) The determination shall be promulgated by the President.*
- (3) If the situation imperatively calls for immediate action, and if insurmountable obstacles prevent the timely convening of the legislature cannot muster a quorum, the President shall make the determination.*
- (6) The President must withdraw the order of a state of emergency under the request of two thirds majority of the legislature.*
- (4) If the territory is under attack by armed force, and if the competent authorities are not in a position at once to make the determination, the determination shall be deemed to have been made and promulgated at the time the attack began. The President shall announce that time as soon as circumstances permit.*

¹²⁸ *The Basic Law for the Federal Republic of Germany*, art. 115a.

Article #: [The Presidential Power]

- (1) Upon the promulgation of a state of emergency, the power of command over the Armed Forces shall pass to the President.*
- (2) The President's order to use of armed forces shall be rescinded once the danger is removed, or at any time on the demand of the legislature.*

Article #: [The Legislative Power]

- (1) The state shall have the right to legislate concurrently for a state of emergency in pursuant to a law. The laws shall require the consent of the legislature.*
- (2) To the extent required by circumstances during a state of emergency, a federal law for a state of emergency may:*
 - 1. Make temporary provisions concerning compensation in the event of expropriation that deviate from the requirements of establishing an equitable balance between the public interest and the interests of those affected.*
 - 2. Establish a longer time limit for deprivations of freedom in case of arrest. Detainment on suspicion of having committed a criminal offence may be brought before a judge not the day following his arrest. The time, however, shall not exceed 4 days.¹²⁹*

Article #: [The Constitution and the Constitutional Court]

- (1) The Constitution may neither be amended nor abrogated nor suspended in whole or in part by a law enacted by any competent authorities.*

¹²⁹ Ibid., art. 115c, (2).

*(2) Neither the constitutional status nor the performance of the constitutional functions of the Constitutional Court or its judges may be impaired. The law governing the Constitutional Court may be amended by a law enacted by the legislature only insofar as the Constitutional Court agrees is necessary to ensure that it can continue to perform its functions. Pending the enactment of such a law, the Constitutional Court may take such measures as are necessary to this end. Determinations shall be made by a majority of the judges present.*¹³⁰

Article #: [Urgent Bills]

- (1) During a state of emergency, the legislature process shall be governed by the provisions of paragraphs (2) of this Article.*
- (2) The government bills that the government designates as urgent shall be forwarded to the legislature. The legislature shall debate such bills in joint session without delay. Insofar as the consent of the legislature is necessary for any such bill to become law, a majority of the votes shall be required.*¹³¹

*Article #: [Expiry of Electoral Terms and Terms of Office]*¹³²

- (1) Any electoral terms of the legislature due to expire during a state of emergency shall end 6 months after the termination of the state of emergency. A term of office of the President due to expire during a state of emergency, and the existence of his functions shall end 6 months after the termination of the state of emergency.*

¹³⁰ Ibid., art. 115g.

¹³¹ Ibid., art. 115d.

¹³² Ibid., art. 115h.

(2) The legislature must not be dissolved while a state of emergency exists.

Article #: [Repeal of the State of Emergency]¹³³

(1) The legislature may at any time repeal laws enacted by the President. Any measures taken by the government to avert a danger shall be rescinded if the legislature so decide.

(2) The legislature may at any time declare a state of emergency terminated. A state of emergency shall be declared terminated without delay if the conditions for determining it no longer exist.

<Chapter 9: Transitional and Concluding Provisions>

Article 177:

- (1) The constitutional amendment is proposed by a majority of the National Assembly or by the President.
- (2) The constitutional amendment for extension of the President's tenure or change of the President's tenure are not effective to the President at the time proposed.

Article 179:

- (1) The National Assembly must vote within 60 days of the announcement of constitutional amendment, and the vote must meet with two thirds of the National Assembly.
- (2) The Constitutional Court must determine constitutionality of the constitutional amendment. The vote must meet a majority of the justices at the Supreme Court.*

¹³³ Ibid., art. 115.

