Hybrid Constitutionalism to Mainstream Human Rights in a Unified Korea

by

David Moon

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Abstract

Amidst the global wave of democratization, modernization, and economic engagement during the 1980s and 1990s, the traditional tenets of constitutionalism have proven to be unwieldy dogma for States undergoing periods of rapid transition. In order to retain the administrative capacity to steer – rather than merely adapt to – political and social change, numerous transitioning States have adopted a new paradigm of constitutionalism, namely transitional constitutionalism, characterized by a centralized and streamlined structure of governance. However, in many instances, including Korea’s post-division transitional history, this model has demonstrably undermined fundamental human rights protections. In this thesis, I propose a hybrid constitutional paradigm for unification in Korea (another form of State transition) which seeks to balance the dual objectives of effective governance and human rights protection. I do so by examining and critiquing the core principles of traditional and transitional constitutionalism, outlining the human rights issues that the unified Korea will likely confront in its constitutional trajectory based on an analysis of Korea’s political, social, cultural, and constitutional history, and finally proposing a hybrid model of constitutionalism that utilizes an institutional approach to prevent violations of human rights in the unified Korea while allowing the State to retain governmental efficiency during transition.
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Chapter 1

Introduction

While the question of reunification in Korea has constantly been a topic of controversy in the divided peninsula for the past half-century, advocates as well as opponents of Korean unification commonly agree that the prospect of a new unified Korean State is not far-fetched, given the continued conflict between North and South Korea, weakening economic ties between China and the Kim regime, increased economic sanctions posed upon North Korea by the United Nations, and the ever-present hope for reunification shared by many Koreans today.

However, the question of which constitutional formula Korea should opt to implement upon reunification is an issue that is far from being settled. On the one hand, Korea has the option of implementing a traditional western model of constitutionalism, building on its demonstrated successes in the United States, Canada, Western Europe, as well as in South Korea itself. However, it has been proposed and arguably proven in contemporary legal scholarship that due to its lack of features which accommodate the political, societal, and cultural realities of the host State, the arbitrary implementation of the western model of constitutionalism in transitioning societies has lead to inefficient or corrupt governance, political/legal discord, and ultimately, an unsustainable

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constitutional system.\(^2\)

On the other hand, Korea may choose to implement a transitional model of constitutionalism – a more recent model of constitutionalism that originated from newly developing democratic societies in Eastern Europe, South Africa, and East Asia during the 1980’s and 90’s.\(^3\) This model aimed to provide a flexible and organic solution to the issues arising from transition in the host State such as economic instability, lack of political / ethnic identity, hasty or non-organic democratization, and inefficient governance.\(^4\) Since any sustainable constitutional model that aims to provide a structural framework for a unified Korea must be able to accommodate the potential conflict caused by the clash of the local traditions – or the political and social realities – of both Koreas upon reunification, the transitional model of constitutionalism will likely be a more practical model for Korean unification than its western counterpart.

However, an assessment of which constitutional model will be more efficient for Korean reunification cannot be the end of the inquiry: from a human rights perspective, the transitional model and its emphasis on empowering the State to address transitional issues leaves unsolved a challenging scenario for those constitutional scholars who

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\(^4\) See in general, Katz, Constitutionalism, supra note 2; Katz, Teacher-Training Project, Ibid., at 10-13.
argue for a purely organic model of constitutionalism, namely, “If Korea’s constitutional model allows the self-aggrandizement of government powers in order to address social and political issues upon reunification, will this create and perpetuate the risk of systemic human rights violations?”

For example, an analysis of South Korean history will reveal (despite the high standards of substantive human rights protections in its constitution) a pattern of human rights violations perpetrated by a government that relies on the pressing needs of political transition to justify its policies of centralization, followed by civil / student movements that are swiftly smothered by the succeeding president. While democratic restructuring and the promulgation of human rights were eventually achieved through the social movements of a growing “middle class” comprised of students, intellectuals, and religious leaders, this victory was achieved only after the Korean government had perpetrated mass and systemic human rights violations.⁵ Similarly, after isolating itself from the international community at the end of the Korean War, North Korea developed its own extremist Juche (self-reliance) doctrine of nationalism in order to grant itself limitless legislative and executive powers.⁶ Generations of state oppression and indoctrination of the Juche doctrine bred a voiceless, politically unaware citizenry that was not only deprived of, but hostile towards “imperialist” notions of property ownership and civil or political rights.

⁵ Refer to the Jeju Uprising, the Yosu-Suncheon massacres, and the Gwangju Democratization Movement described in Chapter 3 re: political developments in South Korean Constitutionalism.
⁶ Refer to North Korean leadership’s utilization of extreme nationalism (or “Juche”) to transfer all political power to military seats (Chairman of the Central Military Commission, First Chairman of the National Defence Commission of North Korea, the Supreme Commander of the Korean People’s Armydescribed in Chapter 3 re: political developments in North Korean Constitutionalism.
Furthermore, in both countries, shifts toward extreme nationalism were reinforced by
the common experience of Japanese colonization, civil war, and further foreign
intervention, which led to an unprecedented national demand for political, military, and
economic independence from external powers. To the extent that such local realities
informed subsequent legislation which effectively satisfied the need for centralization,
political unity, and effective governance, it can be said that Korean constitutionalism
during this period was indeed organic. However, these organic and often effective
policies resulted in gross human rights violations that occurred on a systematic level
throughout much of post-division Korean history.\(^7\)

Accordingly, I argue that in some cases, the strict implementation of the transitional
paradigm in a unified Korea will only reinforce existing local traditions that are
detrimental to human rights protections; without normative guidance from a
constitutional text, the human rights violations that occurred during Korean history will
only repeat upon unification. Without the need to look too far into the future, we can
already see evidence of this in the intra-national “unification formula race” in which
both Koreas have engaged from as early as the 1950 Korean War, wherein both
governments attempted to propose potential solutions to the issue of reunification.
While both sides did suggest unification models that were more contextually sensitive
and thus more feasible than those suggested by the proponents of the traditional model
of constitutionalism, they still failed to address critical human rights issues and focused

\(^7\) See McDorman, *Constitutional Structures*, supra note 2. After noting that constitutions were expected
to carry out a broad array of functions in developing countries, McDorman and Young conclude at 107
that “the gap between constitutional human rights provisions and the reality of their observance may be
explained, in part, by the fact that within the four countries examined, the written constitutions have as
their primary purposes goals such as organization, ideology, and unification which are inconsistent with,
or do not provide encouragement for, constitutional human rights protection.”
only upon the abovementioned issues of political, national, and ethnic unity; economic development; and administrative capacity.\(^8\)

It is beyond doubt that there will once again be great demand for effective governance and political/economical development upon unification. Given the overall history of both Koreas, it is likely that the transitional paradigm of constitutionalism will only exacerbate previous or continuing human rights issues, and leave the State without any practical human rights protection mechanisms or processes that are otherwise explicitly embodied in the constitutional text. Ironically, the new middle class that will be responsible for championing human rights in the new unified State will likely be comprised of a politically oppressed former North Korean populace that lacks any exposure to democratic practices or notions of individual rights. In such scenarios where both the State and its citizens are unlikely to take the lead in advocating individual rights, the creation of a constitution based on pre-existing local traditions will only reproduce or even exacerbate existing human rights concerns. Therefore, to look to local traditions in such periods of transition is, to a certain degree, inherently paradoxical, since said transition is occurring precisely because the nation is trying to disassociate itself from oppressive, ineffective, or conflict-inducing local traditions.

\(^8\) For example, the Sunshine Policy, Kim Dae-jung’s “three-step formula,” South Korean proposals to establish a Korean Economic Community, and North Korean references for Pyongyang to adopt the Chinese free-market model all focus on structuring policies and institutions to ease the economic burden of unification. On the other hand, while North Korea’s *Juche* approach to unification emphasizes political and ethnic unity and independence throughout the unification process, the “four plus two” solution proposed by Henry Kissinger aimed to promote political multilateralism and the international interest in Korean unification. Even though the existing scheme of proposals could eventually benefit human rights protection through gradual liberalization and democratization, the lack of explicit emphasis on human rights protection during the constitution-making process would render the resulting constitution void of human rights protections in the event of unification. And even if protections were to be guaranteed by explicit provisions in the constitution, the lack of political initiative and the structural or institutional support required for its enforcement is bound to render any language devised to protect human rights ineffective.
Admittedly, a rigid application of the traditional model of constitutionalism will likely lead to the creation of an unsustainable constitutional structure in the unified Korea, as the State will find that the tenets of civil empowerment and the simultaneous delegation of State power embodied in the traditional model of constitutionalism are incompatible with Korea’s historical proclivity towards centralization and efficient administration. However, it is exactly in such situations where local tradition and historical State practice are unfavorable to the protection of human rights that Korea’s constitutional model should not compromise principle for the sake of administrative efficiency. The solution lies in creating a balanced constitutional framework that will be both sustainable (by accommodating Korean political realities) and principled (by protecting human rights through normative standard-setting). My aim is to promote such balance between the traditional and transitional models of constitutionalism, and I argue that this is best achieved through a hybrid model which is comprised of the key concepts of both traditional and transitional constitutionalism. By applying this hybrid model, I will propose constitutional mechanisms that will set human rights at the heart of the unification agenda.

This paper will assume a Korean unification scenario.⁹ I will seek to answer the following questions:

(a) What is the traditional model of constitutionalism and how has it contributed to

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⁹ Many scholars argue that unification will likely take place through the “absorption” of North Korea by the South, as in the historical precedent of the West and East Germany. This paper is applicable to such a scenario, as regardless of the form of unification, the local traditions and cultures of both countries must be taken into account if Korea is to create a sustainable culture of constitutionalism.
human rights? What are its limitations in addressing States in transition?

The traditional model of constitutionalism has championed human rights in the West by establishing the principles of popular sovereignty, limited government, the rule of law, and judicial independence as explicit requirements in the text of a constitution, often in the form of a Charter or Bill of Rights. The clear protections required by the traditional model of constitutionalism serve as a measuring rod by which government is held accountable by society. In addition, the application of the traditional model of constitutionalism encourages society to establish government and grassroots institutions which are mandated to keep the State accountable and ensure that its policies do not violate constitutional and statutory human rights provisions.

By nature, the human rights elements of the constitution are inseparable and co-dependent: The failure to recognize and practice the provisions described above (i.e., limited government) will necessarily lead to the violation of another (i.e., judicial independence). Therefore, especially in periods of transition, governments lacking the constitutional infrastructure and the various institutions required to maintain such a structure struggle to uphold an artificial and cumbersome constitution that is divorced from its political culture, history, and practice. In the context of Korean unification, it is likely that an unwieldy, non-organic constitutional text that lacks infrastructural and institutional human rights support mechanisms will fail to provide effective protection of civil and political rights.
(b) What is transitional constitutionalism and how does it remedy the limitations of traditional constitutionalism? How can it be problematic in the Korean Unification context?

The need for a transitional model of constitutionalism arose during the rapid succession of government collapses in Eastern Europe, the Soviet Union, and South Africa during which post-colonial or communist regimes recognized the unfeasibility of maintaining traditional constitutional values while adjusting to rapid political transitions. The changing landscape of transition required the government to adopt and engage in a form of centralized administrative practice that was often antithetical to the text of the constitution, which had been established on the values of traditional constitutionalism. For example, the government would not only modify the powers of the judicial, executive, and legislative branches, but also blur the boundaries between them in order to administer streamlined and sensitive policies, often using juridical processes to enforce or create law.\(^\text{10}\) In addition, the transitional model placed an emphasis on institutionalizing national initiatives or legislation in order to address the issues arising from transition, and bestowed broad discretionary powers upon these institutions execute legislation in an effective manner.\(^\text{11}\) By doing so, the transitional model of constitutionalism offered a pragmatic and organic approach to constitutionalism which empowered the government to address the

\(^{10}\) Refer to sections 3-A and B of Chapter 2, “Modified Legislative / Judicial Powers to Further National Initiatives” for examples.

\(^{11}\) Refer to section 3-D of Chapter 2, “Institutionalization of State Initiatives” for examples.
disparity between constitutional principle and reality during transition in a timely manner and provided the State with the necessary degree of flexibility and discretion to alter constitutional provisions that were irrelevant to its needs, its history, and its political practice. The experience was, in many cases, positive, as it allowed the government to retain administrative efficiency and effectiveness while encouraging the growth of an organic constitutional structure.

On the other hand, the emphasis of transitional constitutionalism fell more upon enhancing the efficiency and flexibility of the administration and less upon recognizing constitutional principles of governance that could limit the potential for State abuse of power. As a result, formerly dictatorial administrations would rely upon the need for fast and effective government to unilaterally empower themselves to override civil and political barriers to State powers – including human rights protections. In the context of Korean unification, I argue that in light of the defined historical pattern of human rights violations during transition and the consistent government emphasis upon centralization (which I will attempt to demonstrate in the following section), the application of a purely transitional and organic constitutional model without the safeguards of constitutionally entrenched human rights provisions and relevant institutions will be detrimental, if not damning, to the protection of human rights in Korea.

(c) What are the key characteristics of South and North Korean constitutionalism? What will be the resulting key priorities of the Unified Korean nation during
transition? What are the prospects for meaningful human rights protection during transition if a purely traditional or transitional constitutional model were adopted?

Initially, South Korea adopted the traditional model of constitutionalism, while North Korea created its own socialist constitutional model. Despite the disparity in their respective political and legal origins, the common transitional events of Japanese colonial rule, the Korean War, and constant mutual rivalry led to the creation of similar constitutional features inherent in the State practices of both Koreas. For example, in order to adapt to the perils of transition, both Koreas placed a strong emphasis on national identity, political unity, and economic strength.\(^{12}\) To achieve these goals, the Korean governments implemented centralized and fluid administrative policies which, in effect, blurred the lines between the executive, legislative, and judicial branches.

In the event of another transition – i.e. unification – it is likely that the unified Korean government will adopt a variation of the same constitutional formula it has relied upon in the past. Especially in light of the lack of political and national unity between both Koreas, coupled with the economic burden posed by North Korea, there will be a strong incentive for the new Korean government to opt for administrative efficiency over strict adherence to constitutional principles during and after unification. In such an event, a purely traditional model of constitutionalism would be impractical as the hurdles to administrative

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\(^{12}\) Refer to the political developments of both Koreas described in Chapter 3.
efficiency presented by human rights principles (such as limited government) in the text of the constitution would discourage the government from complying with said principles. On the other hand, strict adherence to the transitional model of constitutionalism would only reinforce the existing human rights problems ingrained within Korean political practice. I conclude that the prospects for effective and sustainable human rights protection are dim if either a purely traditional or transitional approach were implemented in Korea.

(d) What is the Hybrid Model of Constitutionalism? What are the defining features of this hybrid model?

The hybrid model aims to bridge the gap between the traditional and transitional model of constitutionalism by allowing governments to effectively adjust to transition while maintaining the basic provisions of human rights protections intact within the constitution. While the text of the constitution will entrench minimum provisions of human rights principles such as equality, civil, political, social, and economic rights, the execution of these rights will be undertaken by an integrated network of institutions mandated to monitor, administer, and interpret government compliance with human rights provisions. Various tiers of accountability will be integrated between grassroots, governmental, and international institutions – each representing different segments of society and the State – to ensure that all voices are reflected throughout and after unification. The participatory concept of constitutional change found in the transitional model of constitutionalism will be a crucial element of this model, as it is only
through active participation that the Unified Korean government and its people can contribute to the protection of human rights, while successfully sustaining a principled, yet organic model of constitutionalism.
Chapter 2
The Traditional and Transitional Model of Constitutionalism

(1) Traditional Model of Constitutionalism: Definition, Elements and Relation to Human Rights

While it would seem appropriate to define the term “constitutionalism” at the outset before engaging in an analysis of what constitutes “traditional constitutionalism,” the following observations must be considered when attempting to define constitutionalism:

First, there is an underlying consensus in comparative constitutional scholarship that there is no consensus on the meaning of constitutionalism; Second, even if there is a commonly assumed definition of constitutionalism in contemporary legal literature, the definition has, due to the efforts of comparative scholars who had observed the various forms of constitutionalism throughout history and across the globe, been refined to the degree that there is both a temporal and spatial divorce between the common understanding of constitutionalism and its more nuanced definitions or elements. With these considerations in mind, I assume for the purposes of this thesis that constitutionalism and “traditional constitutionalism” both share the following definition:

“Constitutionalism … enshrines respect for human worth and dignity as its central principle. To protect that value, citizens must have a right to political participation, and their government must be hedged in by substantive limits on what it can do, even when perfectly mirroring the popular will.”

13 Katz, Constitutionalism, supra note 2, at 9.
14 The Oxford English Dictionary briefly defines constitutionalism as “adherence to a constitutional system of government.” Even assuming this definition, it can be inferred thus that the form of constitutionalism will be as fluid and varied as the number of differing models of constitutional government.
15 Walter F. Murphy, “Constitutions, Constitutionalism, and Democracy,” in Constitutionalism and
The above definition provided by constitutional scholar Walter F. Murphy encapsulates the Western understanding of the essence of constitutionalism. While it finds its roots in the Enlightenment, Christianity, and Greek tenets on democratic governance, the principles and elements currently associated with the Western notion of constitutionalism were developed more recently in the wake of the 1776 American Revolution, when American colonists, fearful that it would “re-establish a domestic [European] version of imperial authority: distant, unresponsive, and yet overly powerful,”17 established a set of principles that purported to limit and bind the government to the will of the people in order to ensure that the State was a nearby, responsive, and accountable power that was subject to written law.

In many Western countries, these principles provided the foundation of what I will hereby refer to as the “traditional model of constitutionalism” or “traditional constitutionalism.” It is a deliberate approach to shaping State power for the purpose of protecting human rights by limiting the State’s powers while keeping the State’s administrative capacities intact. While arguably all models of constitutionalism will seek to accomplish this balance to varying degrees, the true advocate of the traditional model will always focus on the former objective.

Specifically, the traditional model has been able to offer protection for the concept and

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16 For the purposes of this thesis, as well as per contemporary understanding, I define the “West” as including Europe, the United States of America, and Canada.
practice of human rights from oppressive State action by entrenching its principles (described below) in a written constitution. However, it is beyond the scope of this thesis to engage in a lengthy discussion of the substantive merits of each of the element described above; rather, this thesis merely recognizes that these principles are embedded within Western constitutionalism, and for this purpose, a brief overview of each element is sufficient.

