

Violence Does Not Need To Be the Answer – How South Korea Embraces Peaceful Methods of Discourse over Social Issues through the Constitution

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Abstract

In an era where democracies are the most common form of government in the world, the question remains on how to successfully accommodate the issues of society. While democracy encourages public participation in national politics, many governments still struggle with how to cope with rising public participation, where a popular form of participation is through social movements. Often times, governments resort to violence to stifle social movements, but this violent clash does not need to be eternal. Perhaps there is a solution to this situation, where the constitution and legal bodies that derive their influence and power from the constitution can provide the platform for controlled and peaceful discourse between the public and political elite on social issues. In South Korea, the preamble of the constitution and the constitutional court have been powerful legal tools that have allowed for peaceful discourse over social issues and have entrenched the South Korean nation into utilizing peaceful forms of discourse to settle grievances. This paper will explore the historical evolution and foundations of this peaceful South Korean system and present lessons that could be adopted by other democracies around the world to promote peaceful communication between the public and political elite.

Key words: Conflict management, Constitution, Preamble, Constitutional Court, Social Movement, Grievances, Government, Society

I. Introduction

Democracy is an interactive form of government. The level of democracy in a nation depends heavily on how open the nation is to public participation. Referencing the democracy identification framework of International IDEA, democracy can be identified using five general attributes: “Representative Government (free and equal access to political power), Fundamental Rights (individual liberties and resources), Checks on Government (effective control of executive power), Impartial Administration (fair and predictable public administration), Participatory Engagement (instruments for and realization of political involvement).”¹ Within these attributes, International IDEA defines 16 subattributes as further indices to measure how democratic a government is. These indices present that public participation is vital to a democratic system of government, where over half of the indices mention public or civil involvement in some form in the national political sphere.² This underscores the importance of public involvement in developing a democracy, reiterating Lincoln’s sentiments from his Gettysburg address: “government of the people, by the people, for the people, shall not perish from the earth.”³

Over the course of history, democracies have been growing in the world and are allowing more people to be involved in political matters. The Second World War triggered many democratization efforts in the world, but it was not until the fall of the Iron Curtain around 1989 that led to a dramatic increase in the number of democracies around the world.⁴ In 2015, data showed approximately 4.10 billion people lived under a democratic system of some kind.⁵ Considering that nearly half of the world’s population lives under a democratic system,⁶ it is expected that more communities around the world will open up to public participation in political matters. To some extent, this is true, as 2019 marked the year of the

1 Claudiu D. Tufis, *The Global State of Democracy Indices: Technical Procedures Guide*, 10 Int’l IDEA (2019).

2 *See Id.* at 11..

3 Abraham Lincoln, *The Gettysburg Address*, Presidential Remarks at the Dedication of the Soldiers’ National Cemetery in Gettysburg, Pennsylvania, (Nov. 19, 1863), *available at* <http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm>.

4 *See* Max Roser, *Democracy, Our World in Data* (2013), *available at* <https://ourworldindata.org/democracy> (visited Mar. 14, 2021).

5 *See Id.*

6 *See* The Economist Intelligence Unit, *Global Democracy in Retreat* (Jan. 21, 2020), *available at* <https://www.eiu.com/n/global-democracy-in-retreat/> (visited Sep. 4, 2020).

highest number of protests worldwide, as communities protested against the decline of democracy in their government or protested for democratization in their nation.⁷

The global growth in democracies raises attention to the manner in which the public gets involved in political matters and social movements stand out as a popular form of public participation in politics. Social movements attract significant attention, due to the disruptive nature of collective activism to raise awareness on an issue and encourage social change. Defined as “organizational structures and strategies that may empower oppressed populations to effective challenges and resist the more powerful and advantaged elites,”⁸ social movements effectively raise the influence of the public in the political sphere. This is amplified by the ability of social movements to mobilize a large mass of people to develop solidarity around a certain issue, increasing pressure on the political elite to respond. However, there are dangers associated with large mobilizations to domestic stability, as social movements may take violent or non-violent forms. In the case of democracy protests, “more often, states have used forceful means to repress democracy protests,”⁹ which raises the question of whether social movements will resort to violence more often than peaceful means of discourse.