*The process of constitutional amendment should involve all three branches of government and the people. The constitutional court should assist the process by deciding constitutionality of the amendment and each provision so as to grant legitimacy to the constitution.

(3) Then, the constitutional amendment must be put into referendum within 30 days of the announcement of constitutional amendment. The vote must meet a majority of the electorate.

(4) Constitutional amendment is confirmed if the second paragraph of this article is met, and the President must promulgate the constitutional amendment without delay.

Article 180:

(1) Constitutional amendment which violates the principles of basic rights, *national unity* and the principles of free and democratic republic, *and the principles of constitutional order* is prohibited.

*All four constitutional principles are stated to stress that the constitutional principles must be considered as eternal principles for reunified Korea.

(2) Constitutional amendment is prohibited in a state of emergency.

Bibliography

- “A Changing North Korea.” *Liberty in North Korea*. <http://www.libertyinnorthkorea.org/learn-a-changing-north-korea/>.
- Arendt, Hannah. *Crises of the Republic: Lying in Politics, Civil Disobedience, on Violence, Thoughts on Politics and Revolution*. Harvest Books (1972): 1-252.
- Barber, Nicholas W. “Constitutionalism: Negative and Positive.” *Oxford Legal Studies Research Paper*, no. 7 (2015).
- Beck, Colin J., Gili S. Drori, and John W. Meyer. “World Influence on Human Rights Language in Constitution.” *International Sociology* 27, no. 4 (2012): 483-501.
- Becker, Jasper. *Rogue Regime: Kim Jong Il and the Looming Threat of North Korea*. Oxford University Press (2006): 1-328.
- Beitz, Charles R. *The Idea of Human Rights*. New York: University Press (2011): 1-256.
- Benson, Josh. “The Past Does Not Repeat Itself, but It Rhymes: The Second Coming of the Liberal Anti-Court Movement.” *Law & Social Inquiry* 33 (2008): 1071-1100.
- Brennan, William J. “The Constitution of the United States: Contemporary Ratification.” *U.C. Davis Law Review* 19, no. 1 (1985): 2-14.
- Buergenthal, Thomas. “Modern Constitution and Human Rights Treaties.” *Columbia Journal of Transitional Law* 36, no. 211 (1997).
- Cheol-Soo Kim. *국가는 국민을 위해 존재한다* (State Exists for the People). By EBS (Educational Broadcasting System). November 19, 2016.
- Chilton, Adam and Mila Versteeg. “Do constitutional rights makes difference?” University of Chicago Coase-Sandor Institute for Law & Economics Research Paper 694 (2014): 1-62.
- Choe, Sang-Hun and Rick Gladstone. “North Korea’s No. 2 Diplomat in London Defects to the South.” August 17, 2016. http://www.nytimes.com/2016/08/18/world/asia/north-korea-defector-thae-yong-ho-britain.html?_r=0.
- Court of Korea. 2016. <http://www.scourt.go.kr>.
- Das, Jatindra Kumar. *Human Rights Law and Practice*. Delhi: PHI Learning (2016): i-702.