A. Popular Sovereignty

First is the principle of popular sovereignty, or the concept that the legitimacy of the State is a product of the congregated will or consent of the people. I argue that this is the cornerstone of a constitutional structure that promotes human rights, since it is only when government derives its "just powers from the consent of the governed"\(^\text{18}\) that it finds incentive to (a) create explicit constitutional human rights provisions, i.e., civil, political, social, and economic rights, and (b) voluntarily restrict centralization through limited government, even at the cost of effectiveness and administrative capacity. In practice, popular sovereignty is achieved through democratic processes and institutional mechanisms which place power in the hands of the people via either positive allotment of power to the people or negative restriction of government power by the people.

Professor Donald S. Lutz, in his analysis of how Americans applied this doctrine during the period of territorial struggle before the civil war, offers a helpful description of how popular sovereignty should be understood and practiced:

\(^{18}\) Declaration of Independence (U.S. 1776), found online at: <http://www.ushistory.org/declaration/document/index.htm>, at paragraph 2.
“To speak of popular sovereignty is to place ultimate authority in the people. There are a variety of ways in which sovereignty may be expressed. It may be immediate in the sense that the people make the law themselves, or mediated through representatives who are subject to election and recall; it may be ultimate in the sense that the people have a negative or veto over legislation, or it may be something much less dramatic. In short, popular sovereignty covers a multitude of institutional possibilities. In each case, however, popular sovereignty assumes the existence of some form of popular consent, and it is for this reason that every definition of republican government implies a theory of consent.”

The above concept of popular sovereignty is critical to the concept and practice of human rights in the traditional model of constitutionalism, as it serves to establish the consent of the people as the prerequisite of legitimate governance and renders government action without popular consent arbitrary.

B. Limited Government

Popular sovereignty naturally invokes the concept of limited government, the second principle of traditional constitutionalism. According to this principle, government intervention in the rights of the individual is restricted by law, pursuant to the spirit of a written constitution.

The limitation of government is predominantly practiced through the distribution of

20 For more readings on the importance of popular sovereignty in constructing an enduring constitutional order, see Bruce Ackerman, We the People: Foundations (1991); and The Future of Liberal Revolution (1992).
21 The closely related concept of small government, or minarchism, goes further to define the perfect government as one which confines itself to foreign policy, defence, and law while leaving other activities to local government, companies, and individuals.
core government powers, which ensures that the various powers of the state are not
vested upon a unitary organ. Such distribution takes two forms: horizontal and vertical.
A horizontal distribution of powers, also known as the principle of separation of powers,
allocates the functions of government into separate and independent branches. The
rationale for doing so is well summarized by James Madison: “But the great security
against a gradual concentration of the several powers in the same department consists in
giving those who administer each department the necessary constitutional means and
personal motives to resist encroachment of the others.”

Vertical distribution, often
practiced through federalism or a similar constitutional mechanism that divides power
between various tiers of government, may also serve to limit government powers by
assigning different spheres of sovereignty between different levels of government, i.e.
central, regional, and local.

C. Rule of Law and Judicial Independence

Because popular sovereignty is only possible when both the government and the people
adhere to a legal process which distributes and defines power and authority,
constitutionalism must be, in essence, a “legal process that transforms power into a
legally specified legitimate authority.” As such, the definition of constitutionalism
absolutely necessitates adherence to a legal process. In this way, the rule of law acts as
the adhesive that binds government to the principle of popular sovereignty – it provides
that “decisions should be made by the application of known principles or laws without

23 Daniel S. Lev, “Social Movements, Constitutionalism and Human Rights: Comments from the
Malaysian and Indonesian Experiences,” in Constitutionalism and Democracy: Transitions in the
Contemporary World (Douglas Greenberg et al. eds., 1993) [hereinafter, Lev, Social Movements], at 140.
the intervention of discretion in their application."^{24} Ultimately, the principle of the rule of law is intended to safeguard the people from both arbitrary governance and majoritarian rule.

In addition, traditional constitutionalism necessitates that the “legal process” mentioned above be embodied into a legally specified authority. While as a whole, the “legal process” can be construed to capture the holistic process of making law, executing it, and determining its substantial and procedural legitimacy – these roles are traditionally endowed in the legislative, executive, and judicial branches respectively – the legally-specified authority typically associated with the administration of the legal process in traditional constitutionalism is the judiciary. Furthermore, Western constitutionalism recognizes that for the rule of law to be a valid and operational principle, the courts must be kept “secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.”^{25}

Practically, judicial independence is often evidenced by life tenure or long tenure, an independent judicial selection process, and financial independence from the executive branch of government. Another manifestation of judicial independence is the practice of judicial review, through which courts are able to check and refine the powers of the legislature and executive through its decisions.^{26}

\footnotetext{24} Black's Law Dictionary (Fifth Edition, 1979), at 1196.

\footnotetext{25} Valente v. The Queen, [1985] 2 S.C.R. 673 at para. 3 [Valente]. The principles outlined in Valente are considered to be the minimum requirements for judicial independence in Canada.

D. Protection of Human Rights

Not only does traditional constitutionalism protect human rights indirectly / structurally (through the organization of government, the rule of law, and popular sovereignty discussed above) but directly / substantively by setting out enumerated individual rights that the government is prohibited from encroaching upon, as well as rights that the State is positively obligated to administer.

Traditional constitutionalism originally viewed human rights as a negative right, whereby the government is precluded from violating certain rights or encroaching upon set protections. Ronald Dworkin goes so far as to define constitutionalism essentially as “a system that establishes individual legal rights that the dominant legislature does not have the power to override or compromise.” More recently, however, traditional constitutionalism also recognizes that the government can be charged with various positive obligations to further individual rights. For example, the French Constitution of 1958 states that France “shall ensure the equality of all citizens before the law,” while the Canadian Charter of Rights and Freedoms in the Canada Act 1982, 1982, c. 11 (U.K.), also provides various rights such as the ones found in section 23(1) which requires provincial governments to ensure that French-speaking or English-speaking minorities have access to education in their preferred language when communities are sufficiently large. Also, the South African Constitution of 1996 has recognized that

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28 Welfare, education, economic rights have been recognized as positive obligations in various western States.
29 French Constitution 1958, Article 1. (emphasis mine)
30 Canadian Charter of Rights and Freedoms 1982, section 23(1).
municipalities have a legal obligation to promote participation in regional development initiatives and programs.\textsuperscript{31}

E. Self-Determination

While many states do not recognize the explicit right to self-determination in their constitutions, it can be argued that the traditional understanding of constitutionalism has been modified to include the right of the people to choose, change, or terminate their political or national affiliation.\textsuperscript{32} For example, the constitutions of countries such as Austria, Belarus, Ethiopia, France, and Singapore have express or implied rights to secession, while the Supreme Court of Canada also confirmed in principle the possibility of secession in the \textit{Reference re Secession of Quebec}.\textsuperscript{33}

\textbf{(2) Limitations of the Traditional Paradigm in Transitioning States}

While the concept of traditional constitutionalism became a firm foundation for the establishment of human rights in the West, its application abroad was beset by various practical concerns. Building upon the triumph of American democracy and

\begin{footnotesize}

\textsuperscript{32} Recent scholarship suggests that the international legal obligation to protect the collective rights of minorities translates into a domestic legal obligation to give force to internal self-determination rights, as well as the right of colonized people to formal political independence. \textit{See Abdullahi Ahmed An-Na`im}, \textit{The National Question, Secession and Constitutionalism: The Mediation of Competing Claims to Self-Determination} in Constitutionalism and Democracy: Transitions in the Contemporary World (Douglas Greenberg et al. eds., 1993).

\textsuperscript{33} \textit{Reference re Secession of Quebec}, [1998] 2 S.C.R. 217. The Supreme Court stated that the international right to secede was not applicable to the situation in Quebec, as it pointed out that international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their ‘parent’ state. However, it did hold that such a right could be exercised through negotiation.
\end{footnotesize}
constitutionalism in the 18th century, transitioning governments in East Central Europe, East Asia, and South Africa during the 1980s and ’90s struggled to disassociate themselves from decades if not centuries of political upheaval and turmoil and sought to replace their former political traditions with democratic practices, written constitutions, and westernized institutions. During this period, the traditional model of constitutionalism was effectively sold as the West’s greatest commodity to these newly emerging democracies. However, implementing this model – which effectively restricted the self-aggrandizing tendencies of the State by pitting its organs against each other – proved to be unwieldly and cumbersome, especially in the context of transition, when the State was called on to address dramatic social and political shifts in a timely and effective manner.

Naturally, these host countries discovered to their dismay that the American formula of constitutionalism was not “working” for them. They had simply assumed that the traditional model of constitutionalism could be applied as a universal formula to address their unique political, social, economical, and cultural nuances. However, they failed to realize that they were attributing the success of the traditional model of constitutionalism in the United States to the formula itself without considering the specific set of American social and political factors which created demand for such a formula in the first place, and in so doing failed to recognize that the problems the new

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34 For a general overview of the transition to democracy in Eastern and Central Europe, see Jon Elster Constitutionalism in Eastern Europe: An Introduction, 58 U. Chi. L. Rev. 555, 557 (1991); and Democratization in Central and Eastern Europe (Mary Kaldor & Ivan Vejvoda eds, Printer 1999)(2002).  
35 See in general, Yeh, Asian Constitutionalism, supra note 3.  
37 To see the particulars of how the features of traditional constitutionalism negatively impacted transitions in newly emerging democracies, refer to the limitations of traditional constitutionalism listed in Chapter2, (2) A – E below.
host States were trying to solve were completely different from the set of problems that the United States had confronted. I argue that traditional constitutionalism was a specific solution, customized to address a set of problems unique to the West; therefore, it would be unrealistic to expect that applying traditional constitutionalism to a different context would produce the same effects, namely, the simultaneous coexistence of effective governance, rule of law, human rights, and economic robustness.

After realizing that the traditional model of constitutionalism was incompatible with the socio-political realities of transition, various constitutional scholars around the world engaged in an effort to study the experiences of various host countries with traditional constitutionalism and establish a revitalized concept of constitutionalism that transitioning States could benefit from. In particular, professor Stanley Katz launched a Comparative Constitutional project hosted by the American Council of Learned Societies (ACLS) in which he and his ACLS colleagues held discussions on constitutionalism in various parts of the world for more than three years, with participants hailing from both developed and developing societies, from socialist and capitalist regimes, and from societies governed by written and unwritten constitutions. In the aftermath of this project, Katz reflected on the experiences of these countries and concluded that “the American and Western European universalistic forms of constitutionalism were not persuasive in many parts of the world… Meaningful approaches in different national contexts require the development of the core meaning of constitutionalism in terms of local cultures… American jurists and scholars … too often act upon a series of universalist assumptions that do not take into account the multiplicity of historical, ethnic, religious, and political traditions and current realities at
In theory, the traditional model of constitutionalism seemed capable of achieving the dual goals of (a) robust human rights protection; and (b) effective governance, and the successful experience of constitutionalism in America stood as seemingly irrefutable proof of this proposition. But the notion that this success could be emulated in countries undergoing transition was fatally undermined in light of the experiences of the host countries that had arbitrarily implemented the traditional model of constitutionalism, as described above.

I argue that by design, the traditional model of constitutionalism will not be able to reproduce the success achieved in America because it ignores the constitutional milieu of a State in transition. Because the traditional model imposes the Western experience of constitutionalism as a universal formula while failing to recognize that the political, cultural, and socio-economic circumstances which, in essence, define the notion of constitutionalism are unique to each country, the greatest issue with applying the traditional model to transitioning societies is the contextual insensitivity that results.

In this section, I will attempt to demonstrate specific instances in which concepts central to traditional constitutionalism have proven incompatible with the transitional setting. While not all of these examples necessarily apply to the Korean context, they are illustrative of the gradual realization of the international community that state transitions and constitution-building must be informed by local traditions rather than

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38 Katz, Constitutionalism, supra note 2, at 10 (emphasis mine).
formulas that assume Western traditions, many of which have never existed in the host states.

A. Different perspectives of the role of the Rule of Law

First, the traditional view of the rule of law is ill-fitted to the transitional setting.

Traditional constitutionalism is characterized by a clear distinction between law (i.e. the judiciary) and government, which is embodied in the principle of judicial independence. This principle dictates “it is not the vocation of the law or the constitution to stabilize social order and to form political consensus. Instead, a constitution is an end-result, a codified document of social and political consensus.”39 This stance of judicial reflectivity and non-involvement can be seen in Justice Albie Sachs’ statement, “Our [the judiciary] function is to interpret the text of the Constitution as it stands. Accordingly, whatever our personal views on this fraught subject [capital punishment] might be, our response must be a purely legal one.”40

Ruti Tietel observes that “in established democracies during ordinary times, adherence to the rule of law implies the operation of principles that constrain the purposes and application of law.”41 She continues to qualify such constraints as an “adherence to

40 *State v. Makwanyane*, 1995 (6) BCLR 665 (CC), at para. 349. Justice Albie Sachs is a judge in South Africa’s Constitutional Court, which draws heavily from the traditional paradigm of constitutionalism despite having steered one of the most dynamic transitions in history.
settled law.” The resulting perception of the role of law and the judiciary creates, as Ruti later points out, a dilemma for transitioning states, since times of political flux “present tensions with constitutionalism, which is ordinarily considered to bind the political order…” Indeed, in such scenarios, there is little “settled law” that the judiciary can properly adhere to during periods of transition. When social and political changes arise, the government responds (often partially, lacking the hindsight that is so readily available in settled governments to provide comprehensive and well-planned legislation), and it is often the judiciary that is tasked with interpreting the law in a comprehensive manner, but without the power to explicitly change the impugned law per se. As such, many States undergoing critical periods of transition have adopted a different approach to the rule of law that is characterized by active judicial involvement in social and political affairs. In such times, it can be said that a passive and reflective view of the rule of law – and the role of the judiciary – may be too “tame” to address the spontaneous political and social demands of transition. The traditional view of the rule of law is thus limited in the sense that it cannot grasp the need for – and the reality of – the utilization of law and the judiciary to achieve a political agenda during transition.

The tension between the traditional view of the rule of law and transition is clearly accentuated in the issue of successor justice in post-transition or post-conflict scenarios, wherein this paradox can be framed by the following question: In the event of transition, are successor governments able to prosecute predecessor elites, even though this would

42 Ibid., at 2017.
43 Ibid., at 2051.
violate the rule of law by promoting legal discontinuity – ignoring the legitimacy of the laws of the prior administration? On the other hand, if the rule of law demands legal continuity by allowing predecessor elites to continue to stay in power, is it not also true that this too violates the rule of law by acknowledging and continuing the injustice of past state actions, thus undermining the moral legitimacy of the current justice system?

When faced with such a question, regardless of what course of action the successor government takes, it would violate the traditional view of the rule of law to some degree, since both legal continuity and moral legitimacy are preconditions to the legitimacy of the rule of law in the worldview of traditional constitutionalism.45 While developed democracies have had the luxury of meeting both assumptions, the rule of law would be seen as compromised in transitioning states because either legal continuity or moral legitimacy must be forfeited.

To the extent that transition involves either a break in either legal continuity or moral legitimacy, pure advocates of traditional constitutionalism cannot, as a result, contemplate the moral legitimacy of South Africa’s truth and reconciliation committees or Brazil’s broad grants of amnesty of officers of the Brazilian military dictatorship, nor can they acknowledge the legal continuity of the Ethiopian regime in light of the

45 To the extent that (a) it can be validly claimed that legal positivism and natural justice both inform the rule of law, and that (b) the issue of which of these two concepts presents a clearer depiction of the rule of law has not been settled, I argue that the traditional concept of the rule of law cannot be realized to the full extent in a transitional context unless a transitional approach is taken. For a detailed analysis of legal positivism, see H.L.A. Hart, “Positivism and the Separation of Law and Morals” reproduced in H.L.A. Hart, Essays in Jurisprudence and Philosophy (Oxford Clarendon Press, 1983), 49; for readings in natural law theory, see Lon L. Fuller, “Positivity and Fidelity to Law – A Reply to Professor Hart”, 71 Harvard Law Review 630 (1958); for balanced reading into both positions, see Shapiro, Scott J., The “Hart-Dworkin” Debate: A Short Guide for the Perplexed (February 2, 2007), U of Michigan Public Law Working Paper No. 77.
criminal prosecutions of the former Mengitsu regime for systemic human rights abuses.\footref{foot1} Applied to the Korean context, the traditional view of the rule of law would present a formidable obstacle to Korean unification, since it would likely cause South Korea (which is likely to condemn the past and current human rights atrocities of the North) and North Korea (which is unlikely to agree to unification without the guaranteed continuity of their current leader) to take adversarial and incompatible positions during negotiations for unification.

B. Inefficiencies of Limited Government and Division of Powers

Second, the concepts of limited government and division of powers are estranged from the political realities of transition, or more specifically, the demand for centralized administrative capacities. In examining the role of constitutionalism, Walter F. Murphy mentions that “[c]onstitutionalism’s perils lie in its propensity to paralyze government and so create a kind of oppression: Governmental inaction, no less than action, generates costs and benefits.”\footref{foot2} Especially in countries where a history of weak government has cultivated a popular demand for strong government and centralized state functions, the restrictive role of constitutional delegation of power and its potential to undermine effective administration may be seen more as a threat, rather than a boon, to individual rights. Looking upon the historical traditions of Poland, for example, Wiktor Osiatynski states that the failure of the Western tradition of the limited state to


\footref{foot2} Murphy, Constitutions, supra note 15, at 6.
take root in Poland “was partly a result of poor memories of the days of democracy and privileges of the nobility when the weakness of the state contributed to the fall of Poland and was partly due to the fact that during the period of the country’s partitions, and afterward under the German and Soviet occupations, the lack of a state was tantamount to the Poles deprivation of their basic rights: to freedom, to property, to cultural identity, and even to life.”\(^{48}\) He concludes that “the Polish people appreciate the need for a strong state, provided it is their own, benevolent and democratic.”\(^{49}\)

Even today, there are there similar ongoing sentiments amongst Korean citizens that the loss of sovereignty during Japanese occupation and the division of the Korean peninsula were due to a weak state, economy, and military.\(^ {50}\) It can even be said that the dictatorships that coloured the early history of the Korean Republic were a natural response to such public demand for a powerful government. Similarly, many transitioning societies – especially those with a history of colonization and foreign occupation – may find the concept of limited government unsavoury in the wake of such “poor memories” described by Osatynski.\(^ {51}\)

C. The Disputed Bond between Constitutionalism and Human Rights


\(^{49}\) Ibid.

\(^{50}\) For an overview of Korean nationalism in Korean politics, see B.C. Koh, Chuch’esong in Korean Politics (Chicago: Association for Asian Studies, 1973) (revised version of a paper presented to the twenty-fifth annual meeting of the Association for Asian Studies, held in Chicago, March 30 – April 1, 1973) in Studies in Comparative Communism [Koh, Chuch’esong], at 83 – 97.