Violent forms of discourse between the public and political elite can be mitigated through a sturdy legal framework within a nation, namely through the constitution, which is an outstanding legal mechanism found commonly in democracies and is capable of providing legal bodies that can contain disputes within the realm of peaceful discourse. “A constitution is an enactive document consummating the creation of a polity”¹⁰ and represents the fundamental rights and laws that the public and political elite have agreed upon to become the keystone to the nation’s legal system. Notably, the interaction between the preamble of the constitution and the rest of the legal document is significant, as the preamble identifies the core values, morals, and identity of a nation and outlines the how the subsequent clauses in the document will be interpreted for

7 *Id.*

8 Davita Silfen Glasberg and Deric Shannon, *Political Sociology: Oppression, Resistance, and the State* 150 (Pine Forge Press 2011) (2010).

9 Dawn Brancati, *Democracy Protests: Origins, Features, and Significance* 2 (Cambridge Univ. Press 2016) (Sep. 2016).

10 Vivien Hart, *Constitution-Making and the Transformation of Conflict*, 26 *Peace & Change* 153, 154 (Apr. 2001).

the people given the universal understanding provided in the preambulatory clauses. As Ginsburg described, “preambles often speak in the name of a distinct people, either real or fictional, who are both the creators and subjects of the constitutional order...constitutions, particularly preambles, reflect local needs, idioms, and aspirations.”¹¹ Essentially, the preamble is the “national expression”¹² of the citizens that have created the constitution based on their agreed vision for the nation. The preamble thus acts as the heart of the constitution and provides context to all laws and rights in a nation that are born out of the constitutional order.

Therefore, the following hypothesis could be contemplated: if the fundamental understandings of a community are outlined robustly within the preamble of a constitution and are amended to promote peace within a community, then the nation will develop a peaceful culture around expressing grievances and utilize more peaceful methods of discourse provided by the strong constitutional foundation and legal bodies that derive therefrom. This is not a foreign idea, as South Korea possesses a preamble dedicated to peaceful discourse that has legal power in a court of law and has established a constitutional court under that spirit that interprets constitutional issues directly in order to enact social change. This makes South Korea an interesting case study for this hypothesis, as South Korea is a nation that was able to transition to full democracy in a relatively short period of time whilst maintaining a dedication to peaceful forms of discourse.¹³ By having strong legal tools born from a series of democratization events in the resplendent history of South Korea, the people of South Korea have developed a culture of peaceful social movements and non-violent forms of voicing social issues that live on to the current day.

This paper will explore the role of the constitution in building a peaceful method of voicing and resolving social issues by utilizing South Korean participatory democracy as a primary case study of how the democratic nation successfully minimized violent clashes between the political elite, law

11 Tom Ginsburg, Nick Foti & Daniel Rockmore, “We The Peoples”: The Global Origins of Constitutional Preambles, 46 *Geo. Wash. Int’l L. Rev.* 305, 306 (2014).

12 *Id.*

13 South Korea was classified as a closed anocracy following independence in 1945. Between 1945 and 1986, South Korea maintained a closed anocracy and autocracy style of government. Following the restructuring of South Korean democracy in 1987, South Korea built an open anocracy in 1987 before swiftly turning to a democracy in 1988. See Max Roser, *Democracy, Our World in Data* (2013), available at <https://ourworldindata.org/democracy> (visited Mar. 14, 2021).

enforcement, and the people over its history. The first section will discuss the critical nature of constitutions in democracies and why the preamble is of increased importance for finding peaceful resolution to internal conflict. The second section will explore the modern-day preamble of the South Korean constitution by performing a historical analysis and discussing the significance of the social movement elements of the preamble in developing the modern-day South Korean society that relishes peaceful forms of political discourse for social issues. The third section will discuss the role of the newly-formed constitutional court and how it operates in mediating conflict between the public and political elite, especially in regards to the controversy surrounding the National Security Act and the problems it raises to fundamental freedoms protected by the constitution. The fourth section will briefly look to the future of South Korea with the preamble amendment proposal from the Moon administration and how it is significant in molding a more modern version of South Korean participatory democracy. The last section will draw conclusions to the general hypothesis and highlight important lessons from the South Korean case that could be of importance to other democracies around the world.