- Gale, Alastair. "North Korea's Largest Recent Defector Group Arrives in South Korea." *The Wall Street Journal*. April 8, 2016. <http://www.wsj.com/articles/north-koreas-largest-recent-defector-group-arrives-in-south-korea-1460113227>.
- Gause, Ken E. "The Role and Influence of the Party Apparatus." In *North Korea in Transition: Politics, Economy, and Society*. New York: Rowman & Littlefield Publishers, Inc. (2013): vii-312.
- Grimm, Dieter. "The Basic Law at 60: Identity and Change." *German Law Journal* 11, no. 1. (2010): 33-46.
- Gutmann, Amy and Dennis Thompson. *Why Deliberative Democracy?* Princeton University Press (2004): 1-232.
- Ham, Chaibong. "South Korea's Miraculous Democracy." *Journal of Democracy* 19, no. 3 (2007): 128-142.
- Howard, A.E. Dick. "The Indeterminacy of Constitutions." *Wake Forest Law Review* 31 (1996): 384.
- "International Covenant on Civil and Political Rights." *United Nations Human Rights Office of the High Commissioner*. December 16, 1966.
- James Madison. "Federalist No.48". In *The Federalist Papers*. Ed. Clinton Rossiter. New York: New American Library (1961).
- Jeon, Soo-Young. "The Constitutional Court over the Supreme Court (헌법재판소, 대법원 뒤흔들기)." Seoul: Ilyo Seoul. June 18, 2012. <http://www.ilyoseoul.co.kr/news/articleView.html?idxno=62943>.
- "Juche Ideology." Columbia Law. http://www2.law.columbia.edu/course_00S_L9436_001/North%20Korea%20materials/3.html.
- Kant, Immanuel. *Lecture on Ethics*. Hackett Publishing Company, Inc. (1980): 1-269.
- Keith, Linda Camp, C Neal Tate, and Steven C. "Is the Law a Mere Parchment Barrier to Human Rights Abuse?" *The Journal of Politics* 71, no. 2 (2009): 644-660.
- Keith, Linda Camp. "Constitutional Provisions for Individual Human Rights (1977-1966): Are They More than Mere Window Dressing." *Political Research Quarterly* 55, no. 1 (2002): 111-143.
- Kim, Cheol-Soo Kim. "A Research on the Reunification Constitution Draft." *The National Academy of Sciences* 54, no. 2 (2015): 1-81.

- Kim, Chulsu Kim. "Parties and Factions in Korean Politics." University of Massachusetts (1973): 1-355.
- Kim, Moo-sung. The JTBC Newsroom. By Sohn Suk-hee. JTBC, November 24, 2016.
- Kim, Seung-Dae. "Revision of Constitution and Unification of Korea (Verfassungsänderung und Wiedervereinigung)." *Korean Academy of Public Law (한국공법학회)* (2010): 135-154.
- Kim, Sung-Min. "Is Ministry of Unification Investigating on North Korean Human Rights without North Korean Refugees?" *Chosun Ilbo*. September 28, 2016.
<http://pub.chosun.com/client/news/viw.asp?cate=C03&mcate=M1007&nNewsNumb=20160921535&nidx=21536>.
- Kommers, Donald P. "German Constitutionalism: A Prolegomenon." *Scholarly Works Paper* 98 (1991): 837-873.
- Law, David S. and Mila Versteeg. "Sham Constitution." *California Law Review* 101, no. 4 (2013): 863-952.
- Lee, Myung-Jae. "Juche Ideology." *Dictionary of North Korean Literature*. 국학자료원 (1995).
- Madison, James. *Speech in Virginia Convention*. December 2, 1829.
- "Major Duties." *Ministry of Unification*. <http://eng.unikorea.go.kr/content.do?cmsid=1830>.
- McIlwain, Charles Howard. *Constitutionalism: Ancient and Modern*. Liberty Fund Inc. (2010): 1-168.
- Megret, Frederic. *International Human Rights Law Theory* (2010).
<https://ssrn.com/abstract=1539591>
- Melton, James Melton. *Do Constitutional Rights Matter? The Relationship between De Jure and De Facto Human Rights Protection*. London: University College London (2014): 1-39.
- Ministry of Gender Equality and Family.
http://www.mogef.go.kr/korea/view/intro/intro01_02.jsp.
- Moon, Rennie J. and Jeong-Woo Koo. *Global Citizenship and Human Rights: A Longitudinal Analysis of Social Studies and Ethics Textbooks in the Republic of Korea*. The University of Chicago Press (2011): 574-599.
- Murray, John L. "The Influence of the European Convention on Fundamental Rights." *Fordham International Law Journal* 33, no. 5 (2011): 1388-1422.
- National Assembly of the Republic of Korea. 2016. <http://www.assembly.go.kr>.