\(^{51}\) See Stephen Holmes, Can Weak-State Liberalism Survive? (Spring 1997) (paper presented at Colloquium on Constitutional Theory, N.Y. University School of Law) for a discussion regarding Russia’s struggles with its absence of concentrated state power.
Ironically, constitutionalism often does not go hand-in-hand with individual rights and rights proliferation as assumed by the traditional model of constitutionalism. If political and social sentiments in certain transitioning States do not demand human rights proliferation due to the need to devote public funds to address more “urgent matters” of national concern, it follows that the application of constitutionalism in that society will not necessarily produce a rights-respecting government, complemented by the extensive (and expensive) array of institutional and procedural arrangements required to actively effectuate individual rights. Instead, according to the recurring theme in this thesis, the more fundamental question is whether the social and political demands which led to the proliferation of rights in the West can also be identified in the transitioning host state to justify the implementation of the Western model of constitutionalism.

Given the broad scope of this thesis, it would be unreasonable to even attempt to pinpoint all the socio-political and economic factors that create the necessary demand for human rights proliferation in a given society, since each State would have its unique array of factors. However, for the purpose of illustration, I look to Daniel S. Lev’s compelling argument that one of the elements which caused the entrenchment of human rights in traditional constitutionalism was a new or growing middle class that was “bent on reordering state and society to their own purposes.” According to Lev, without the right-by-birth claim to restrictive rights enjoyed by royalty and the aristocracy, or the divine rights to authority asserted by religious hierarchies, middle class groups “have no choice but to generalize the appeals to all who own property or to all citizens or even to all humanity.” Lev applies this principle to countries such as Indonesia and Malaysia to

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52 Lev, Social Movements, supra note 21, at 141.
demonstrate that efforts to determine how state authority is exercised in these countries “have been initiated and sustained by groups [the middle class] with an interest in protecting themselves against the state and in gaining access to it.”

Lev’s view demonstrates that it is not the blind application of a constitutional formula that leads to human rights proliferation in a given society, but rather the existence of a local demand for human rights, i.e., a formerly disenfranchised but rapidly expanding middle class, which leads to its proliferation in society. However, while this view is both persuasive and popular (I rely upon this theory to identify the origins of human rights in South Korea), it is but one possible explanation of how human rights came to exist in certain societies. For example, under this theory there may be outlier States which have had a positive experience with benevolent monarchies or a centralized government that is not self-aggrandizing. In such cases, the inherent causal factors which lead to the proliferation of human rights may be found in some other local tradition, such as socialist values of equality or religious views of human sanctity; therefore, limiting the power of government in such countries will not necessarily contribute to the proliferation of human rights.

D. Fluidity of Democratic Theory amidst Transitional Realities

The traditional model of constitutionalism assumes a political democracy. However, Walter F. Murphy argues that while there are “basic agreements” between democratic

53 Ibid., at 142.
theory and constitutionalism, “the two theories differ significantly.” He distinguishes between the two concepts by finding that democratic theory is informed by moral relativism, resulting in a system that requires only a few institutional conditions, while constitutionalism turns to moral realism, resulting in “substantive limits on what government can do, even when perfectly mirroring the popular will.” Other scholars argue that democracy does not depend upon constitutionalism as much as it does upon economic surplus. While there are many arguments that aim to either debunk or buttress these arguments, the common agreement between the above scholars is that constitutionalism – in practice – does not necessarily entail democracy.

For example, many host countries that have implemented the traditional constitutional model suffer from floundering economies with severe deficits, during which democracy, political participation and civil responsibilities may be seen as an unaffordable luxury. For example, Hartmut Jackel made the following assessment of the feasibility of democratic reform in Russia:

“But how can this [gradual reconstruction and preservation of a democratic government] be done when, at least for now, most people do not care at all about democracy or participation or

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54 Murphy, Constitutions, supra note 15, at 5.
55 Ibid., at 4. Murphy lists, “popular election of representatives, by universal adult suffrage in districts of approximately equal population for limited terms, to institutions that allow those representatives to govern; free entry of citizens to candidacy for electoral office; and freedom of political communication and association so citizens can be informed and can try to persuade others to join them.”
56 Ibid., at 3.
57 See David M. Potter, People of Plenty: Economic Abundance and the American Character (Chicago and London, 1954), where he states, “By viewing democracy simply as a question of political morality, we have blinded ourselves to the fact that, in every country, including, of course, the economic conditions, and that democracy, like any other system, is appropriate for countries where these conditions are suited to it and inappropriate for others with unsuitable conditions, or at least that it is vastly more appropriate for some than for others. Viewed in these terms, there is a strong case for believing that democracy is clearly most appropriate for countries which enjoy an economic surplus and least appropriate for countries where there is an economic insufficiency.”
political issues? How can this be accomplished as long as they are forced instead to care about jobs, wages, prices, housing, food, and so forth?"\(^{58}\)

Jackel’s statement may be even more appropriate for the North Korean context, as well as the unification scenario, where it can be argued that despite all efforts to implement the principles of traditional constitutionalism in order to create a democratic model of governance, it may simply be the case that North Koreans will be too preoccupied with poverty and food to truly foster an organic demand for democratic rights. This is not to say that democratic rights should not be provided in any given constitutional model; I merely argue that the traditional model fails to (a) reconcile the lack of an organic demand for democracy with its assumption of democratic governance; and (b) provide any feasible alternative to democracy that is able to meet the demands of transition.

E. The Progressive Reality of Transition

Finally, the post-revolution experience of American constitution-making has led to the expectation that revolutions should culminate in constitution-making.\(^ {59}\) However, the reality is that many post-revolution countries have not created new constitutions or even altered their previous constitutions. Rather, albeit after a process of trial-and-error, many of these countries have been content to interpret their pre-existing constitutions in a way that appropriated transitional reality, or to amend the constitutional provisions

\(^{58}\) S. N. Katz, D. P. Kommers, and H. Jackel, *Constitutionalism in East Central Europe: Some Negative Lessons from the American Experience* (Providence, RI: Berghahn Books, 1994). Jackel later concludes that democratization in Russia, which led to the formation of more than five hundred political parties in the USSR within a five-month period, has created a situation that “resembles anarchy more than democracy.”

progressively via regular political processes over the course of time. Theodor Schweisfurth states that the gradual reconstruction of socialist constitutions gave transitioning countries “time for composing a new constitution without being compelled to live temporarily under the old socialist one or in a constitutional vacuum.”

Although constitution-drafting by itself may require little time, the cross-border transplanting of what is essentially a complex alien legal system – including its supporting institutions, norms, and values – may take decades or even centuries to inculcate into the practice of the host country. Cultures, norms, and values must gradually conform to the text of a foreign document on both national and local levels, and this in turn requires an atmosphere of adjustment, conversation, and participation to permeate the whole of the host society.

F. Summary of the Limitations of the Traditional Model

The above examples, although generalized, demonstrate that to the extent traditional constitutionalism lacks contextual sensitivity, the traditional model cannot serve as a viable and sustainable constitutional model for States in the process of transition. Instead, the above points ground a strong case for concluding that one must take into account local traditions and practices in the event of constitution-building during or after transition. In the next section, we will look at the features and characteristics of a model of constitutionalism which attempts to accommodate such transitional realities.

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60 Theodor Schweisfurth, “New Constitutional Structures in Central and Eastern Europe,” HeinOnline, 24 Rev. Cent. & E. Eur. L. 289 (1998): 3. He continues to state in the next sentence that after a certain lapse of time, new constitutions replaced the revised ones in Croatia, Slovenia, Bulgaria, Macedonia, the Federal Republic of Yugoslavia, Slovakia, the Czech Republic, Belarus, and in Moldova during the 1990s.
Before exploring this alternative model, however, one must note that the problem with applying the traditional model to a transitional context is not that it is detrimental to human rights protection in principle, but that the traditional model is unsustainable due to the divorce between constitutional principle and the social and political reality of the host country. Therefore, while the traditional model of constitutionalism can provide normative human rights guidance if implemented within a compatible context, its rigid and indiscriminate implementation in transitioning states can lead to the creation of an unsustainable and ineffective government practice which directly conflicts with its constitution and, ironically, may result in ineffective human rights protection.

(3) The Transitional Model of Constitutionalism: Origins and Features

After decades of trial-and-error due to the aforementioned limitations of traditional constitutionalism, the various host countries altered or modified its respective principles to address their own unique political, social, and cultural problems. During this period, the view of the role of constitutions and constitution-drafting changed dramatically; whereas the traditional paradigm viewed the constitution as a reflective product of the conglomerated will of the people, the new constitution was an active document that would act as a catalyst to gather and unify the varying views of the people and the State to address the core issues before the nation. Yash Ghai outlined the modified role of these newly emerging transitional constitutions in the context of Third World States:

“Although it appears unfair to condemn them as utopian, one must

61 The particulars of which host country modified which aspect of traditional constitutionalism are outlined as examples in the following Chapter 2, (3) A-E.
question the feasibility of western models for most developing countries. Western constitutions (and constitutionalism) assume settled political and economic conditions and a broad consensus on social values (as is obvious from the readiness with which they are willing to suspend substantive and procedural legal guarantees when faced with a crisis, such as terrorism). The constitutions themselves created neither the conditions nor the consensus, although they consolidated and reinforced them. Constitutionalism represented the victory of particular groups and classes; but the victory itself was often the result of violence, exploitation, and repression.

In the developing countries the constitutions were expected to carry a much heavier burden. They had to foster a new nationalism, create national unity out of diverse ethnic and religious communities, prevent oppression and promote equitable development, inculcate habits of tolerance and democracy, and ensure capacity for administration. These tasks are sometimes contradictory. Nationalism can easily be fostered on the basis of myths and symbols, but in a multiethnic society they are often divisive. Traditional sources of legitimacy may be inconsistent with modern values of equality. Economic development, closely checked and regulated during colonialism, also threatens order and ethnic harmony, as it results in the mobility of people and the intermingling of communities in contexts where there is severe competition for jobs and scarce resources. Democracy itself can sometimes evoke hostilities as unscrupulous leaders prey on parochialism, religion, and other similar distinctions.  

As countless debates over the definition, implementation, and limitations of traditional constitutionalism continued throughout the political turmoil of transition during the 1970s, '80s, and '90s, various aspects of traditional constitutionalism gradually transformed and branched into various forms that deviated significantly from their Western origins. I attempt to provide below a brief overview of the changed perspective of traditional constitutionalism brought about by the transitional paradigm – which I will hereby refer to as the “transitional model of constitutionalism” or “transitional constitutionalism”. However, because each host State encountered different transitional

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realities and issues due to its own unique traditions and political, social, and cultural practice, any constitutional “model” purporting to define the notion of constitutionalism in transitioning countries by setting out a grocery list of constitutional characteristics runs the risk, again, of imposing a universal – and possibly obsolete – formula.

Furthermore, we must bear in mind that certain aspects of transitional constitutionalism derive from observations of constitutional practice in the very specific context of post-communist democratization in East Central Europe, while other features will arise from constitutional reform efforts in post-apartheid, post-colonialist South Africa. Post-war East Asia demonstrates its own unique transitional characteristics. Therefore, to the extent that constitutionalism is informed by unique local traditions, it is questionable as to whether any study which attempts to define transitional constitutionalism will have any bearing upon the transitional reality of Korean constitutionalism in the event of unification. Therefore, for the purposes of this thesis, I will limit my observations to elements and features commonly associated with the “global” notion of transitional constitutionalism as understood by scholarship in the international and comparative constitutional law communities.

A. Modified Legislative / Judicial Powers to Further National Initiatives

The first feature of transitional constitutionalism is the modified roles assumed by the various branches of government, particularly Parliament and the Judiciary. In periods

63 The only viable comparison to the Korean context may be the East and West Germany experience due to the following commonalities: (a) unification scenario, (b) homogeneous ethnicity; (c) antithetic political ideology and structure; and (d) vast gap in economic wealth.

of transition in post-communist, post-colonialist, or post-conflict societies, the political
and constitutional identity of a State undergoes substantial change because new sources
of power are identified, political structures are re-established, or the aforementioned
struggle between legal continuity and moral legitimacy is accentuated. Regardless of the
specific cause of change, it is critical for the State to be sensitive to the unique array of
social, political, and cultural issues that manifest in the process of transition, and to
respond to these issues flexibly in order to maintain a stable transition process – hence
justifying the need for a centralized State with streamlined and efficient legislative and
executive powers.

For example, one of the more notable responses that transitioning States in Eastern
Europe demonstrated was a streamlining of their respective legislative processes so that
the State could legislate solutions to pressing transitional issues.65 As a result, countries
such as Poland, Hungary, Romania, and Bulgaria experienced a dramatic change in
electoral rules, the scope of the powers of the presidency, and central-regional power
allocation via a streamlined law-making process during their respective post-Leninist
transitions to democracy.66 While traditional constitutionalist states would have
facilitated such large-scale and fundamental changes through constitutional amendment
(requiring a two-thirds majority), the above transitioning governments had implemented
such changes by enacting a series of quasi-constitutional statutes which required a

where the author identifies three central issues in Easter Europe: transition; racial and ethnic divisions;
and the inability to forge a durable social consensus on the necessity of strong institutions of private
property for both political liberty and economic growth.
66 Arend Lijphart and Carlos H. Waisman, Institutional Design in New Democracies: Eastern Europe and
Latin America (1996), at 2 – 3; Richard Rose et al, Democracy and its Alternatives: Understanding Post-
Communist Societies (1998), at 9 – 10; Stefan Viogt and Hans-Juergen Wagener eds., Constitutions,
simple majority vote. The streamlined nature of these changes would have been considered highly unconventional in Western states, but in these countries, quasi-constitutional legislation requiring a simple majority vote was not deemed be lacking in democratic legitimacy.67

Other countries such as the Czech Republic, whose primary concerns were post-war justice and international recognition as legitimate democratic states, conducted an extensive post-war lustration process of former communist officials involving a series of criminal prosecutions against members of the former government. For example, the demand for justice in the Czech Republic invited the Czechoslovakian Parliament to implement its Lustration Acts, and, despite heightened controversy and criticism, alter its statute of limitations to allow the State to prosecute criminal acts committed by former officials – which they would have been precluded from doing under the previous limitations act.68

The demands of transition also birthed a modified Judiciary, as demonstrated in the critical role played by the constitutional courts – specialized judicial tribunal exclusively responsible for deciding constitutional questions69 – during the past three decades in East Central Europe, South Africa, and East Asia. In particular, the Courts become actively involved in political and social disputes, often legitimizing the laws enacted by Parliament and their execution by the Executive branch through purposive

interpretation that is consistent with the transitional agenda. For example, when the constitutionality of the Lustration Act mentioned above was challenged in the Czech Republic, the Polish Constitutional Tribunal upheld the constitutionality of the Act by relying upon their social and political necessity for furthering the goals of transition – despite potential violations of previous limitation acts.\textsuperscript{70}

The constitutional courts have taken such an activist role in the formation of the political landscape of post-Communist Eastern Europe that they are now considered important “veto-players”,\textsuperscript{71} as their judgments have played a critical role in determining political controversies that were traditionally set apart for the legislature. Herman Schwartz describes the appreciation of the role of the Constitutional court in Eastern Europe:

Abstract judicial review is encouraged, and decisions on political questions are appropriate. And whereas American law makes it very difficult for members of Congress to go to court to challenge government actions, especially with regards to congressional enactments they had unsuccessfully opposed, the new European constitutions virtually encourage public officials to go to the Constitutional Court in such circumstances. All give a relatively small number of parliamentary deputies the authority to challenge legislative actions in the Constitutional Court. Many also give the President such a right before he signs legislation. Other laws give such standing to ministers, high regular or administrative courts, prosecutors, and other public officials.\textsuperscript{72}

Despite the controversy surrounding the role of the Constitutional Courts as policy

\textsuperscript{70} See the decision of the Polish Constitutional Tribunal at Vicki C. Jackson & Mark Tushnet, Comparative Constitutional Law (1999), at 347-56.


makers in Eastern Europe, I take the position that given the unique social, political, and cultural demands of post-communist Eastern Europe (and in particular the demand for stability and legitimacy in the dynamic social shifts towards democratization), the involvement of the Constitutional Court in core policy determinations was a necessary, and perhaps even desirable outcome. Overall, these modified parliamentary and judicial functions contributed to the efficiency of the transition process. Unlike the traditional approach which imposes a rigid structure that limits the powers of a government, the transitional approach empowers Parliament and the Judiciary to address the pressing needs of the host State. By authorizing the State to enact politically and socially responsive laws and encouraging the courts to “step into the fray” in order to help the State define boundaries that appropriated transitional reality, the transitional model of constitutionalism remedies the insensitivity of traditional constitutionalism by retaining adaptability and flexibility at its core.