II. Constitutions are Critical in Democracies: How Preambles Can Define a Democracy and Present Avenues for Change

A constitution is essentially a social contract between the citizens and the political elite, making it the keystone to any nation. All organized nations have a form of constitution. Whether the nation is authoritarian or democratic, a constitution defines the nation and the laws, values, and morals that the people have agreed to.

Constitutions are even more crucial in democracies, since democratic systems of government try to promote a politically inclusive community and the constitution is a way to promise interaction between the public and the political elite. While democracy is a style of government, there are diverse types of democracies that makes each democratic government somewhat unique. As Dahl discussed, “the very fact that democracy has such a lengthy history has actually contributed to confusion and disagreement, for ‘democracy’ has meant different things to different people at different times and places.”¹⁴ Therefore, to some

14 Robert A. Dahl, *On Democracy*, 3 (Yale Univ. Press 1998).

extent, constitutions are the instruction manuals for each diverse democracy, as “constitutions provide the legal framework for a democracy and the rule of law.”¹⁵ Such framework is crucial to keep democracy alive in a nation, as “democracy, unchecked, is as much a threat to freedom as dictatorship.”¹⁶

The preamble of a constitution is important in enveloping the spirit of the people and defining the democratic identity of a nation in the course of its existence. It summarizes the values, cultures, and aspirations of a nation and also embraces “a concept of popular sovereignty according to which the constitution is the fruit of a constituent power exercised directly by the people and not by its representatives.”¹⁷ Furthermore, the preamble is a section of the constitution that opens a nation for change, as “preambles are the expression of cultural development, an instrument of cultural self-representation of a people, a mirror of its cultural heritage and the foundation of its hope.”¹⁸ Not only does the preamble possess the characteristic of being a historical reference for a nation, but it can also provide an avenue for social change depending on how the culture of a nation changes over time. Therefore, the preamble helps define what direction a nation wishes to take in its evolutionary path. The combination of the democratic values and the cultural aspirations of the people makes the preamble the heart of the constitution and hails the fact that the nation was constructed by the people.

Recognizing the characteristics of a preamble can offer deeper insight into the attitudes and aspirations of a nation. Orgad identifies five characteristics of a preamble: sovereign, historical narrative, supreme goals, national identity, and God or religious.¹⁹ The sovereign characteristic refers to defining sovereign power of the nation and is the most general identification that allows many citizens to relate to. A historical narrative tells the story of a civilization rooted in language, heritage, and tradition. The supreme goals outline the fundamental goals of a society and project objectives the citizens aim to achieve in the future.

15 Democracy Reporting International, *Constitutions* (2016), available at <https://democracy-reporting.org/constitutions/> (visited Sep. 8, 2020).

16 Randall G. Holcombe, *Constitution and Democracy*, 7 IDEP 43 (2001).

17 Justin O. Frosini, *Constitutional Preambles at a Crossroads between Politics and Law*, 34 (Maggioli S.p.A 2012).

18 *Id.* at 17.

19 See Liav Orgad, *The Preamble in Constitutional Interpretation*, 8 Int. J. Const. Law 714, 716-717 (Oct. 2010).

National identity refers to national constitutional philosophy and commitments. The religious aspect of a preamble references spiritual belief of the society and whether the nation accommodates religious belief or separates itself from religion entirely. Depending on the nation, each characteristic can have a different amount of impact on the preamble, allowing for nations to mold their own governing system based on their beliefs.

While Orgad's five characteristics assist in the general understanding of the preamble of the constitution, it lacks an important characteristic that is prevalent in the modern world engulfed in globalization, which is the additional discussion of modernization and allowing for international understanding. As globalization makes international relations more prevalent and important in diplomacy, the accessibility and understanding of national identity and style of government to foreign nations and governments has become important. For the purpose of expanded exploration in this paper, modernization is defined as amendments to the preamble that make the constitution more accessible to all, which include, but are not limited to, amending the constitution to the use of more modernized and colloquial language and amending language to be more recognizable in international understanding. Modernization assists in keeping the preamble accessible to all members of society and even attracts international attention to give the possibility of sharing national values and eagerness of cooperation to progress. Given the addition of this characteristic, the formation of a democratic government relies on how the six characteristics are incorporated in the preamble and how they are defined to preserve a positive attitude toward cooperation between the people and political elites in implementing social change.