- National Human Rights Commission Act. The Republic of Korea (2001).
- Nickel, James W. *Making Sense of Human Rights*. Wiley Balckwell (2007): 1-274.
- Pearson, James. "North Korea's Black Market Becoming the New Normal." *Reuters*. October 29, 2015. <http://www.reuters.com/article/us-northkorea-change-insight-idUSKCN0SN00320151029>.
- Pernice, Ingolf. "Constitutional Law Implications for a State Participating in a Process of Regional Integration: German Constitution and Multilevel Constitutionalism." *German Reports on Public Law* (1998): 40-66.
- Pinelli, Cesare. "The Combination of Negative with Positive Constitutionalism in Europe: The Quest of a 'Just Distance' between Citizens and the Public Power," *European Journal of Law Reform* 13, no.1(2011): 31-39.
- Plattner, Marc F. "Liberalism and Democracy: Can't have One Without the Other." *Foreign Affairs* 77, no. 2 (1998).
- Ray, Gullett Carlos. "Reverse Discrimination and Remedial Affirmative Action in Employment: Dealing with the Paradox of Nondiscrimination." *Public Personnel Management* 29, no. 1 (2000): 107-118.
- Shulztiner, Doron and Guy E. Carmi. "Human Dignity in National Constitutions: Functions, Promises, and Dangers." *The American Journal of Comparative Law* 62, no. 2 (2014): 1-43.
- Steinberg, David I. "The Evolution of the Political Party System and the Future of Party Politics in the Republic of Korea." In *A Turning Point: Democratic Consolidation in the ROK and Strategic Readjustment in the US-ROK Alliance*. Honolulu, HI: Asia-Pacific Center for Security Studies, 2005.
- Steinberg, David I. and Myung Shin. "Tensions in South Korean Political Parties in Transition: From Entourage to Ideology." *Asian Survey* 46, no.4 (2006): 517-537.
- Sunstein, Cass R. "Constitutionalism after the New Deal." *101 Harvard Law Review* 421 (1987): 503: 421-510.
- Sunstein, Cass R. *Designing Democracy: What Constitutions Do*. New York: Oxford University Press (2002): 1-292.
- Terry, Sue Mi. "North Korea's Strategic Goals and Policy towards the United States and South Korea." *International Journal of Korean Studies* 67, no. 2 (2013): 63-92.
- The Basic Law for the Federal Republic of Germany*. Translated by Christian Tomuschat, David P. Currie, and Donald P. Kommers. Deutscher Bundestag. 2012.

The Constitution of the Republic of Korea (1987).

The Constitution of the Federal Republic of South Africa (1996).

“The Papers of James Madison.” Ed. William T. Hutchinson et al. *The Founders’ Constitution* 1, Ch. 14, Doc. 47 (1977).

The Socialist Constitution of the Democratic People’s Republic of Korea (1972).

The Workers’ Party Covenant, Democratic People’s Republic of Korea (2010).

“The World Fact Book 2013-14.” *Central Intelligence Agency*. 2013.
<https://www.cia.gov/library/publications/the-world-factbook/>.

Tocqueville, Alexis de, Harvey C. Mansfield, and Delba Winthrop. *Democracy in America*. Chicago. University of Chicago Press (2000):1-722.

Understanding North Korea 2016 (북한오해 2016). Ministry of Unification (2016).

Verma, J. S. “Human Rights Redefined: The New Universe of Human Rights.” *Journal of the NHRC* 1 (2002): 1-17.

Weber, Max. “Politics as a Vocation.” *Essays in Sociology* (1946): 77-128.

Wellman, Christopher Heath. “Debate: Taking Human Rights Seriously.” *The Journal of Political Philosophy* 20, no. 1 (2012): 119-130.

Yoo, Sinmo. “South Korea Reaching 30,000 North Korean Refugees.” *Kyunghyang Ilbo*. November 13, 2016.
http://news.khan.co.kr/kh_news/khan_art_view.html?artid=201611131600031&code=910303.

488 U.S. 469 (1989), 109 S.Ct. 706.