B. Centralization and the Overlap of State Powers

A natural consequence of the modification or enhancement of the legislative and judicial branches in transitioning States is the centralization of State powers, characterized by collaboration between the various branches for the purpose of pushing forward a political or social agenda. In times of transition, the separation of powers has proven to be an inconvenient constitutional hurdle because it does precisely what it was conceptualized for – it segregates the various sources of government power and, essentially, weakens the State. Instead of adopting the traditional “checks and balances” arrangement where each branch is designed to limit the self-aggrandizing tendencies of
the other branches by embodying unique and inviolable roles, the transitional paradigm bestows complementary powers upon each branch and thus empowers the State to adjust to the fluctuating socio-political dynamics of post-communist or post-conflict transition. Building on the examples above, the interplay between the legislature (in the enactment of Lustration Acts in the Czech Republic) and the judiciary (which upheld the constitutionality and legitimacy of said legislation) shows substantial coordination between branches of the government to achieve justice and legitimacy. Similarly, cooperation between the legislature and the constitutional court in South Africa was critical in advancing progressive human rights concepts such as income distribution, eradication of poverty, and subsistence rights.73

C. Emphasis on Procedural Participation and Integration

Thirdly, transitional constitutionalism attempts to address the “tension between [the] radical political change [required to end a conflict] and the constraints on such change that would appear to be the predicate of constitutional order.”74 As such, societies transitioning from a state of conflict between different ethnic, political, or religious groups, and especially those that have been involved in armed conflicts for the foregoing reasons, have often utilized the constitution, the State’s legislative, executive, and judicial capacities, as well as various institutions to promote peacemaking and social integration. In this way, the transitional constitution responds to the peacemaking

74 See Teitel, Transitional Jurisprudence, supra note 41, at 2053.
needs of conflict and post-conflict societies.\textsuperscript{75}

Ruti Teitel recognizes that the transitional constitution “mediates the process of political change,” reflecting a consensus on how political change \textit{should} occur rather than what that change will be.\textsuperscript{76} In this sense, transitional constitutionalism can be defined as a forward looking process which is continually subject to development and in some instances is intended only as an interim measure.\textsuperscript{77} This emphasis upon the procedural aspect of transitional constitutionalism is further espoused by Vivian Hart, who observes that the challenge of the new constitutionalism is finding a balance between the traditional goals of constitution-making, including building a stable and secure foundation for the state, and the flexibility necessary to mediate conflict and divisions.\textsuperscript{78}

Various scholars have found that constitutional reforms during periods of transition have led to the establishment of a new set of values as well as grounds for participating in the construction of the emerging political identity.\textsuperscript{79} In particular, Jiunn-Rong Yeh observed that the integrative effect of transitional constitutionalism helped facilitate social integration in Poland and Hungary,\textsuperscript{80} South Africa,\textsuperscript{81} and Taiwan.\textsuperscript{82}

Additionally, Hart finds in the following passage that the transitional paradigm, and

\begin{itemize}
  \item \textsuperscript{75} \textit{Ibid.}
  \item \textsuperscript{76} \textit{Ibid.}, at 2058 (emphasis mine).
  \item \textsuperscript{77} \textit{Ibid.}, at 2057.
  \item \textsuperscript{78} Vivien Hart \textit{Democratic Constitution Making}, United States Institute of Peace Special Report 107 (2003), at 3.
  \item \textsuperscript{82} Jiunn-Rong Yeh, “Institutional Capacity-building Towards Sustainable Development: Taiwan’s Environmental Protection in the Climate of Economic Development and Political Liberalization,” 6 \textit{Duke J. Comp. \& Int’l L.} 229 (1996): 269-270. Also see, Yeh, \textit{Asian Constitutionalism}, supra note 3, at 165.
\end{itemize}
specifically its procedural nature, provides a meaningful opportunity for parties (previously at conflict) to settle their differences via participation in the development of the transitioning State:

Traditional constitution making as a conclusion of conflict and codification of a settlement that intends permanence and stability can seem to threaten rather than reassure. Citizens who actively reject a final act of closure seek instead assurances that constitution making will not freeze the present distribution of power into place for the long term, nor exclude the possibility of new participants and different outcomes. . . The constitution of new constitutionalism is . . . a conversation, conducted by all concerned, open to new entrants and issues, seeking a workable formula that will be sustainable rather than assuredly stable.\(^83\)

D. Institutionalization of State Initiatives

While relatively stable societies will also establish institutions with mandates that enable the institution to contribute to and correspond with the policy objectives of the State, the institutions established under a transitional government will often be given a much more specific mandate, greater autonomy, broader discretionary powers, constitutional or quasi-constitutional standing, and more logistical and financial support from the core branches of the government. As such, transitional constitutionalism is characterized by the institutionalization of specialized committees, tribunals, and boards that further complement and centralize State powers and carry out specific policy directives.

Below is a chart listing examples of institutions in various transitioning States, setting

out the specific mandate assigned to the institution.

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<th>Transitional Issue</th>
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<tr>
<td>Constitution Drafting</td>
<td>Constituent Assembly&lt;br&gt;Department of Justice and Constitutional Development</td>
<td>South Africa, Kenya</td>
</tr>
<tr>
<td>Election and Electoral Rules Drafting</td>
<td>Election Board, Electoral Committee</td>
<td>South Korea, Poland, Hungary, Czech Republic, Kenya, India, Germany</td>
</tr>
<tr>
<td>Human Rights</td>
<td>HR Committees, HR Tribunals</td>
<td>South Africa, South Korea, India</td>
</tr>
<tr>
<td>Post-Conflict Reconciliation</td>
<td>Truth and Reconciliation Commissions</td>
<td>South Africa</td>
</tr>
<tr>
<td>Post-War Justice</td>
<td>Lustration Committees, Criminal Tribunals</td>
<td>Czech Republic, Germany, Poland, Rwanda, Yugoslavia, Bosnia, Rwanda</td>
</tr>
<tr>
<td>Democratization</td>
<td>Democratic Committees</td>
<td>South Korea, Poland, Hungary, Czech Republic, Kenya, India, Germany</td>
</tr>
<tr>
<td>Unification</td>
<td>Ministry of Unification</td>
<td>Germany, South Korea</td>
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Institutionalization creates specialized or regionalized avenues to address specific issues and allows for further customization and organic implementation of the State’s often-

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84 Generally, most States that have gone through a post-conflict, colonialist, or communist transition towards democracy have focused on the majority of the transitional issues listed in the chart – the list of States is not exhaustive.
blunt policies. For example, when the South African government imposed State initiatives to encourage local participation in government and administration, it introduced the *Local Government: Municipal Systems Act* of 2000, which mandated that municipal institutions encourage the involvement of communities in local government, inform the public about their activities, and simplify the way they conducted business.\(^{85}\) In particular, it provided for a representative forum on integrated development planning in each municipality, which acted as a consultative body allowing debate and workshop-style decision-making to implement regional or local development programs and projects.\(^{86}\)

Another example can be found in Brazil’s national response to address the needs of the HIV/AIDS-affected population.\(^{87}\) The State had faced difficulties in responding effectively and in ensuring that all three levels of government – federal, state, and municipal – as well as the legislature had appropriate skills and coordination mechanisms to respond.\(^{88}\) In response, the UNAIDS Theme Group in Brazil, the Brazilian National Programme on STD/AIDS and the Commission on Human Rights of the Chamber of Deputies collaborated with the Brazilian government to establish Parliamentary Group on HIV/AIDS in 2000 in order to mainstream the role of the legislature in coordinating actions by the executive and legislative branches of all levels of government as well as civil society in order to strengthen the national response to the


\(^{86}\) *Ibid.*


In particular, the Parliamentary Group was designed to (a) serve as a permanent public space for debate about policies and laws related to HIV/AIDS, (b) encourage discussion on technical and legal measures to combat the epidemic, (c) disseminate HIV/AIDS–related information within the Chamber of Deputies and the Senate, and (d) promote a discussion between the legislature, the executive and civil society organizations. As a result, the Parliamentary Group was not only able to raise awareness among public officials and the public, and improve coordination among the various levels of government, but its facilitation of discussion has also generated a public debate on ethics, human rights and HIV, and strengthened a culture respecting and demanding human rights protection. Another practical result was that the Brazilian government also started to invest in the production of antiretroviral drugs.

By utilizing the emphasis on institutionalization in the transitional model, the South African and Brazilian governments were able to effectuate their respective State goals of participation and HIV/AIDS treatment at the local, regional, and federal levels.

E. Instrumentality of the Constitution in Addressing Issues of National Concern

Whereas traditional constitutionalism sets out the highest law of the land by which all State activity is interpreted, transitional constitutionalism is characterized by the use of

89 Ibid., at 20.
90 Ibid., at 21.
91 Ibid., at 22.
92 Ibid., at 23.
93 This is not to say that traditional model does less to encourage institutional involvement in addressing national issues. However, the transitional model shows relative strengths in interconnectivity and coordination between the various branches and tiers of government, bureaucratic efficiency, and heightened civil involvement.
constitutional text to fit and accommodate political priorities that arise during the transition process. This feature of transitional constitutionalism – viewing the constitution as a political instrument more than as the embodiment of fundamental legal and political principles – stems in part from the modified view of the rule of law during transition, as well as the political activism of the judiciary. But mostly, it is attributable to the rationale underlying all of the other elements of transitional constitutionalism described above, namely the need for flexible and adoptable constitutional provisions which address the day-by-day problems of transition. This utilitarian approach to the constitution is clearly evident in Jiunn-Rong Yeh’s observation below, wherein he indicates that a constitution during transition is significant not in and of itself, but because of its utility in guiding social policy:

In other words, in a time of great uncertainty and social disintegration, constitutional changes were not merely end results of political transformations. To the contrary, transitional constitutionalism may take a steering role and serve as a strong mechanism to help form political consensus and transform social values… Operating this way, constitutional functions during democratic transitions would shift clearly from constraining government powers to steering reform agendas or even reconstructing social structures.\footnote{Yeh, Changing Landscape, supra note 39, at 149.}

While it is often the case that transitioning States initially implemented or drafted a completely westernized constitution that bore all the trademark features of traditional constitutionalism, during key policy-making periods, these States responded to pressing social and political issues by drafting contingent or provincial constitutional arrangements such as an interim constitution, a series of initial constitutional amendments, or even a written consensus of political statements.\footnote{Ibid., at 151.} Examples include
the Interim Constitution and its earlier “thirty-four principles” in South Africa, the Little Constitution of Poland, and the Additional Articles in Taiwan. Other transitioning States bypassed the rigorous constitutional amendment process (requiring a two-thirds majority) by enacting interim quasi-constitutional statutes which required a simple majority vote. The above instances simply indicate that during periods of transition, it will often be the case that the State will prioritize its need to respond quickly and sensitively to its socio-political needs (regardless of whether or not the action is consistent with its constitution) over the relatively academic need to maintain constitutional supremacy, especially in the event that the State considers the constitutional to be unwieldy or onerous.

F. Summary

In summary, transitional constitutionalism promotes the development of organic and efficient governance during periods of transition by (a) modifying traditional State powers; (b) allowing and even encouraging overlap between the various branches of government; (c) crystallizing the State’s collaborative efforts and interests into specialized institutions that ensure that specific policy objectives are carried through; (d) facilitating social and political integration by granting all members of the host State the

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opportunity to provide input in the transition process; and (e) utilizing the constitution as a means to effectuate a political agenda.

It should be noted at this point, if it has not already been inferred from the above, that the utility and desirability of the transitional paradigm arises from the fact that it maximizes the effectiveness of the government in carrying out a specific social or political goal – regardless of what it is. In this sense, transitional constitutionalism is purposeful and instrumental by nature, and organic applicability and flexibility are its greatest merits. As such, I argue that to a great extent, transitional constitutionalism overcomes the rigid and insensitive framework of the traditional paradigm. Regardless of whether transition occurs as a result of government collapse, secession, revolution, or (in the case of Korea) unification, transitional constitutionalism serves as a desirable alternative to the traditional model of constitutionalism during the transition process.

However, to the extent that the State retains the capacity to infringe upon human rights, the function of transitional constitutionalism to enhance, overlap, and further institutionalize State capacities and objectives can be a double-edged sword. This concern is especially valid in situations where the political agenda of the host State directly violates, or incidentally undermines individual rights; in such a scenario, the utility of the transitional paradigm in maximizing government efficiency in implementing policies, as well as political instrumentality of the constitution which is inherently assumed within the transitional paradigm, may merely aggravate any human rights violations committed by the State. Indeed, this will be a key concern in the following section, wherein I introduce the constitutional history of North and South
Korea, demonstrate both countries’ utilization of key transitional constitutionalism concepts, and identify the human rights abuses that occurred throughout their respective histories during the process of transition. By doing so, I will highlight the potential for the transitional paradigm to allow the unified Korean State to repeat the same mistakes throughout its transition via unification.

Finally, while transitional constitutionalism – as observed in the global trend of transitions in the 1980s and 1990s – has demonstrated significant differences from the traditional paradigm, the two concepts are not necessarily mutually exclusive. If transitional constitutionalism can be characterized as the optimization of constitutional principles to fulfill national objectives and / or socio-political demands, in a scenario where the host state demonstrates a demand for the division of State powers, protection of human rights, judicial independence, and the fulfillment of the rule of law, then transitional constitutionalism and traditional constitutionalism would be synonymous.
Chapter 3

Constitutionalism in South and North Korea

As we have so far discussed, the key principles of transitional constitutionalism allow for the development of an organic constitutional culture in the transitional setting. In the event of unification, the transitional model would not only help the new State to cope with the transition process, but empower the government to steer it in a purposeful manner. However, whether its implementation will provide adequate human rights protection in a unified Korea is a question which requires an overview of local traditions in past and present Korean constitutionalism and, in particular, an assessment of whether such local traditions support an organic demand for human rights protection.

Since transitional constitutionalism assumes that political, socio-cultural and economic demands will mould the constitutional model of the transitioning State, I take the approach that under a purely transitional paradigm, the demands of unification in Korea will ultimately dictate post-unification Korean policy. As such, I will first explore the political, constitutional, socio-cultural, and economic developments in the history of both countries and demonstrate that throughout their respective transitory periods, both countries have utilized the principles of transitional constitutionalism for the purpose of promoting a State agenda. Second, I will analyze the key characteristics of Korean constitutional history and attempt to predict the core principles and elements of the unified Korean constitutional model. Finally, I will demonstrate how the application of the transitional paradigm has aggravated the human rights situations in both Koreas, and how it will continue to do so during Korean unification.

(1) South Korean Constitutionalism
A. Political Developments

Before the division of North and South Korea, Japan’s victory in the Russo-Japanese War (1904-1905) led to the official annexation of the Korean peninsula in 1910. Amidst massive resistance from the Korean people, the Japanese colonial regime (1910–1945) sought to forcefully replace Korea’s political, social, and economical infrastructure with modernized colonial institutions.99 During this period, harsh modernization policies driven by the Japanese regime were brutally enforced upon a reluctant people. As a result, the post-independence political cultures in both the North and the South would become heavily coloured by anti-colonial and nationalist sentiments. As a result, the communist Soviet Union established the anti-Japanese Kim-Il Sung as the leader of North Korea, and South Korea elected Syngman Rhee, another legendary symbol of Korea’s resistance to Japanese colonialism, as its president.

The first Constitution of South Korea, which was drafted simultaneously with the establishment of the First Korean Republic in 1948, was a showcase for Western democracy as it demonstrated “an elaborate constitutional mechanism that is commonly found in any liberal democratic constitutional order”100 such as political, social, and economic rights, popular and regular elections for both the legislature and presidency, judicial independence, and the separation of powers. However, the prospects for effective human rights protections dimmed in the face of the Rhee’s anti-communist military policy and the brutal suppression of the 1948 Jeju Uprising and

99 See Savada, Andrea Matles; Shaw, William, eds. “A Country Study: South Korea, The Japanese Role in Korea’s Economic Development” (1990) Federal Research Division, Library of Congress. Savada and Shaw note that Japan introduced many modern economic and social institutions and invested heavily in infrastructure, including schools, railroads, and utilities. Also, see Adres Aviles, Impacts of Japanese Colonialism on State and Economic Development in Korea and Taiwan, and its Implications for Democracy (June 2009) (thesis submitted to Naval Postgraduate School at Monterey, California). Aviles notes that Korea’s banking, its Chaebol-driven economy, and centralized originated from colonialist institutions such as the Japanese zaibatsu (business and industrial conglomerates) and modernized Japanese bureaucracy. However, it should be noted that whether Korea’s economy actually benefitted from Japanese colonialism is a controversial topic between Korean and Japanese economists and scholars.

the Yosu-Suncheon Rebellion – semi-military insurrections against Christians and US-supporting right wing families. These initial tensions were closely followed by the Korean Civil War (1950-1953) and the threat of Communist North Korea, which created a need for effective and responsive governance to address the struggle of both nations to establish sovereignty over the entire peninsula. Accordingly, the now-dictatorial President Rhee pushed for presidential amendments to the constitution which would make the presidency a directly-elected position, and in order to do so, bypassed vital constitutional protections of individual rights, declared and executed martial law, and jailed the members of parliament whom he expected to vote against it.

Despite the push for civil and political rights by an educated and expanding middle class, the Second Republican government continued to ignore the cries for rights proliferation and economic reform and instead focused on the following issues which the State considered matters of “national importance”: acquiring independence and national sovereignty through centralization of government powers, establishing an infrastructure that would promote economic development and modernization, and responding to the North Korean threat by strengthening its political identity as a flourishing democratic State.

Ironically, the demand for a strong and effective government led to the abrupt overthrow of the Second Republic by a military government known as the Supreme Council for National Reconstruction in 1961, led by Major General Park Chung-hee. Further constitutional changes made during the junta administration effectively turned South Korea into a parliamentary system, with Chang Myon as Prime Minister and Yun Po Sun as president, although both figures

\[101\] Rhee later resigned from the presidency on April 26, 1960 due to student movements, such as the April Revolution, which resisted Rhee’s dictatorship.

exercised only nominal powers. Actual power still resided with the Supreme Council, which was initially chaired by Chang Do-yong and subsequently by Park Chung-hee. On December 2, 1962, a referendum was held on returning to a presidential system of rule, which was allegedly passed with a 78% majority.\textsuperscript{103} Despite the promises of Park Chung-hee and the other military leaders of the Junta that they would not run for presidency, Park ran anyway and narrowly won the election of 1963. The resulting Third Republic of South Korea held power from 1963 to 1972, wherein Park ran again in the election of May 3, 1967, taking 51.4% of the vote.\textsuperscript{104} While the presidency during the Third Republic was constitutionally limited to two terms, Park forced a constitutional amendment through the National Assembly in 1969 to allow him to seek a third term.

Park was re-elected in 1971. From 1972 to his assassination on October 26, 1979, Park reigned over South Korea with an iron fist. In October 1972, he dissolved the National Assembly and suspended the constitution; Park later replaced it with the October Yusin (“restoration”) Constitution.\textsuperscript{105} The new constitution granted enormous powers to the president, including effective control of Parliament, six-year terms with no limits on re-election, and the power to appoint a large portion of the National Assembly, which guaranteed Park a parliamentary majority. Park’s dictatorship and the Yusin constitution remained in effect until Park’s assassination, the military coup d’état of Major General Chun Doo Hwan in 1979, and the end of the Fourth Republic of Korea.

Unfortunately, the Fifth Republic of South Korea (1979-1987) was also initiated by a declaration of martial law, which was confronted by violent student protests. In particular, on


\textsuperscript{104} \textit{Ibid.}

\textsuperscript{105} Jung Hae Gu, Kim Ho Ki, Development of Democratization Movement in South Korea, Stanford Korea Democracy Project (2009) [Jung, Democratization], at 6.
May 18, 1980, the government neutralized a student demonstration at Gwangju by ordering the military to open fire on civilians, resulting in 207 casualties. This consolidated nationwide support for democracy, which led to the demise of the Fifth Republic government.