All democratic nations have public participation in government included in some shape or form in the preamble of their constitution, but how they are phrased and included is critical in how sustainable social participation and social change is in the nation. Especially in regard to social movements, some democratic nations are more lenient to protests compared to others. Democratic peace theory discusses this phenomenon to some extent. While the theory discusses the greater picture of democracies not getting involved in international conflict with each other, some scholars discussed the high unlikelihood of democratic government systems getting involved in violent internal conflict. The likelihood of internal conflict depends on several factors, such as "the constitutional constraints on

the chief executive, the competitiveness of domestic politics, the openness of the process for selecting the chief executive, and the strength of the rules governing participation in politics.”²⁰ Yet, studies have shown that “internal wars in democracies are less lethal,” due to the bargaining and credible commitment possibilities democratic government systems have with their citizens.²¹ However, this very much depends on how the people forged their democracy and democratic government, including how public participation is seen in the national identity. After all, even some democracies are insusceptible to violent repression: as social movements have been invigorated by corruption, authoritarianism, and economic motives, governments have been leaning towards aggressive and sometimes violent crackdowns to bring order to their nations.²² Therefore, the wording of the preamble is even more important than originally perceived, as the preamble is essentially the building block of the whole constitution, outlining national identity, values, and morals that have significant impact in how social change is brought about.

The violent clashes between government and citizens do not need to be the immediate and permanent result of social movements. What South Korea did was incorporate the spirit of peaceful social movements to reframe the view of the clash between the public and political elite on social change. Historically, South Korea was a nation built on social movements and this is ingrained in the national identity. While there are many instances of social movements being suppressed with violent retaliation from the central government, over its history, the Korean people were headstrong in keeping their faith in peaceful social movements and this is preserved in the South Korean constitution, namely in the preamble. The preamble embodies and emanates peace, hence how the nation shaped its relatively peaceful participatory democracy. Thus, South Korea is still very active in organizing social movements; however, both political elites and social movement organizers have a mutual understanding of resolving issues peacefully and have established legal bodies like a constitutional court to promote this sentiment.

20 Edward D. Mansfield and Jack Snyder, *Democratization and War*, 74 *Foreign Affairs* 3, 81 (May-Jun. 1995).

21 Håvard Hegre, *Democracy and Armed Conflict*, 51 *J. Peace Res.* 159, 161 (2014).

22 See Austin G. Mackell, *Worldwide Protests Challenge the Global System (Democracy Without Borders Nov. 4, 2019)*, available at <https://www.democracywithoutborders.org/12000/worldwide-protests-challenge-the-global-system/> (visited Sep. 6, 2020).

III. The Importance and Impact of Social Movements in Korean Society

Korean society has always valued social movements as an important method of participation in politics. “Social movements and popular protests continue to be one of the most representative and dominant forms of political expression in South Korea”²³ and this is largely due to the Korean culture of organizing social movements as a method of displaying public displeasure of political proceedings. This culture surrounding social movements sprouted from the independence movement during the early 20th century and has been upheld to this day. Social movements have become a core element in South Korean politics and society that “major newspapers in South Korea casually label their nation a ‘Republic of Demonstrations (*siwi gonghwaguk*).”²⁴ The indispensable nature of social movements became the core of the Korean national identity and therefore, social movements take considerable attention in the constitution.

The preamble of the South Korean constitution has the unique feature of outlining the spirit of crucial social movements in the history of the nation that were responsible for forming the current nation. In essence, the preamble describes South Korea’s long and arduous journey to democracy, while also presenting how the Korean public continued to refine the democracy that leads the political system in the nation today. According to the current preamble of the constitution, amended and enforced in 1987, there are two major social movements explicitly stated as the source of cause and spirit of the current South Korean nation. The preamble reads as follows:

“We, the people of Korea, proud of a resplendent history and traditions dating from time immemorial, upholding the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919 and the democratic ideals of the April Nineteenth Uprising of 1960 against injustice, having assumed the mission of democratic reform and peaceful unification of our homeland and having determined to consolidate national unity with justice, humanitarianism and brotherly love, and to destroy all social vices and injustice, and to afford equal opportunities to