The rise of the Sixth Republic, which is South Korea’s present government, was celebrated by holding South Korea’s first democratic election in 1987, whereby Roe Tae Woo was elected as its first president and Kim Young Sam as its second president in 1992. The 1987 constitution provided in Chapter 6 Articles 111-113 for the establishment of a Constitutional Court to respond to the people’s longing for democracy and the assurance of basic rights. It is significant that it was during the Fifth and Sixth Republics that the civil and political human rights which South Korea enjoys today were established, not by government-driven reform but through civilian movements in opposition to non-democratic governance.106

B. Constitutional Developments

Changes to the Korean Constitution generally mirror the shifts in South Korea’s government described above. For instance, the first Constitution of South Korea was drafted in 1948 and provided for central control by the President. In 1952, Syngman Rhee’s desire for re-election and further centralization of powers led to a hastily-constructed constitutional amendment which provided for direct election and a bicameral legislature.107 In 1954, Rhee moved for another amendment in order to remove term limits for the presidency. The ensuing public protests for transparency and democracy led to the drafting of the 1960 Constitution, which created various institutions to prevent systemic totalitarianism, such as an election commission, a constitutional commission, a cabinet, a bicameral legislature, elections for Supreme Court

justices and provincial governors, and explicit human rights provisions.  

The provisions of the 1960 Constitution were drastically altered with the May 16 coup of Park Chung-hee, who passed the Third Republic’s Constitution in 1962. Although this constitution provided for democratic processes such as a judicial review function, these mechanisms were largely nominal and were barely utilized for fear of political ostracism and persecution. Through a referendum held on November 21, 1972, the Fourth Republic Constitution of 1972 – the Yusin Constitution – was passed. This revamped constitution extended Park’s presidency to six-year terms with no limits on re-election, which allowed Park to be elected without opposition in both 1972 and 1978. The Yusin Constitution also allowed the President to override the other branches of the government, and contained additional restrictions on the Bill of Rights.

Upon Park’s assassination in 1979, the Fifth Republic Constitution of 1980 was drafted. This period was characterized by extensive efforts at constitutional and political reform due to widespread civil protest comprised of university students and labor unions. However, after Major General Chun Doo-Hwan established himself as president after the coup d’état of December 12, 1979 and the declaration of martial law on May 17, 1980, he proceeded to close universities, ban political activities, and further curtail the press. Chun’s subsequent creation of the National Defense Emergency Policy Committee and the founding of another military dictatorship led to further student protests, which ultimately culminated in the events of the  

\[108\] Constitution of the Republic of Korea, 1960, found online at: <http://law.go.kr/lsInfoP.do?lsiSeq=53084&ancYd=19600615&ancNo=00004&efYd=19600615&nwJoYnlInfo=N&efGubun=Y&chrClsCd=010202#0000>. For the full text of the Constitutions of the Republic of Korea, refer to the National Laws Information Centre, found online at: <http://law.go.kr>  
\[111\] See Jung, Democratization, supra note 105, at 10.
Gwangju Democratization Movement and the Gwangju Massacre. In response to the above antidemocratic policies and other State actions, the nation saw unprecedented democratic protests in 1987, also called the June Democracy Movement, after which the National Assembly passed the 1988 Constitution of the Sixth Republic on October 12, 1987.\textsuperscript{112} Roh Tae-woo was inaugurated as its first president.

In summary, throughout South Korean history, the constitution was amended nine times and rewritten five times. The current 1980 Constitution of the Republic of Korea consists of a preamble, 130 articles, and supplementary provisions. The Constitution declares South Korea a democratic republic and does not recognize the legitimacy of the North Korean government, since – according to the text of the constitution – the Republic of Korea’s territory consists of “the Korean Peninsula and its adjacent lands.” The constitution recognizes an executive branch headed by a president and an appointed prime minister, a unicameral legislature (the National Assembly), and a judiciary consisting of the Constitutional Court, the Supreme Court, and lower courts. The Constitutional Court of Korea is a specialized court mandated to determine the constitutionality of laws, presidential impeachments, disputes between government organs, the dissolution of political parties, and individual complaints based on the Charter.

While Articles 10-39 of Chapter 2 of the constitution provides for fundamental human rights, these rights are qualified by other constitutional provisions and pre-existing laws such as the National Security Act, which allows for the restriction of due process rights in political offense cases.\textsuperscript{113} Article 119 provides for economic rights provided by the government, such as stable

\textsuperscript{112} Constitution of the Republic of Korea. 1987, found online at: <http://law.go.kr/lisInfoP.do?lsiSeq=61603&ancYd=19871029&ancNo=00010&efYd=19880225&nwJoYNlnfo=Y&efGubun=Y&chrClsCd=010202#0000>.

\textsuperscript{113} The following were made illegal under this act: (a) communism; (b) recognition of North Korea as a political entity; (c) organizations advocating the overthrow of the government; (d) printing, distributing, and ownership of “anti-government” material; and (e) failure to report such violations. This Act is still in force today.
and balanced growth rates, the proper distribution of income, and the prevention of abuse of economic power. While these articles explicitly enumerate human rights principles, it can be argued that they also reflect the close affiliation between politics and the Korean economy.

C. Economic developments

South Korea’s real gross domestic product expanded by an average of more than 8.7% per year, from US$30.3 billion in 1960 to US$340.7 billion in 1989, while GDP per capita grew from US$1,226 in 1960 to US$8,027 in 1989.114 Today, South Korea has risen to the world’s eighth largest exporter, surpassing the UK, Russia and Canada in 2009.115 Believing that a strong central government should play the key role in Korea’s economic development, Park incorporated a hybrid system of state capitalism and free enterprise that would implement consecutive five year plans designed to shift South Korea from a predominantly US-financed state into an independent, heavy industry exporter. Government involvement in economic growth was highly effective, with bodies such as the Economic Planning Board, the Ministry of Finance, the Ministry of Trade and Industry, the Ministry of Labor, and the Bank of Korea (which was controlled by the Ministry of Finance) playing crucial roles in modernizing the economy and maintaining sustained growth during the 1970s.116

The promotion of government involvement in economic development is reflected in Chapter 9

of the Constitution, which directly addresses the South Korean economy. Article 119, paragraph 2, states that “The State may regulate and coordinate economic affairs in order to maintain the balanced growth and stability of the national economy, to ensure proper distribution of income, to prevent the domination of the market and the abuse of economic power, and to democratize the economy through harmony among the economic agents.” Further articles allow active government intervention in economic activities concerning land and natural resources, agriculture and fishing, consumer protection, foreign trade, and even industry innovation and national standards.

(2) North Korean Constitutionalism

A. Political Developments

In contrast to the numerous social upheavals that characterized the development of South Korean constitutionalism, North Korea’s constitutional history is relatively stable. After the Soviet Union established Kim Il-Sung as head of the Provisional People’s Committee in 1945, Kim aligned with the communist platform and formed the Korean People’s Army (KPA), a professional group of guerrilla fighters and former soldiers who had developed a unique ideological background of communism and anti-colonialist nationalism after fighting against Japanese colonialists. After Kim succeeded in stalling the original plans for an all-Korean election sponsored by the United Nations in 1948, he was established as the premier of the

118 Ibid., at Chapter IX, Article 120.
119 Ibid., at Chapter IX, Article 123.
120 Ibid., at Chapter IX, Article 124.
121 Ibid., at Chapter IX, Article 125.
122 Ibid., at Chapter IX, Article 127.
Democratic People’s Republic of Korea on September 9, 1948, a month after the Republic of Korea was declared.

Upon division, Kim moved to amalgamate all political parties and organizations under the Worker’s Party of Korea (WPK) during a period in which Stalinist revolutions and the proliferation of communist propaganda hindered the consolidation of Syngman Rhee’s administration in the South, while U.S. forces withdrew from the Korean peninsula in 1949. In light of these developments, Kim was able to gain Chinese and Soviet support to invade South Korea, thereby instigating the Korean War on June 25, 1950. After signing an armistice with South Korea on July 27, 1953, Kim remained in power and proceeded to reconstruct the DPRK with Chinese and Soviet assistance, with consolidation of power and militarization set out as the State’s main agenda.

After Kim established domestic stability through a policy of centralization and purification, the gradual rift between Russia and China during the mid-1960s solidified Kim’s conviction to establish a purely North Korean ideological, economic, and social model that was distinct from the Russian and Chinese models. This gave birth to the Juche philosophy – an idea of self-reliance which effectively replaced Marxism-Leninism as North Korea’s official ideology. The Juche philosophy also became the basis upon which Kim sought to achieve military independence from Russia and China, creating the Songun or “military first” policy.

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126 Han S. Park, Military First Politics (Songun): Understanding Kim Jong-il’s North Korea, Academic Paper Series, Vol. 2, No. 7 (Korea Economic Institute, 2007), at 1.
Initially, while North Korea’s thrust towards centralization and nationwide militarization threatened to overpower the South, the prolonged hostilities with the international community, the continued economic strain of weapons and infrastructure development, the death of Kim Il-Sung in 1994, devastating famines throughout the 1990s, as well as international isolation through UN sanctions brought North Korea to the brink of economic collapse. The economic situation only worsened when Kim Jong-II succeeded his father. Instead of investing in much needed consumer goods and food production, he decided to utilize the Songun policy to effectively transform North Korea into a military dictatorship, with the Korean People’s Army surpassing the powers of the already ornamental Worker’s Party of Korea and becoming the most influential political State organ.

The DPRK continues to function as a single party State with nominal democratic elections; under the constitution, the Worker’s Party of Korea (WPK) is the only legally permitted party, while the legislative Supreme People’s Assembly (SPA) is the highest organ of State power, to which the North Korea Judiciary is accountable. However, in practice, all three organs – the KPA, the WPK, and the SPA – are controlled by Kim Jong-UN, the recent successor who now heads the regime. Currently, he holds the titles of the First Secretary of the Worker’s Party of Korea, the Chairman of the Central Military Commission, First Chairman of the National Defence Commission of North Korea, the Supreme Commander of the Korean People’s Army, and also a presidium member of the Central Politburo of the Worker’s Party of Korea.

B. Constitutional Developments

In contrast to constitutional developments in South Korea, where the constitution was changed in response to the conflict between political centralization and democratic civil movements, amendments to the Socialist Constitution of the Democratic People’s Republic of Korea
consistently and unilaterally reflected the State’s movement towards greater power centralization.

The first Constitution of the DPRK was inaugurated in September 9, 1948 and stayed in force until 1972. The constitution enunciated the legitimacy of socialism and the anti-colonialist revolution, and like its southern counterpart, claimed sovereignty over the entire Korean peninsula. The constitution consisted of ten chapters and 104 articles, and contained provisions relating to the basic principles, rights, and responsibilities of citizens. Most importantly, the constitution provided for the effective centralization of power by elevating the Supreme People’s Assembly (SPA) as the State’s highest organ and the legislative body of the Nation. While the SPA was given broad legislative powers, in practice, it was the Presidium of the SPA – which is comprised of fifteen to twenty elite officials and party personnel who (a) exercised effective control of the Worker’s Party of Korea; and (b) formed the majority of the cabinet – that dominated policymaking in North Korea. As a result, the SPA has often been criticized as a democratic façade which, in effect, allowed the political elite (centered on the Kim family) to dominate both legislative and executive State functions while shielding the DPRK from the scrutiny of the international community.

The second 1972 Constitution of the DPRK, or the so-called Socialist Constitution, was characterized by the removal of all non-socialist provisions from the 1948 Constitution; the first

127 It is noteworthy that Article 6 of the 1948 Constitution confiscated “…land owned by the Japanese government and the Japanese nationals as well as the korean landlords,” reflecting the anti-colonialist nationalism.

128 These included the right to equal protection under the law (Article 11), the right to vote and be elected (Article 12), the right to freedom of speech (Article 13), the right to religion (Article 14), the right to privacy (Article 21), protection from arbitrary arrest (Article 24), and a right to petition (Article 25). Reports and testimonies from North Korean refugees, escapees, and defectors provide a detailed account of North Korea’s systemic violation of these rights.

129 The SPA was given power to create a Presidium to operate on its behalf when the Assembly was not in session; approve the laws and statues adopted by the Presidium; revise and amend the Constitution; deliberate and approve the national budget; elect and recall a Prime Minister of the Cabinet and its members; appoint major officials such as the Chief Justice of the Supreme Court and Prosecutor-General of the Central Prosecutor’s Office; and dispatch foreign service personnel.
three chapters of the 1972 Constitution espouse socialist principles modified to fit the North Korean model. For example, the foundational principles of political rule in the DPRK — outlined in Chapter 1 of the Constitution — state that sovereignty rests with workers, peasants, soldiers and working intellectuals who exercise their power through the SPA and local assemblies.\textsuperscript{130} The “evil” of class inequality was declared eliminated. In addition, the Juche ideology of the KWP was explicitly incorporated into the Constitution, and all State organs were to follow the principle of democratic centralism.\textsuperscript{131} Economically, the 1972 Constitution abolished all forms of private ownership and class division. Specifically, articles 18 and 19 state that there is no limit to what the State can own. Article 12 incorporates the Chongsan-ri principle, which encouraged high-level party officials to provide on-the-spot guidance for their subordinates in various areas of labour in order to “…guarantee that the upper units help the lower, the masses’ opinions are respected and their conscious enthusiasm is aroused by giving priority to political work, work with people.”\textsuperscript{132} Article 13 refers to the Chollima or “Flying Horse movement,” which is “the general line of socialist construction” that aims to “accelerate construction to the maximum.”\textsuperscript{133} This attempt at maximizing industrial and productive efficiency is North Korea’s adaptation of China’s economic and social campaign between 1958 and 1961, known as “the Great Leap Forward.”

The 1972 Constitution was revised in 1992 to ensure the DPRK’s political and economic survival after the collapse of the Soviet Union and communism in Eastern Europe, as well as the economic and socio-cultural transformation of China in the 1980s. First, the revision erased all correlation between North Korea’s Juche ideology and Marxist-Leninism in Article 3, emphasizing that it was solely the Juche ideology that guides the activities of the DPRK.

\textsuperscript{131} Ibid., Article 9.
\textsuperscript{132} Ibid., Article 12.
\textsuperscript{133} Ibid., Article 13.
Second, Article 11 emphasized the authority of the KWP, stating that “[t]he DPRK shall conduct all activities under the leadership of the Workers’ Party of Korea.” Third, relations with South Korea would now have a softer tone, as stated in Article 9 that the DPRK “…shall strive to achieve the complete victory of socialism in the northern half of Korea by strengthening the people’s power and vigorously performing the three revolutions – the ideological, technical, and cultural – and reunify the country on the principle of independence, peaceful reunification, and great national unity.”

The third Constitution, which came into force on September 5, 1998, made several changes to facilitate the succession of power to Kim Jong-Il. This was mainly achieved by eternalizing the status of Kim Il-Sung. In fact, the entire preamble of the 1998 Constitution – the so-called Kim Il-Sung Constitution – is devoted to emphasizing Kim Il-Sung’s critical role in establishing the DPRK. His name is mentioned a total of fifteen times in the preamble itself. For example, the preamble declares that Kim Il-Sung founded socialist Korea, developed the “immortal Juche idea, guided the social revolution, and clarified the fundamental principles of state-building. Kim Il-Sung is identified as the “sun of the nation and the lodestar of the reunification of the fatherland.” In addition, it stated that “the DPRK Socialist Constitution is a Kim Il-Sung constitution which legally embodies Comrade Kim Il-Sung’s Juche state construction ideology and achievements. It further establishes Kim Il-Sung as North Korea’s “eternal president.” According to Yoon Dae Kyu, the entrenchment of Kim Il-Sung’s eternal presidency in the constitution thus justifies (a) the abolishment of the presidency; (b) the empowerment of the National Defence Commission to its position as “the highest military leading organ of State power”; and (c) the granting of authority upon the Commissioner of the NDC to direct and command all of the armed forces of North Korea and guide “defense affairs as a whole.”

134 Ibid., Article 9.
The 2009 Constitution, inaugurated during the first session of the 12th Supreme People’s Assembly on April 9, is the current constitution in force. In response to Kim Jong-Il’s waning health, the 2009 Constitution added 6 new articles which served to (a) strengthen the National Defense Committee and its chairman’s powers and (b) elevate the Songun ideology to the level of the Juche doctrine. Both modifications served to strengthen the influence of the military in all State affairs. Specifically, Article 100 designated the Commissioner of the National Defense Commission – Kim Jong-Il – as the country’s supreme leader. Article 102 further specifies that the commissioner functions as the supreme commander who exercises control over all of North Korea’s armed forces. Further powers and duties were granted, such as leadership over the general business of the nation, powers to ratify or abolish major treaties with other nations, and the authority to issue mobilization orders in times of national emergency or war.

C. Economic Developments

Upon division, Kim proceeded to nationalize all previously Japanese-owned assets to form a centralized command economy. Notably, the State planned nine development agendas, similar to Park’s five-year plans in South Korea, to increase heavy industry and electric, steel, and machinery production. By the end of 1958, the North Korean government had socialized all means of production through the nationalization of the industrial sector and collectivization of the agricultural sector. From 1961-1967, North Korea invested substantially in heavy industry, state infrastructure, and military strength while neglecting initiatives to import

137 In the previous Constitution, the authority to ratify and abolish treaties was given to the SPA, and the authority to issue mobilization orders was given to the National Defense Commission, not its Commissioner.
advanced foreign technology and attract foreign capital.\textsuperscript{139} These biased investments in the heavy industry and military-related industries – which were due to the Juche philosophy of self-dependence, which necessitated military might – began to take its toll as heavy increases in military expenditures prohibited the State from investing in the necessary technological advances to compete within the global economy.\textsuperscript{140} Even despite setbacks such as the death of Kim-il Sung in 1994, as well as a famine known as the Arduous March which killed off a significant number of the North Korean population, military expansion continued with the Juche ideology consistently steering the nation’s Songun policy.\textsuperscript{141}

\textbf{(3) Analysis of Korean Constitutional History}

The preceding review of constitutionalism in South and North Korea is not meant to provide a comprehensive overview of all relevant constitutional events, but rather to present a purposive overview of three themes which underlie the panorama of political, constitutional, socio-cultural, and economic developments in both countries. While South Korea and North Korea have, in effect, diverged into two different ideological extremes, constitutionalism in both countries demonstrates the following similarities: First, a policy of centralization was facilitated by modifying and interlacing the various branches of government in order to promote State goals such as political autonomy, economic growth, and nationalism. Second, the text of the constitution has become flexible and responsive to address social, political, and economic reality while also promoting the three State goals mentioned above. Third, the judiciary became increasingly active in political affairs, which had the effect of furthering the three State goals.

In the following discussion, I argue that the elements of transitional constitutionalism were –

\textsuperscript{139} Ibid., at 13-15.
\textsuperscript{140} Ibid.
knowingly or unknowingly – effectively utilized throughout the transitions of both Koreas to
effectuate State goals. However, I will also demonstrate that the transitional paradigm led to the
infringement of critical human rights, especially in scenarios of civil disagreement with State
initiatives. In particular, I set out historical instances in which State policies of nationalism,
centralization, and economic development led to human rights violations that were only
exacerbated by the implementation of the transitional paradigm.

A. Centralization to achieve national priorities

Upon division, both North and South Korea engaged in a race to centralize government powers
in anticipation of the external and mutual threat of invasion, as well as the internal unrest of
political, ideological and economic instability. The influence of the mutual hostility of the
Koreas for each other cannot be overemphasized, for it created radical demand for nationalism,
political autonomy, and robust economic development, and furthermore justified the means by
which the government pursued these goals, even in violation of individual rights.

(1) Nationalism

North Korea’s explicit reference to the Juche principle in its constitution is the legal
embodiment of radical and unswerving nationalism. It has had a profound impact upon the
DPRK’s policies, namely its Songun, or military-centered power structure, centering on the
Korean People’s Army. In addition, the principles and concepts underlying Juche – national
pride, self-identity and sufficiency, and independence – have been critical to political
restructuring in South Korea as well, especially during the Park Administration. For example,
after gaining political dominancy in the South through his military coup, Park established the
Democratic-Republican Party (DRP) and defined national self-identity as one of its primary
objectives.\textsuperscript{142} Ever since, Juche has since become one of the recurrent themes in Park’s speeches.\textsuperscript{143}

The common nationalistic thrust in both countries is indicated in a paper presented to the twenty-fifth Association of Asian Studies on April 30, 1973, where B. C. Koh observed similarities in the power structure and use of political symbols between the Kim regime in the North and the Park Administration in the South.\textsuperscript{144} Especially, he found that “the political complexion and dynamics of the two Koreas are and will remain a function, to a striking degree, of the goals, ideas, and perceptions of their respective presidents” and that “the goals that both [presidents] are pursuing at the national level can largely be subsumed under the quest for Korea’s self-identity, economic self-reliance, and political autonomy.”\textsuperscript{145} In fact, Koh goes even further, stating that “[e]ven a cursory look at the political writings and speeches of presidents Kim and Park reveals that they see eye to eye on at least one significant issue – the importance of Korean national pride and independence.”\textsuperscript{146} Koh identifies the spirit underlying this national preoccupation as the notorious chuch’
\textsuperscript{e} (Juche) ideology and illustrates how both presidents used their dictatorial powers to saturate 1970s Korean politics with this term.\textsuperscript{147}

As betrayers of the nation, Japanese collaborators in North Korea were defined as traitors\textsuperscript{148} and tortured, executed, or sent to intense labour camps shortly after the division of the Korean

\textsuperscript{142} See Koh, Chuch’
\textsuperscript{esong}, supra note 50, at 89.  
\textsuperscript{143} Ibid.  
\textsuperscript{144} See in general Koh, Chuch’
\textsuperscript{esong}, supra note 50.  
\textsuperscript{145} Ibid., at 84.  
\textsuperscript{146} Ibid.  
\textsuperscript{147} Specifically, Koh refers to references to Juche in Park’s inaugural speech in 1963, Park’s speech for the 21\textsuperscript{st} anniversary of Korea’s liberation from Japanese colonial rule (in which Park used the term Juche five times), Park’s speech declaring martial law on October 17, 1972, and a press conference on January 12, 1973, and Park’s speech on Liberation Day in 1971. In regards to North Korea, Koh refers to the central role of Juche ideology in steering policy, as manifested in Kim’s 1955 speech where he declares, “Let us more thoroughly realize the revolutionary spirit of independence, self-reliance, and self-defense in all aspects of national life.”  
\textsuperscript{148} John Feffer, North Korea / South Korea: U.S. Policy at a Time of Crisis (Toronto, 2003), 26.
peninsula. Violations of human rights in South Korea (caused by sentiments of nationalism and anti-colonialism) have occurred more recently. For example, the South Korean National Assembly passed the *Special Law to Redeem Pro-Japanese Collaborators’ Property* on December 8, 2005. Under this law, the South Korean government was given *carte blanche* to nationalize land and other properties owned by 452 Korean collaborators who had supported the Japanese occupation, Japanese colonizers, and their descendants (*chinilpa*). This law further established an Investigative Commission on Pro-Japanese Collaborators’ Property to search and confiscate assets acquired as a result of collaborating with Japan during their 1910-1945 colonial rule.

(2) Political Autonomy

With a communist North and a democratic South sharing the same peninsula, both Koreas have utilized the *Juche* philosophy to centralize key State functions for the purpose of fortifying their political identity and autonomy, as described in the above discussions on political developments in both Koreas. Domestically, both countries sought to distinguish their political identity from that of their enemy across the 38th parallel; internationally, Korea’s experience with Japanese imperialism and the perceived threat from other global powers during World War II further contributed to Korea’s need to respond by solidifying the nations’ political identity and sovereignty.

In South Korea, the government relied upon *Juche* to insulate its political identity not only from communism, but also from the political influence of the United States of America. For example, the first president of the First Republic of South Korea, Syngman Rhee, inherited a guerilla war between the leftist South Korean Labor Party (SKLP) and other underground communist groups

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on one side and the newly established government on the other. This enabled Rhee to shift the national focus away from Japanese colonialism to the communists and engage in a wide scale persecution of civil or paramilitary uprisings that threatened its new democratic and pro-West platform, resulting in the 1948 Jeju Uprising and the Yosu-Suncheon massacres. Furthermore, one of the first official acts of the South Korean National Assembly was to pass the National Traitors Act of 1948, which, among other measures, purged ex-colonial officials from the former administration, specifically targeting the Worker’s Party of South Korea, the National Police, the Constabulary, the youth associations, the entrepreneurial elite, northern refugees, educational and religious leaders, and government banking and economic development officials. Furthermore, this Act made even mentioning the Jeju uprising a criminal offence punishable by torture and incarceration.

Similarly, the North Korean leadership distinguished itself from former communist States in Eastern Europe, Russia, as well as other countries that had “defected” from pure communism. I argue that the resulting establishment of Juche in the DPRK socialist constitution allowed North Korean policy to depart from the social ideals elaborated in other communist constitutions, empowered Kim and his descendants to focus on military development while curbing social and economic rights, and transferred all political power to military seats (Chairman of the Central Military Commission, First Chairman of the National Defence Commission of North Korea, the Supreme Commander of the Korean People’s Army), thereby mainstreaming the role of the military in DPRK politics.

(3) Economic Development

150 Both rebellions were characterized by the civilian massacre of right wing and American military government supporters, as well as Christian youths. When the government first suppressed the Jeju uprising with military force, leaving between 14,000 to 60,000 killed or executed, soldiers in Yeosu responded by refusing to help the fledgling government suppress the Jeju uprising. Between 439 to 2,000 civilians were killed in this massacre.

In the history of Korean constitutionalism, centralization has been critical to economic development in both countries. In North Korea, communist ideology mainstreamed the role of the government in all sectors of the economy. Generally, economic policy objectives are decided by the Central People’s Committee, while the State Planning Committee translates the initiatives of the CPC into tangible and specific goals on both a national and regional scale. However, despite vigilant efforts by the State to sustain development and growth by implementing its military first policy, the famines of the 1990s and the nation’s heavy investment in military expenditures resulted in economic collapse and widespread poverty which continues today.

In South Korea, however, the experience of centralization and government intervention in economics was much more positive. In particular, Park Chung-Hee and the Democratic-Republican Party were the driving force behind the “miracle of the Han river,” in which government organs such as the Economic Planning Board, the Ministry of Finance, the Ministry of Trade and Industry, the Ministry of Labor, and the Bank of Korea subsidized key industrial and agricultural sectors and planned for their development in five-year bursts. In contrast to many Western constitutions, which placed an emphasis on restricting government influence over the economy and on facilitating the expansion of individual economic rights for a growing middle class, South Korea’s constitution allows the government to intervene in economic affairs by providing a list of sectors in which the government is allowed to engage, as discussed above.

B. Political instrumentality of constitutional text

Both Koreas often utilized their constitutions in a politically sensitive and often whimsical manner that undermined the stability of the rule of law. The constitutional text was often

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restructured, amended, or renewed to reflect the three initiatives of each government – nationalism, political autonomy, and economic development.

In North Korea, the absolute lack of opposition to any form of State authority seemingly points to a stable and non-responsive constitutional text, but similar to its southern counterpart, the DPRK’s constitutional amendments were also responsive and sensitive to political agendas. For example, the replacement of traditional socialist values with unique North Korean features in the North Korean Constitution, as discussed above, was a result of Kim Il-Sung’s effort to promote nationalism in response to the rapid demise of Communism in Eastern Europe and the Soviet Union. The remodelling of the preamble to eternalize the status of Kim Il-Sung was a move to secure Kim-Jong Il’s succession and further centralize State power, and the dissolving of the presidency and the explicit reference to the Songun policy was effectuated for the purposes of establishing centralization and military dominance in domestic politics. Also, the most recent amendment to include protection for human rights and the removal of the term “communism” can also be seen as a political effort to appease the international community and to lessen international pressure from human rights organizations.

Such efforts to utilize the constitution to promote a political agenda are also evident in South Korea. Dae Kyu Yoon, an assistant professor of Law at Kyungnam University, finds that while there have only been four changes of government in South Korea between 1948 and 1987, there have been nine constitutional amendments during the same period, occasioned by political turmoil or abnormal extension of presidential terms.153 Yoon makes two relevant observations; first, he stipulates that the shift from the parliamentary system to the presidential system – a feature of the New Constitution of 1948 – “was based not on any consideration of principles or any long-term effect, but on a short-term interest of ensuring the presidency for one individual”;

second, Yoon observed that the constitution reflected the interests of the dominant political faction of Rhee Syngman, who advocated maintaining the separation of the North and South Korean government, while failing to accommodate the views of political forces favouring a government whose purpose was to unify the North and the South.\footnote{Ibid.} In response to Rhee’s dictatorship, the opposition party submitted a proposed amendment to convert the presidential system into a parliamentary system, which received the required two-thirds majority. Because article 53 of the first Constitution provided that the President be elected by the National Assembly, Rhee proposed a slightly modified constitution characterized by a direct popular vote for the presidency combined with a bicameral legislature, which became the official amendment to the constitution on July 7, 1952. Even with the illegalities that attended this move,\footnote{Ibid., at 3. Among the illegalities Yoon points out were the deployment of thugs to molest and aggravate dissenting assemblymen, arrest of dissenting assemblymen through false police charges, and the declaration of martial law to repress political activity.} the amendment was implemented – despite procedural irregularities such as the unwarranted waiving of Article 98 of the Constitution, which required a constitutional amendment to be made public 30 days before it was introduced, and the legislature passing the bill without debate.

The second amendment of November 29, 1954, which would allow Rhee to run for a third presidential term, also involved gross procedural violations; even though the proposed amendment failed by one vote to acquire the necessary 136 votes out of 203, the government went to “ridiculous lengths” to defend its position, even having mathematics professors testify.\footnote{Ibid., at 4.} Among the arguments proposed was that a two-thirds majority of 203 votes would be 135.33, which would have to be rounded down since “a human cannot be a decimal.”\footnote{Wu Song, Hanguk Honpop Kaechongsa (The History of Korean Constitutional Amendment) (Seoul: Chimmundang, 1980), at 23.} As a result, the amendment passed with a slight modification, which would limit the unlimited term
of the presidency to only the first President of the Republic.158

The fourth amendment to the Korean constitution took exceptional steps towards democratization in response to the student and civil movements which ultimately toppled Rhee’s government. The people demanded a provision allowing punitive retribution against “national traitors” such as Rhee Syngman, to which the government responded via a constitutional amendment which allowed for retroactive punishment for “anti-democratic acts” such as election irregularities, corruption, and appropriation of public property.159 The resulting fourth constitutional amendment of November 29, 1960 was an act of political retaliation which utilized constitutional text to allow an exception to the legal principle prohibiting *ex post facto* penalty.

The constitution fared no better during Park Chung-Hee’s administration, as the fifth amendment of December 26, 1962 – which would subject the other branches of government to the executive – proceeded without the input of opposing political parties, as all political activity was banned under Park’s declaration of martial law. The sixth amendment of October 27, 1969 authorized a third term for Park, while the seventh amendment of December 27, 1972 ushered in the *Yusin* order, which vested nearly limitless powers on the President.160 The *coup* following the assassination of Park added an amendment on October 27, 1980 which would further ban political activity and freedom of speech under martial law, and the amendment process was managed by the government under the control of the military. Finally, the ninth amendment of October 27, 1987 was, for the first time, achieved through collaboration between the majority government and opposition, providing that elections for the Presidency would be based on a

158 1948 Constitution (1954 Amend.), article 55(1) and Supplementary Provisions, article 4.
159 Supra note 108.
160 The President was allowed to serve as many terms as decided by the National Congress for Reunification. Article 39, 40, 47, 53, 59, and 103 of the 1972 *Yusin* Constitution allowed Park to name one-third of the National Assembly, dissolve the legislature, appoint judges including the chief justice, and issue extraordinary measures that could suspend constitutional provisions.
direct vote for one five-year term, restored the power of the legislature, and strengthened constitutional support for individual human rights.\textsuperscript{161}

C. Politically Sensitive Judicial Activism

Access to the decisions of the courts in North Korea is restricted; therefore, it is unfeasible to establish from its jurisprudence whether judicial activism is practiced in the courts of North Korea, and if so, whether it is genuinely free from political manipulation. However, it is feasible to assess the likelihood of the politicization of judicial activity by studying the mandate and structure of North Korea’s courts in its socialist constitution. In North Korea, the structure of the Judiciary is set out in article 153 of the DPRK’s Socialist Constitution, which states that justice is administered through the Central Court, the Provincial Court, the People’s Court, or the Special Court.\textsuperscript{162} Article 160 states, “In administering justice, the Court is independent, and judicial proceedings are carried out in strict accordance with the law.”\textsuperscript{163} While it may be argued that this article provides for, in the minimum, a nominal sense of independence of the judiciary, article 156 provides, “The court has the duties to: (1) protect through judicial procedure the State power and the socialist system established in the DPRK…”\textsuperscript{164}

According to article 161, the Central Court is the supreme court of the DPRK and supervises the activities of all lower courts. It is itself accountable to the SPA and to the SPA Presidium when the SPA is in recess.\textsuperscript{165} As mentioned above, the current SPA Presidium, Kim Jong-Un, exercises effective control of the legislative functions of the SPA; moreover, it is subject to the executive powers of the Workers Party of Korea, which again is dominated by Kim Jong-Un.

\textsuperscript{161} Supra note 112.
\textsuperscript{162} DPRK’s Socialist Constitution (1998), online at: <http://www.novexcn.com/dprk_constitution_98.html>
\textsuperscript{163} Ibid., Article 160.
\textsuperscript{164} Ibid., Article 156.
\textsuperscript{165} Ibid., Article 162.
Taking into account the fact that the highest court is accountable to Kim Jong-Un, as well as the fact that the court is constitutionally mandated to protect State power, it can be said in all certainty that any judicial activism, if it were to exist, cannot be exercised in a manner which contradicts North Korean policy. In all likelihood, North Korea’s court functions as an advocate of State policy and serves to legitimize the directives of the SPA and other critical organs.

In South Korea, judicial review was embedded in the first Constitution in 1948, which assigned a Constitutional Committee to review legislation. The committee was first established as a political compromise, as it was structured to give fair representation to all three branches. However, its composition – which included the Vice President, five Justices of the Supreme Court, two members of the Senate, and three members of the House – potentially undermined its independence and severely limited its role. Indicative of this is the fact that the Constitutional Committee conducted only seven reviews between 1948 and 1959, among which only two laws were struck down as unconstitutional. 166

The Judiciary continued to exercise passive judicial review functions during the Third Republic and Fourth Republic of Korea. 167 Between 1948 and 1988, only ten cases received judicial review and only three laws were ruled unconstitutional by the Constitutional Committee and the Korean Supreme Court. 168 In addition, the Committee did not make a single decision concerning the constitutionality of a law between 1972 and 1980. In addition, the Committee

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166 See Yoon, Judicial Review in the Korean Political Context, 17 Korean J. Comp. L. 133 (1989) at 137. Yoon refers to two cases in which laws were decided as unconstitutional; Constitution Committee Decision, September 9, 1952 (Honwi 1), which addressed article 24(1) of the Agricultural Land Reform Act and provided the Court of Appeal as the final appellate authority; and Constitution Committee Decision, September 9, 1952 (Honwi 2), which addressed article 9(1) Special Decree for Criminal Punishment under Emergency and concluded that district courts had original jurisdiction for certain crimes.

167 In 1971, the Supreme Court decision that the State Damage Redress Act of 1971 was unconstitutional was the only instance in which the Supreme Court had held a legislative act as unconstitutional during the ten years of its operation, before Park Chung-Hee removed judicial review powers from the courts.

did not have the power to initiate its own review, but required a request from the Supreme Court. The Constitution Committee continued to remain inactive throughout the Fifth Republic (1980-1987) until it was replaced by the Constitutional Court, which was first adopted in the 1960 Constitution and reinstated by the 1987 Constitution.

The Constitutional Court has been acclaimed for its judicial activism in steering democratic transition in Korea. Between 1988 and 1999 alone, the Constitutional Court made 117 rulings against the state out of the 1,450 cases of constitutional complaints, and of the 712 cases of constitutional review, 266 were ruled either entirely or partially unconstitutional. The Court is guaranteed independent status through provisions provided in a separate chapter of the Constitution, giving it a status on par with the other highest constitutional organs such as the Executive, the Supreme Court, and the National Assembly. In addition, Article 68(2) of the Constitution permitted concerned parties to petition directly to the Constitutional Court. Through judicial and constitutional review, the Court has proven an invaluable motivating force for democracy and constitutionalism in South Korea.

Despite these vast improvements, there are still two potential aspects which may raise concerns about the independence of the Court. First, Chapter 6 of the Constitution provides that nine adjudicators of the Constitutional Court are to be appointed by the President, among whom three are selected by the National Assembly and three appointed from persons nominated by the Chief Justice. In addition, the head of the Constitutional Court is also appointed by the President, and all nine adjudicators are subject to six-year terms with the chance to be reappointed. The

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171 See the Constitution of the Republic of Korea, 1987, supra note 112, Chapter VI.
lack of life tenure or long tenure and the president’s role in appointing judges may point to a lack of institutional capacity in the Judiciary to be fully independent.

Second, it has also been argued that through its activism, the Constitutional Court was merely responding to the rapidly changing political landscape of the 1980’s, and their decisions “were mostly supported by the majority of rising reformist political alliances.” For example, when the issue of President Roh Moo Hyun’s impeachment was sent to the Constitutional Court to be settled, the Court found on May 14, 2004 that President Roh’s statements of support for a particular party at press conferences violated his obligation of neutrality as a public official. However, the court reached a decision not to impeach the President by reasoning that “in light of the gravity of the effect to be caused by the removal of the President, the ground to justify a decision of removal should also possess corresponding gravity.” While this finding could be understood as a form of judicial activism which ran against a majority of 193 members among the 272 members of the National Assembly, this Court decision can also be seen as a political response to the 20% increase in public support for President Roh after the issue of impeachment arose.