23 Sunhyuk Kim, Civic Engagement and Democracy in South Korea, 40 Kor. Obs. 1, 3 (Spring 2009).

24 *Id.*

every person and provide for the fullest development of individual capabilities in all fields, including political, economic, social and cultural life by further strengthening the basic free and democratic order conducive to private initiative and public harmony, and to help each person discharge those duties and responsibilities concomitant to freedoms and rights, and to elevate the quality of life for all citizens and contribute to lasting world peace and the common prosperity of mankind and thereby to ensure security, liberty and happiness for ourselves and our posterity forever, do hereby amend, through national referendum following a resolution by the National Assembly, the Constitution, ordained and established on the Twelfth Day of July anno Domini Nineteen hundred and forty-eight, and amended eight times subsequently.²⁵

The inclusion of the two social movements defines the social attitudes and the expectations of the South Korean society in the present and future. The preamble acknowledges the March First Independence Movement of 1919 and the April Nineteenth Uprising of 1960 as two events that bolstered South Korean democracy and nationhood. Both events were critical transition points in Korean history and were key representations of peaceful social movements in South Korea that successfully sparked the empowerment of democracy in the nation. The two social movements also had different identities and goals that provide different emphasis on important Korean morals and values that warrant preservation in the preamble. Referring to Orgad's characteristics, the identification of the two social movements weighs in on how the two social movements were grand examples that defined South Korea's sovereignty, historical narrative, supreme goals, and national identity.

A. The Korean Independence Movement as the Foundation of National Peaceful Democratic Spirit

The Korean independence movement depicted the power of the Korean people in resisting colonial domination and the importance of peaceful Korean solidarity. Ever since the beginning of the Korean civilization in 10th century BC, the Korean people were proud of the civilization's ability to fend off attacks

25 See University of Bern, South Korea – Constitution, (Univ. of Bern 2010), available at https://www.servat.unibe.ch/icl/ks00000_.html. (visited Apr. 1, 2020).

from greater powers in East Asia and, in the 19th century, the industrialized Western nations that wanted to forcefully open Korean ports. This national pride remained embedded among the people even after the 1910 annexation of Korea by the Japanese Empire and this passion inspired the peaceful protests for Korean independence in 1919. Preserving national language and writing, namely *Hanja* (한자), the use of unique Chinese characters to write Korean words, and the Korean alphabet system *Hangeul* (한글),²⁶ the Korean people coordinated the resistance against Japanese occupation. Political envoys appealed to the international community regarding the illegitimacy of Japanese military presence on the Korean peninsula under the leadership of Ahn Joon-Geun. Others directed calls for independence to the world and “pledged to ‘follow the model of the advanced democratic nations that are based on justice and freedom’ in establishing an independent Korea that would join the League of Nations.”²⁷ But these efforts fell on deaf ears. Therefore, inspired by Wilson’s Fourteen Points, Korean scholars took leadership of an independence movement and directed their cause to a democratic and independent Korea.

The March First Independence Movement of 1919 eventually took shape, bringing millions of Koreans together to fight for independence. On 1 March 1919, 33 core Korean scholars organized the *Samil Movement*,²⁸ dedicated to protecting Korean sovereignty, and were devoted to utilizing peaceful ways of promoting independence from Japanese occupation. The 33 scholars signed and submitted a proclamation of independence to the Japanese governor general. Soon after, over two million Koreans swarmed the streets in *Hanseong*,²⁹ shouting “*Mansei!*”³⁰ The whole country immediately followed to protest against Japanese occupation.³¹ The movement grew and the declaration of independence (기미독립선언서), was read aloud: “We have forty-three centuries of history as a distinct self-governing nation. It is our solemn duty to secure the right of free and perpetual development of our own national character, adapting ourselves

26 See Florian Coulmas, *The Writing Systems of the World*, 116 (Wiley-Blackwell 1991).

27 Kyung-Moon Hwang, *The Birth of Korean Nationhood*, N.Y. Times (Mar. 1, 2019).

28 “Samil” in Korean translates to 3.1, or March 1st.

29 “*Hanseong*” was the former name of present-day Seoul.

30 “*Mansei!*” translates to “Long Live Korea!”

31 See Sunhyuk Kim, *Civic Engagement and Democracy in South Korea*, 40 *Kor. Obs.* 1, 3 (Spring 2009). See also Kyung-Moon Hwang, *The Birth of Korean Nationhood*, N.Y. Times (Mar. 1, 2019).

to the principles of the reconstruction of the world.”³² Peaceful demonstrations went on for two days. Despite violent suppression by the Japanese occupation army, the Korean independence movement did not resort to violent methods of protests and remained peaceful until the Japanese governor general forced the Korean independence organizers to flee the peninsula. Korea continued to fight and protest for independence until 1945, when the defeat of the Japanese Empire in the Second World War freed Korea from occupation. This perseverance and sacrifice during the Japanese occupation remained at the heart of the Korean people and as the Korean scholars began to build their nation, they strongly believed in preserving this spirit in the national identity, thus the inclusion of the independence movement in the preamble of the constitution of the new nation. The spirit of the independence movement set the standard of Korean culture and identity and further inspired the peaceful means of voicing opinions in the nation.

B. 19 April 1960: People of South Korea Protecting and Defending Democratic Values

The April Nineteenth Uprising of 1960 raised awareness of corruption in the Korean democratic system and signified the power of the Korean people in protecting democratic ideals and rectifying injustice in Korean history. Following independence in 1945, Korea entered a turbulent period of Cold War political battles. While communism consolidated strength in the northern hemisphere of the peninsula, democracy prevailed in the south. The clashing aspirations between democracy and communism drove the two factions to war in 1950.

A democratic constitution was introduced in 1948 in the southern hemisphere of the peninsula and this became the basis of democracy in the newly proclaimed South Korea (officially named Republic of Korea). The new constitution brought some stability to South Korea, but this was not everlasting. National order was restored through the granting of the people’s wishes through the National Assembly and the right to suffrage, allowing the Korean people to have more roles in impacting political activity in the country. Despite only Koreans over the age of 21 being allowed to vote, the right to suffrage still allowed sentiments of

32 A. W. Taylor, *Koreans Declare Independence*, N.Y. Times (Mar. 13, 1919).

the Korean public to be heard in national politics.³³ However, this participatory democracy would be short-lived, as corruption would sweep the nation.

The Korean War and the threat of communism pressured the political elites of South Korea to attempt to maintain power to provide stability, which the South Korean public saw as autocratic power mongering that they did not agree with. Between 1950 and 1953, the Korean War solidified the division between the communist north and democratic south along the 38th parallel. Unable to find a peaceful solution to the war, an armistice was signed and ever since, South Korea considered North Korea (officially named the Democratic People's Republic of Korea) as the enemy. With a looming threat in the north, in 1954, President Rhee attempted to consolidate power around him by removing restrictions on presidential reappointment to take office for another term. But President Rhee was elected in a corrupt election. This angered the Korean people and public unrest grew in South Korea. Noticing the scheme of President Rhee to remain in power, the Korean people led nationwide protests known as the April Nineteenth Uprising of 1960 (4.19 혁명), resulting with President Rhee resigning from office and fleeing the country.³⁴

The April Nineteenth Uprising of 1960 showed that the South Korean people were passionate about participatory democracy, and that corruption to defile democracy would be strictly punished. In fact, the South Korean people believed that the scheme of the political elite was an injustice to the people and demanded a trial for all involved with the scheme. Therefore, following President Rhee's dismissal and supported by the spirit of the April Nineteenth Uprising of 1960, a Second Republic of Korea was declared. Additionally, in June and November 1960, the Second Republic made constitutional amendments to establish a special court to punish the people involved in the unfair elections

33 See Un-Sun Baek, 선거권 (選舉權), (Encyclopedia Korea 2012), available at <http://encykorea.aks.ac.kr/Contents/Item/E0028601> (visited May 9, 2020) (“The right to vote was given to all citizens over the age of 21 since the establishment of the government in 1948. The common suffrage, something many citizens of various countries around the world bled over hundreds of years to secure, was institutionalized in Korea from the beginning of the constitution.”).