(4) Transitional Constitutionalism in the Unified Korea and Human Rights Concerns

As demonstrated in the above overview of North and South Korean history, although the principles of transitional constitutionalism allowed the governments of the two Koreas to respond effectively to pressing social and political issues such as the demand for a stronger

173 Yeh, Asian Constitutionalism, supra note 3.
174 The Impeachment of President Roh Moo Hyun (14 May 2004), 16-1 KCCR 609, 2004Hun-Na1.
175 Ibid.
central government, national and political unity, and economic development, the manner in which these initiatives were carried out demonstrably violated individual rights, either directly or incidentally. In this section, I will argue that (a) considering the constitutional history of both Koreas, is it likely that the same social and political issues – and hence the demand for the same radical solutions – will arise during the transition towards a unified Korea; and that (b) the principles of transitional constitutionalism – given local traditions and attitudes towards constitutionalism in both the South and North – will only preserve the potential for the unified Korea to repeat the same mistakes concerning human rights violations. The analysis conducted in this section will form the basis of determining whether traditional, transitional, or some other model of constitutionalism will be most appropriate to protect human rights in the Unified Korea.

First, upon unification, political and ideological differences between the formerly divided States will result in extreme tension arising from a growing rift between former North and South Korean citizens. The division will be reinforced by emerging differences (whether actual or perceived) in their respective social, cultural, political, and commercial identities. In particular, the intermeshing between two antithetical political entities will result in a need to once again mould and define the political identity of the newly-born nation. Although I state again that this thesis makes no assumptions as to the form or organization of the government that will eventually arise as a result of transition, it is arguably very likely (in light of the global trend of democratization throughout the past half-century) that the Unified Korea will be a democratic State with a fully functioning free market economy.177 In such a scenario, the currently existing economic and political gap between the two citizen groups will only be exacerbated by the fact that former North Korean citizens will be ill-prepared to engage in modern political and commercial activities due to decades of isolation from democratic governance and a free market economy.

economy. Questions about policies relating to electoral rules, districting, voting privileges, candidacy requirements, and the scope and duration of the presidency will be raised anew and bitterly fought over. While it is possible that a new Constitutional Court and Committee would step in to review these political issues, it is uncertain whether the nature and composition of the Constitutional Court itself will be yet another issue that will spark further debate – i.e. whether there must be a quota of North Korean judges appointed to the Constitutional Court. Finally, the political tension between the two populations may be worsened by pre-existing attitudes of hostility between South Korean “imperialists” and North Korean “red communists,” long perpetuated by decades of government-planned propaganda and skirmishes between the two States.

To respond to this issue or, specifically, to prevent a disenchanted and possibly disenfranchised North Korean population from either defecting to its neighbour China or forming separatist sentiments based on the emerging international principle of self-determination, South Korea has on several occasions proffered reunification plans that involve the active participation of both nations by dividing the unification process into three stages: reconciliation and cooperation, a North-South coalition, and cooperation under the unified State with basic guideline that the process of unification should proceed in gradual, step-by-step manner. However, given the recent events in North Korea ranging from worsening economic conditions and aggravated human rights violations to heightened political and military tensions under Kim Jong Un, it is possible that the Unified Korean government, without the proper safeguards in place, will again draw from the concepts of nationalism and political autonomy to implement policies that will accommodate and ultimately absorb the North Korean population into democratic South Korea, similar to the German experience of reunification. Also, building on my abovementioned

178 Ibid., at 549.
179 North Korea has similarly proposed a plan setting out the gradual absorption of the South by the North’s existing communist regime. During the October 1980 6th Labour Party convention, Kim Il-Sung
observations of Korean constitutional history, I argue that it is highly likely that any national policies implemented to further the goal of national and political unity will be buttressed by a politically active Judiciary.

It is my presumption that to the extent that the transitioning government engages in a policy of protecting national and political unity via political, cultural, and economic assimilation of North Korean citizens into a democratic society and free market economy, there will be the potential for human rights violations to occur. Japanese colonial rule of Korea offers an extreme example of human rights violations when a government implements policies to assimilate a population from a different socio-political demography. During this period, the Japanese government issued policies as part of its assimilation efforts such as the Imperial Decree 19 on Korean Civil Affairs and the Changssi-gaemeyong policy, under which people of Korean ethnicity were encouraged, harassed, or forced to surrender their Korean name and take a Japanese name.\textsuperscript{180} In the west, similar human rights issues arose when the Canadian government during the 19th century attempted to assimilate the aboriginal population by requiring aboriginal children to attend government-funded schools, later called residential schools, to engage in “aggressive assimilation” by encouraging them to learn English and adopt Christianity and Canadian customs.\textsuperscript{181}

Second, the economic hardship brought about by South Korea’s absorption of North Korea’s announced proffered a plan for a Korean Democratic Federal Republic. In 1991, Kim Il Sung’s New Year Address declared four pre-requisites for peaceful reunification: (1) the realization of a democratic society (by abolishing all anti-communist and security laws, (2) the liquidation of the South Korean regime, (3) the withdrawal of U.S. forces in the South, and (4) unification based on the principles of autonomy, peaceful unification, and national solidarity.\textsuperscript{180} Deok-Sang Kang, “Background To History-Related Conflicts Between Korea and Japan”, in Hyun Dae-Song (ed.), \textit{The Historical Perceptions of Korea and Japan: Its Origins and Points of the Issues Concerning Dokdo-Takeshima, Yasukuni Shrine, Comfort Women, and Textbooks} (South Korea: Nanam, 2008), at 345; Andrew Nahm, \textit{Korea: Tradition & Transformation: A History of the Korean People} (Elizabetht, New Jersey, USA: Hollym International Corp., 1988), at 233, 237.


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impoverished economy will lead to an unprecedented demand for economic reform, possibly under a heavily government-sponsored system akin to the Chinese model of economic development, with South Korea as the guiding force behind economic development and policy making due to its successes and experience in performing in the global free market economy. Despite the State’s best efforts, it is likely that the Korean economy will be heavily impaired during the reunification process and, as such, will be preoccupied with increasing national output and maximizing market efficiencies. And in furtherance of these objectives, I argue – based on the above observations of Korean political history – that the unified Korean State will, inter alia, continue to centralize government functions, modify and overlap the powers of various branches of the government, institutionalize core State initiatives, and utilize the text of its constitution to effectuate highly interventionist economic policies. From a human rights perspective, such a high degree of government involvement in economic policy-making is problematic. A report of the International Council on Human Rights Policy (ICHRP) pointed out the pitfalls of such a highly interventionist approach to economic policy during a Colloquium on Human Rights in the Global Economy:

The role of the state sits at the centre of social and economic policy and human rights objectives. More than any other institution, by implementing effective policies, states determine whether people prosper, exercise freedom, become skilled, overcome poverty and enjoy consensual governance. Neo-liberal economic theories, which have dominated policy-making in recent decades, affirm that almost all forms of government intervention distort free markets. Under their influence, states across the world reduced the range of services they provided, privatised public institutions and services, sold public assets and lowered taxes. Yet, while aggregate wealth increased under this policy regime, it did so more slowly than during the immediate post-war period, and growth in many countries has been associated with sharp, sometimes grotesque increases in inequality. The wealth of those at the apex has increased vertiginously in the majority of societies, while large numbers of people living in poverty have been excluded from the benefits of growth, and in many countries even middle class incomes have stagnated or been relatively depressed. (emphasis added)

182 For a detailed study of the economic consequences of reunification, see: Mario Arturo Ruiz Estrada and Donghyun Park, Korean Unification: How Painful and How Costly?, Society for Policy Modeling (Elsevier Inc., 2007). The authors conclude that “inter-Korean unification is likely to be a “costly and disruptive process.”

In the Korean context, while government involvement and interventionist economic policies could initially contribute to solving issues of decreased national wealth during the early years of transition, long-term human rights concerns arise from the fact that this approach, as noted above, may lead to “grotesque increases in inequality” between the rich and poor in general, with a noticeably sharper contrast between the North Korean and South Korean workforce. Again, economic inequalities between the two groups would be aggravated by South Korea’s previous exposure to and competition in a free market and North Korea’s lack thereof. Without opportunities to meaningfully participate equally in the governance of the country, especially with regard to economic development and policy-making, I argue that there is a serious concern that North Koreans could become victims of oppressive economic development policies, leading to an irremediable gap between North Korean and South Korean wealth.

In summary, in the unified Korean State, while the transitional paradigm of maximizing government efficiency and effectiveness will allow the State to address issues arising from the transition process, it will fail to offer any safeguards against human rights violations, as demonstrated in the human rights history of both Koreas. As such, given the rigorous demands and costs of unification, specifically the political, social, and economic tensions referred to above, I argue that it is unlikely that a strong, centralized Korean government will proactively enact policies to protect human rights as a State priority. Furthermore, it is unlikely that there will be any constitutional or quasi-constitutional institution that will, with the full support of the State, implement human rights protections during the transition process, unless certain safeguards are put in place.

Rights Policy, 2010), available at: <http://www.ichrp.org/files/documents/185/210_human_rights_global_economy_colloquium_report.pdf>. 184 Ibid., at page 5, wherein the author points out the importance of participation to create conditions that ensure consideration of valid interests including the views of vulnerable or marginalized people, specifically in the context of offsetting the power of the private sector, major financial institutions, foreign investors and donors to influence economic policy.
The above predictions are based on the assumption that the unified Korea will adopt the transitional model of constitutionalism in order to maximize efficiency and responsiveness to critical transitional issues, as both Koreas have in their respective turbulent histories. By identifying human rights violations that have occurred in the past in both the South and North due to the operation of the transitional model, I have attempted to demonstrate that human rights violations will continue to be a problem in the Unified Korea if it continues to adopt a purely transitional paradigm. Therefore, in the next section, I argue for an alternative hybrid model, attempt to identify its core principles, and discuss its implications for human rights protection in a unified Korea.
Chapter 4
A Hybrid Model of Constitutionalism to Mainstream Human Rights in a Unified Korea

In the first Chapter, I demonstrated that when implemented in an appropriate context, the traditional model of constitutionalism can be and has been a critical foundation for human rights protections, especially in Western Europe and the United States. However, in transitioning societies, the traditional paradigm creates an unsustainable constitutional structure that restricts government from making organic policy decisions to address pressing social and political issues, and to reflect the needs and aspirations of the host State. For example, even if both North and South Korea decided to pursue reunification on an amicable basis, a purely traditional approach to constitutionalism would force the North Korean elite to withdraw from the unification negotiations, since a strict interpretation of the rule of law would require an unprecedented lustration process and post-war trials of North Korean officials in order to meet the demands of legal continuity and justice. Furthermore, the traditional paradigm’s focus on preventing the amalgamation of State powers would only hinder Korea’s practical need to recover from the anticipated economical burden caused by unification, as well as the capacity to cope with the political strain caused by a newfound surge of nationalism spearheaded by the government in order to ensure the United Korea’s political / ethnical identity.

In light of the above issues, the transitional model of constitutionalism was suggested as a practical alternative to traditional constitutionalism, given its predominant function in empowering the State to not only adapt to the realities of transition, but steer the
direction of social change. However, I argued that the very features which allow the transitional model to retain its effectiveness and flexibility may also encourage the State to violate human rights, as demonstrated in the constitutional histories of both Koreas outlined in Chapter 2. Due to its focus on administrative efficiency and capacity-building and its relevant lack of balances / checks to divide or stem State powers, to the extent that human rights policies prove to be detrimental to the State’s policies of nationalism, ethnic unity, and economic development, a purely transitional approach to constitutionalism in the Korean unification scenario would merely prolong State violations of human rights in both South and North Korea. Therefore, as a concluding note, I stated that in a Unified Korea, the transitional paradigm will not offer any protections against human rights abuses committed by a highly centralized and disinterested government unless appropriate safeguards are set in place.

This section aims to identify a model of constitutionalism that addresses the dual goals of the Unified Korea – to empower its newly-established government to address pressing social and political issues via effective policy-making, and yet ensure rigorous human rights protections. In particular, I argue that a hybrid model that incorporates aspects of both traditional constitutionalism and transitional constitutionalism offers a viable solution to these goals.

Accordingly, the remainder of this thesis will not focus upon the mechanisms that allow transitioning governments to retain effectiveness and efficiency, since I presume that to a great extent, States in transition (and in particular, the United Korean State, in light of its political and constitutional history) will by nature be self-aggrandizing and therefore
will adopt a constitutional structure that maximizes administrative effectiveness and efficiency. Rather, the proposed hybrid model of constitutionalism incorporates this presumption into its definition by allowing a government to utilize all the necessary constitutional mechanisms to retain effectiveness and efficiency, and focuses more upon placing the appropriate safeguards in place.

(1) Features of the New Constitutionalism: A Hybrid Model

As discussed earlier, in times of transition the government must be given the discretion to execute timely policies to respond to social and political needs, as well as the powers and institutional support to do so. At the same time, effective safeguards must be set in place to ensure that individual rights are not violated, especially when political interests during transition do not align with human rights concerns. Therefore, the hybrid model of constitutionalism must focus on allowing the government to retain its effectiveness and efficiency to the extent that it does not infringe upon individual rights guarantees.

Whereas the traditional model of constitutionalism pursued these dual goals by weakening the State to the extent that, theoretically, it could not encroach upon individual rights, I propose that the hybrid model of constitutionalism should rather focus upon strengthening human rights protections by utilizing constitutional mechanisms (found in both the traditional and transitional paradigms) to construct a robust and independent infrastructure that will remain operative even if the State should exercise enhanced and centralized powers during transition.

In order to construct a hybrid model of constitutionalism that fulfills the above dual
goals in a manner that is organic to the Korean context, I rely upon the constitutional human rights protections associated with the traditional paradigm to form the content of the Korean constitution, while borrowing from the institutional and procedural focus of the transitional paradigm to give effect to the human rights provisions set out in the Korean constitution.

A. Applying the Elements of Traditional Constitutionalism – Constitutional Provisions in the Unified Korean Constitution

Among the elements attributed to traditional constitutionalism that have contributed to the protection of human rights, the concepts of limited government and separation of powers may render the Unified Korean government unable to implement effective or time-sensitive policies critical to the success of the unification process. The marginal benefits of these elements to individual rights protection dim in light of the potential erosion they may inflict upon the government’s administrative capacities in the Unified Korea. On the other hand, the inclusion and entrenchment of substantive human rights and guarantees of judicial independence in a constitutional document do not unnecessarily impede State administration while providing a sustainable basis for protecting citizens from potentially oppressive government actions. The following elements of traditional constitutionalism are especially important concepts that must be imbued not only within the text of the constitution of the United Korea, but also within its constitutional culture.

Civil and Political Rights
In particular, the constitution of the Unified Korea should explicitly set out a non-exhaustive list of civil and political rights, including but not limited to freedom of conscience, religion, thought, belief, expression, assembly and association, and the press. These rights will be critical in the period of transition directly before and after unification, when a new form of Korean nationalism and the resulting demand for a unified political and ethnic identity may endanger the rights of political dissenters, separatists, or former North Korean citizens. For example, legislation such as the National Security Act (see Chapter 2) and North Korea’s existing criminal code provisions outlawing political alignment with the South point towards the possibility that upon unification, such legislation may be revitalized and modified to criminalize any political affiliation, activities, or statements which have the potential to undermine new national initiatives and other State acts during transition. Similarly, in its nationwide drive toward economic development and state sponsorship of a few select industries in the face of unprecedented financial inequality between the former South and North Korean populations, the Korean State may frown upon cries for reform in welfare, health, and the distribution of other social benefits.

Similarly, the new constitution should extensively detail democratic rights such as the right to a democratic form of government, the right to vote, the right of assembly, the right to form parties and otherwise engage in political activities, the limitation of the term and powers of the presidency, as well as other procedural rights. In light of Sung Ho Kim’s observation that “[a]ll the major constitutional crises in modern [South] Korea, including the ones triggered by military coups, have revolved around the power
of the presidency," the abovementioned constitutional provision of democratic rights – as well as the infrastructural capacity to enforce the same – will be crucial in (a) preventing further political crises by setting out a common agreement and understanding of the scope of the powers of the presidency, (b) creating socio-political consensus by providing for democratic procedures and other methods of political involvement and participation, and (c) forming a sustainable model of constitutional governance by empowering citizens to present their views before the State without fear of retribution, and ensuring that such access to power is distributed equitably and evenly amongst all citizens.

Equality Rights

Given the possibility of discrimination between South and North Koreans in the Unified Korea, especially in light of the two former States’ long-term mutual enmity and differences in political and economical self-identification, special focus should be given to drafting the scope of equality rights provisions in the constitution. In particular, the constitution of the United Korea should set out explicit provisions to prevent discrimination based on, among other factors, political affiliation, race, ethnicity, religion, sex, gender, and sexual orientation. In addition, the constitution should go beyond guarantees of antidiscrimination to actively promote substantive equality by

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185 Sung Ho Kim, Democracy and Constitutionalism at a Crossroad: A Reflection on Democracy after Democratization in Korea (Yonsei University, 2003), presented to the Conference of Casa Asia in Commemoration of the 25th Anniversary of the Spanish Constitution, Madrid / Barcelona.

186 See Dorsen, Rosenfeld, Sajo, and Baer, Comparative Constitutionalism: Cases and Materials (West Group, 2003), at 1287, where the author explains that in addition to constitutional provisions that protect the general franchise, plurality of political parties, or democratic rights of minorities, constitutions offer additional guarantees which allow for citizens to lobby parties or representations, join parties or associations, make campaign contributions, or pressure organizations that work for causes they favor.
assessing how North Koreans (or any other identifiable class of individuals) are relatively disadvantaged in comparison to their southern (or other) counterparts, and utilize positive legislation (i.e., affirmative action policies) to remedy such disadvantages.

Furthermore, considering the pervasive nature of equality rights, equality guarantees should be set out and construed generously to ensure that equality is promoted in the context of education, employment, social and economic status, elections, and access to justice, amongst others. Again, in addition to its direct contribution to the protection of human rights, the promotion and protection of equality rights will also play an important indirect role in developing government practices that are sustainable – similar to the function of substantive constitutional provisions for civil, political, and democratic rights described above.

Social and Economic Rights

The Constitution of the United Korea should also explicitly set out social and economic rights such as the right to property, economic activity, education, shelter, food, healthcare, and access to welfare. Among these rights, constitutional scholars distinguish between traditional economic liberties (property, contract, and entrepreneurship), and “second generation” rights such as social and welfare rights.187 Whereas constitutional jurisprudence established the perimeters of the former negative rights by defining instances in which the State was limited from intruding upon these

187 Ibid., at 1155.
rights, the latter modern rights often impose positive duties upon the government such as creating policies to promote these objectives (e.g., access to education for former North Korean children), forming and mandating a specialized committee to oversee the task of doing so (e.g., Committee for North Korean Education), and setting aside a budge to enable the specialized organization to carry out its mandate.

In the case of the Unified Korea, I argue that there will be an unprecedented demand for extensive and cost-efficient welfare initiatives to deal with outstanding issues such as lack of food, water, shelter, and education, as well as potential issues that may lie dormant for a certain period after unification, such as North Korean unemployment and disparity in income between former North Korean and South Korean citizens. The financial and political strains caused by these demands will likely become a topic of discomfort among policymakers, especially amidst rising awareness of the economic costs of unification. I argue that without extensive and explicit constitutional provisions which detail the scope of positive obligations the government owes to its citizens, there will be no incentive to push for social and economic rights in the Unified Korea.

In addition, a purposive approach should be adopted in interpreting the traditional and second generation economic rights to encourage North Korean entrepreneurship and to promote former North Korean citizens’ confidence and stability in the Korean market. Building off Daniel S. Lev’s view of the role of the middle class in procuring human rights for the general populace (see Chapter 1), I argue in particular that it is critical to ensure that upon and after reunification, there is a constitutional basis through which North Koreans may proactively take part in economic activities and ventures, own
property, and learn to utilize their resources to accumulate capital (i.e. by investing) in order to form a segment of the new middle class in the Unified Korea. The benefits of doing so include but are not limited to recognition of the bargaining and persuasive power of North Koreans by society and political entities, and the enhancement of the collective ability of North Koreans to protect their individual, social, and economic rights.

Implementation of International Standards

The above constitutional human rights protections should be interpreted as complementing the International Bill of Rights, or in particular, the rights enunciated in the International Covenant on Civil and Political Rights (ICCPR)\(^\text{188}\) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).\(^\text{189}\) Recognition of the universality of these covenants in the new constitution will ensure that its provisions are consistent with international standards of human rights protections.\(^\text{190}\) However, it must be noted that because the above human rights guarantees (if incorporated into the United Korean State’s constitution) already encompass most of the rights protected by the ICCPR and the ICESCR,\(^\text{191}\) the implementation of these international human rights covenants would serve more as an


\(^{189}\) International Covenant on Economic, Social, and Cultural Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3; 6 ILM 368 (1967)

\(^{190}\) Both the Democratic People’s Republic of Korea and the Republic of Korea are signatories to these covenants.

\(^{191}\) The ICCPR sets out provisions relating to rights to physical integrity, liberty and security of person, procedural fairness and rights of the accused, individual liberties, and political rights. The ICESCR contains provisions guaranteeing labor rights, social security, family life, the right to an adequate standard of living, the right to health, the right to free education, and the right to participate in cultural life.
additional tier of accountability rather than as a source of substantive human rights provisions.

Judicial Independence

Another critical principle of traditional constitutionalism for the enforcement and protection of human rights during and after the unification process (without undermining the administrative and governing capacity of the State) is judicial independence. Constitutional and human rights scholars have long voiced the critical role of an independent judiciary in securing and protecting constitutional guarantees of human rights. Internationally, both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights state that an independent judiciary is one of the essential elements for the protection of human rights within the State. In fact, the United Nations has set forth standards for achieving an independent judiciary in its Basic Principles on the Independence of the Judiciary, which was adopted by the General Assembly in 1985.

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194 Ibid.
Given the history of constitutional development in both Koreas (described in Chapter 2), especially the instances in which a politically-involved judiciary was a mere rubber stamp to legitimize the enactment and enforcement of policies contrary to human rights principles enunciated in their own constitutions, the importance of the explicit enunciation of the principles comprising judicial independence in the constitution of the United Korea cannot be emphasized enough. In particular, I propose that the following elements be included within the new constitution of Korea in order to produce an independent judiciary that is able to protect human rights: guaranteed terms of office, fiscal autonomy of judges, finality of decisions of the judiciary, exclusive authority of the judiciary to decide a judge’s competence, a ban on exceptional or military courts, and mandatory enumerated qualifications for judges.\(^{195}\)

**Principle of Entrenchment**

Finally, the Constitution should have entrenched within it the abovementioned provisions and guarantees to ensure that any proposed amendments to fundamental human rights provisions are rendered inadmissible, or at least, require a supermajority or a referendum submitted to the people. The importance of the stabilizing and preventive role of such a clause cannot be understated given the instrumentality of the constitution in the history of both Koreas in furthering political agendas, and the frequent amendments to the constitution for the same purpose (see Chapter 2).

\(^{195}\) *Ibid.* In their report, the High Commissioner for Human Rights sets out seven constitutional principles that they describe as key constitutional elements necessary to produce an independent judiciary able to safeguard human rights. Also, *see* Cumaraswamy, *Report of the Special Rapporteur on the Independence of Judges and Lawyers* (submitted pursuant to Human Rights resolution 1995/36).
B. Applying the Elements of Transitional Constitutionalism – Judicial Activism, Participation & Integration, and Institutionalization

Judicial Activism

A key characteristic that defined transition in South Africa and Eastern Europe is the modified role of the Judiciary, or in particular, that of the Constitutional Court. As discussed above, its active engagement in the political sphere to challenge the constitutionality of government actions such as elections, congressional enactments, and administrative or regulatory overview of policies has purposively steered the transition of these countries toward a clear and overarching constitutional theme – whether it be promoting the legitimacy of the new government by accounting for past human rights violations or facilitating peace-making in order to bring about stability and to settle ongoing ethnical or political conflicts.

As demonstrated in the history of both Koreas, the close proximity of the Judiciary to social and political issues during the post-division transition periods often proved problematic since the States were guided by an efficiency-driven model of constitutionalism that prioritized national initiatives over human rights protections. In this scenario, the activism of the courts only served to legitimize and streamline State policy to further the goals of transition. However, when the Judiciary is empowered by a Constitution which prioritizes human rights protection and is granted the necessary insulation from intervention by the other branches of government, judicial involvement in political matters can be an effective way to ensure that human rights protections are
effectively guaranteed in the administration of State actions.

Thus, provided that (a) the human rights provisions mentioned above are explicitly set out in the constitution; and (b) the Judiciary (i.e. the Constitutional Court) is in both principle and reality independent from the other branches of government and empowered to effectuate its decisions, a politically active Court guided by and founded upon a rights-driven constitution would not only be an effective buffer against human rights infringements by the United Korean government, but also a compelling advocate for human rights advocacy in the new nation. Upon hearing an inquiry by or involving the State (or an individual impacted by government policy), the Constitutional Court would be uniquely positioned to proactively mould and interpret the policies of the new State, and even incorporate individual rights protection and equality as an inherent constitutional requirement for all State actions.

**Participation & Integration**

As mentioned in Chapter 1, the transitional paradigm of constitutionalism encourages the participation of citizens in drafting the new constitution and, in the greater scheme, the creation of the new constitutional order. The transitional paradigm thereby ensures that the political, social, and economic practices of the new State are organic and reflect the conglomerate interests of the participants. Ideally, during the process of balancing the various interests of the citizens of the United Korea, the participatory aspects of transitional constitutionalism would result in the integration between former North and South Korean citizens and the inclusion of the various other sub-groups populating the
new nation.

In Korea, it can be anticipated that the constitutional text, ordinance, and practices of the United Korean State would have to be moulded by sustained dialogue (facilitated by various government and non-government institutions) between former North Korean and South Korean citizens in order for the new constitutional order to be truly organic and sustainable. As such, participation and integration will be crucial during the transition leading to unification, since it can be said that the extent of satisfaction and sense of belonging of the citizens of the new State will largely be determined by the degree that their opinions are taken into account (both perceivably and actually) and reflected not only in the text of the constitution, but in the practical, day-by-day administration of State policy.

That said, it is important to define specific areas of unification and their constitutional ramifications which will require the most dialogue and mutual participation. Russell Hardin states that “a successful constitution is likely to attempt no more than to seek to coordinate a populace on the limited set of values that are widely shared. This will obviously be a smaller set in a pluralist society than in, say, a society in which virtually everyone is strongly committed to a common set of religious beliefs. No issue on which two major groups strongly disagree can be easily constitutionalized.” In light of this observation, especially the fact that the North and South hold polemic views on nearly all vital issues such as political ideology, religion, cultural identity, and social norms and values, dialogue will be an indispensable process for successful unification.

However, it is worth repeating that both Koreas will inevitably engage in dialogue and cooperation to resolve the issues of national importance listed in Chapter 2, namely political identity, ethnic unity, and economic development, due to the likely centrality of these issues in the unification agenda. While the overall process of dialogue and participation to resolve the above issues will be beneficial, albeit indirectly, to the protection of human rights in Korea to the extent that it facilitates social, political, economic, or cultural integration between the citizens of the former South and North, it is more important for the citizens of the United Korea to focus their efforts on engaging in a dialogue to directly resolve the crucial issue of how civil, political, social, and economic rights can be effectively upheld and sustained in the context of government action during transition and unification.

Institutionalization

The final and arguably most important feature of transitional constitutionalism is its proclivity to manifest State initiatives into institutions established by statute. This feature is what allowed transitioning societies in Eastern and Central Europe, South Africa, Southeast Asia, and India to (a) flexibly and rapidly adapt to fluctuating political, social, and economic circumstances, and (b) steer the course of transition by addressing key transitional issues through the coordinated actions of their respective branches of government. As stated earlier in Chapter 1, even though many transitioning societies including North Korea had constitutions setting out detailed human rights guarantees,\[197\] I again state that (a) based on its cumulative history, the United Korean State will ensure to mainstream the above issues; and (b) the practicality or feasibility of any implementing any particular political / constitutional model in the new nation is beyond the scope of this essay in any event. The focus of this essay is to promote human rights protection in such a context.
the reality was that these provisions had no practical impact on State practice. I argue that the defining feature that distinguishes these “sham constitutions” from other “effective constitutions” is the degree to which institutional support is provided for the implementation of constitutional provisions.

Often referred to as capacity-building, the process of institutionalization ensures that the State has the financial, legal, and procedural capacity to effectuate its initiatives at all levels of government via designated committees, task forces, commissions, individuals, and other institutional actors. These institutions can be established by statute, as in the case of South Africa, where municipal governments were mandated by the *Municipal Systems Act* to foster civil involvement, integrated development plans, and representation in government policies. On the other hand, the collaborative efforts of civil society organizations and the media to strengthen non-government networks and participate effectively in local government were crucial to the implementation and execution of the *Local Government Code* adopted in the Philippines in 1991. Hybrid organizations such as the Palestinian Women’s Affairs Technical Committee (WATC) operate as non-governmental umbrella organizations that coordinate the efforts of a large number of governmental and non-governmental organizations, including human rights organizations, political parties, and political leaders for the purpose of raising awareness and lobbying groups to achieve legislation aligned with their respective mandates.

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198 *Supra* note 22, at 10–12.
200 *Ibid.*, at 12-14. This organization was established in 1992 in response to large demonstrations demanding greater women’s representation and more gender-sensitive laws and policies in before and after the establishment of Palestinian Authority (1994).
For the purpose of transition and unification in Korea, I argue that the following characteristics must be incorporated into the institutional arrangement in order to effectively implement constitutional human rights protections:

i. Institutional Implementation of Constitutional Standards

Presuming that the text of the new Constitution sets out a comprehensive list of human rights protections, human rights and other institutions should specifically incorporate the Constitutional text related to its specific mandate. This will promote cross-institutional coherency in human rights protection standards in the institutional arrangement of the new Korea.

ii. Mutual Integration and Accountability

Institutions functioning under similar legislation or mandates should be encouraged to cooperate in order to fulfill their respective mandates, not only because of the resulting financial and procedural efficiencies that result from integration, but also because of the added benefit of mutual accountability. Multi-tiered arrangements between provincial and federal institutions as well as domestic and international institutions will ensure that there will be a network of institutions rather than a stand-alone entity responsible for keeping a centralized government accountable for its actions.

iii. Diversified Classification
The array of institutions that will protect human rights in Korea must be diversified to include statutory, non-organizational, and hybrid actors. Even though human rights guarantees may be explicitly outlined in its Constitution, there is no guarantee that the interests and priorities of the State will necessarily align with its constitutional mandate to protect human rights. As such, statutorily mandated institutions that are operated and financed by the State may be conflicted or unable to fulfill their mandates in the event that the protection of human rights may impede national prerogatives, whereas grassroots, non-governmental, and civil organizations will be able to operate independently and relatively unhindered by political interests.

iv. Diversified Financing

For the same reason as above, financing should be obtained not only from the government itself, but from civilian, private, and international entities in order to ensure that the financial integrity of key human rights institutions will not be compromised by government pressure or persecution in the form of federal or provincial budget cuts.

v. Suggested Institutions for the Protection of Human Rights in the Unified Korea

I suggest, for the purpose of illustration, a list of institutions which will promote the protection of constitutional human rights provisions – provided that the above prerequisites, namely the implementation of constitutional text, mutual integration,
diversified classification, and diversified financing, are satisfied:

<table>
<thead>
<tr>
<th>Korean Hybrid Model Objectives that Directly or Indirectly Promote Human Rights Protection</th>
<th>Related / Suggested Institutions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reunification</td>
<td>• Legislature (Parliament) • Ministry of Unification • Domestic / International NGOs</td>
</tr>
<tr>
<td>Constitution Drafting</td>
<td>• Legislature (Parliament) • Constitution Drafting Committee • Lawyers / Activists / Academia</td>
</tr>
<tr>
<td>Inclusion of Substantive Human Rights in Constitution</td>
<td>• Legislature (Parliament) • Constitution Drafting Committee • United Nations General Assembly • Domestic and International Human Rights Organizations • Lawyers / Activists / Academia</td>
</tr>
<tr>
<td>• Civil / Political Rights • Social Economic Rights • Equality • Implementation of International Standards</td>
<td></td>
</tr>
<tr>
<td>Enforcement of Constitutional Human Rights Guarantees</td>
<td>• Constitutional Court • Human Rights Commission • Human Rights Tribunal • Domestic and International Non-government / Non-profit Human Rights Organizations • Lawyers / Activists / Academia</td>
</tr>
<tr>
<td>Judicial Independence / Activism</td>
<td>• Legislature (Parliament) • Constitutional Court • Lawyers / Activists / Academia</td>
</tr>
<tr>
<td>Participation in all facets of democratic governance</td>
<td>• Legislature (Parliament) • Federal / Provincial / Municipal Government • Educational Institutions • Public / Private Companies and other Economic Institutions</td>
</tr>
<tr>
<td>Political / Cultural / Ethnic / Economic Integration</td>
<td>• Legislature (Parliament) • Federal / Provincial / Municipal Government • Educational Institutions • Public / Private Companies and other Economic Institutions</td>
</tr>
<tr>
<td>Peace and Reconciliation</td>
<td>• Peace and Reconciliation Committee • War Crimes Tribunal</td>
</tr>
</tbody>
</table>
| Democratic Elections | • Elections Committee  
|                       | • Educational Institutions |
| Access to Justice     | • Legal Aid  
|                       | • Lawyers / Activists / Academia |
| Anti-Corruption       | • Legislature (Parliament)  
|                       | • Task force on government officials corruption |
| State Accountability Adherence to Constitutional Provisions of Human Rights Guarantees | • NGOs and Grassroots Organizations which monitor:  
|                                                 | ■ The Presidency  
|                                                 | ■ The Legislature  
|                                                 | ■ The Courts |

The scope of this thesis precludes discussion of the mandate, scope, function, procedural layout, financing, governance, and constitution that each of the above institutions should employ; I merely attempt to demonstrate the need for and practicality of such groups in the context of transition, specifically in the Unified Korea. Further details will likely, and necessarily, be subject to further debate and research.

(2) Towards a Sustainable Constitutional Model: Summary of Findings and Key Principles

I have introduced a hybrid model of constitutionalism that will be a viable and sustainable solution to the issue of human rights protection in a transitioning steered by a heavily-centralized government. A careful analysis of this hybrid model reveals that the substantial features of the traditional paradigm and the procedural and institutional features of the transitional paradigm are not only mutually complementary, but mutually necessary for the purpose of protecting human rights in the specific context provided in Chapter 2, namely Korean reunification.
In summary, while the traditional model of constitutionalism provides substantive and extensive human rights protections, its rigidity, inflexibility, and tendency to weaken State power may lead to the creation of inauthentic and inorganic constitutional cultures when implemented in transitioning States. In South Korea, the imposition of the traditional paradigm resulted in the creation of a politically-instrumental constitution, while international standards pressured North Korea to incorporate constitutional human rights provisions they had no intention of practising. The transitional model, on the other hand, grants greater flexibility, adaptability, and discretion to State practice in transitioning societies by implementing procedural and institutional modifications to the traditional model. Overall, this has the effect of empowering the various branches of Government to collaboratively and efficiently implement policies of national importance. In Korea, both the North and the South utilized the transitional paradigm to strengthen their political identity, ethnic unity, and economic development—to the detriment of human rights protection.

Based on this trend I predict that a unified Korea will continue to focus on the revitalized issues of political identity, ethnic unity, and economic development—again, to the likely detriment of human rights protection. In such a context, a hybrid model of constitutionalism would allow the State to retain its efficiency in administering State policy by allowing a certain degree of collaboration between the branches of government, active judicial intervention in political and constitutional issues, and the institutionalization of key national priorities. At the same time, the substantive human rights protection buttressed by the traditional model of constitutionalism would be defended by an independent and active Judiciary and Constitutional Court, administered...
by an extensive institutional infrastructure with multiple tiers of accountability and financing, and sustained by the participation of former North and South Korean citizens. The sustainability of this mode of governance would be determined by the organic form of constitutionalism resulting from sustained dialogue, mutual compromise, and integration between the government, the people, and their various subpopulations.

Of course, many issues remain unanswered, such as whether maintaining a hybrid constitutional structure that provides for extensive human rights protection is economically feasible upon reunification (a period which may possibly be the greatest hardship faced by Korea in the past century), whether unification will occur through war or peaceful negotiations, as well as the question of whether Korea will, in fact, become a constitutional democracy with a fully operating free market immediately or gradually upon unification. Even if a hybrid model is adopted, the minutiae of how the model will be implemented cannot be determined given the scope of this thesis. While this thesis attempts to establish a practical and sustainable basis upon which human rights can be protected when Korean reunification becomes reality – or at least provide grounds for discussion upon such an occasion – the above issues will require further research, extensive dialogue, and even more patience.
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