34 See Ehri Nam, 사사오입 개헌 등 부끄러운 개헌역사도 있어, (National Archives of the Republic of Korea 1999), available at <http://theme.archives.go.kr/next/koreaOfRecord/constitution.do> (visited May 8, 2020) (“In 1954, the year following the signing of the Korean War Armistice, President Syngman Rhee passed the second round of amendments to remove the restriction on the presidential reappointment system to take office once again. However, he was forced to resign from the presidency due to fierce resistance from the people following the March 15 unfair elections. After President Syngman Rhee's dismissal, the Second Republic was launched in the heat of the 4.19 Revolution.”).

and anti-democratic behavior.³⁵ Protecting democracy in South Korea, the April Nineteenth Uprising of 1960 displayed the power of the South Korean people when they gathered in peaceful solidarity and became an important definition of South Korean participatory democracy in the preamble of the constitution.

IV. A Preamble with Legal Powers: How the South Korean Constitutional Court Made the Preamble a Legal Tool

The inclusion of the social movements at critical transition points of South Korean democracy to the preamble may be interpreted as historical embellishments to decorate the South Korean constitution. However, when the preamble has significant legal power in courts, then there is more behind the preamble than just historical summarization.

The South Korean Constitutional Court has had immense influence in raising the legal power of the preamble. The South Korean Constitutional Court (헌법재판소) was established in 1988 as part of the transition into the Sixth Republic of Korea. The constitutional court was built to embody the new democratic constitutional order and resolve both political and social issues under the spirit of the South Korean constitution.³⁶ Chapter VI of the South Korean constitution details the creation of a constitutional court that will adjudicate on matters regarding “the constitutionality of a law upon the request of the courts; impeachment; dissolution of a political party; disputes about the jurisdictions between State agencies, between State agencies and local governments and between local governments; and petitions relating to the Constitution as prescribed by law.”³⁷ While many perceived the constitutional court would be of minimal impact due to history showing constitutional courts in South Korea being of insignificant value, the reinstatement of the constitutional court in 1988 displayed a completely different court that “has the power to consider the constitutionality of legislation or administrative action at the request of political bodies or a court, can resolve competence disputes among governmental institutions, and can

35 *See Id.* (“In June and November 1960, the Second Republic made third and fourth rounds of amendments to establish a Cabinet Liability System and a special court to punish those involved in the 3.15 unfair elections and all who were involved in anti-democratic acts.”).

36 *See Tom Ginsburg, The Constitutional Court and the Judicialization of Korean Politics*, 1 (Andrew Harding et al ed., Routledge 2011) (2009).

37 Daehanminkuk Hunbeob [Hunbeob] [Constitution] art. 111, §1, cl. 1-5 (S. Kor.).

respond to constitutional complaints from citizens if fundamental rights have been abused by government action or omission, or if an ordinary court fails to refer a constitutional question to the Constitutional Court.”³⁸ With a powerful legal body having the capability of influencing most, if not all, legal activity in South Korea with an impartial view under the spirit of the constitution, legal activity in South Korea became more balanced, empowering the people against government bodies and allowing for grievances to be discussed on fairly equal grounds.

The preamble receives significant legal power from how it is utilized in the fair South Korean Constitutional Court. Out of all the major decisions discussed in the constitutional court, 19 decisions utilized the preamble among other provisions of the constitution to justify the decision.³⁹ This gave significant recognition to the power of the preamble and has set a new standard for how the preamble can play an important role in defining Korean society and law going forward. In addition, the preamble has become a legal tool setting the precedent for how the rest of the constitution will be utilized to justify a decision, thus the constitutional court created an environment of peaceful resolution in the courts, inspired by the sentiments presented in the preamble of the constitution through the mentioning of the social movements dedicated to peaceful forms of protest.

Arguably, the existence of the strong constitutional court dedicated to peaceful resolution, born from the spirit of peaceful social movements organized by the public for South Korean democracy, has led South Korea to see a sharp decline in political violence between the public and political elite. Following the enforcement of the constitution in 1987, there was a noticeable decline in show of force and material conflict between the public and political elite.⁴⁰ There was also a sharp decline in the volume of political protests in the nation.⁴¹ Much of the responsibility for such a swift change in attitude in the nation can be given to the creation of an impartial stage where the public and political elite have equal influence and power over social issues. The history of autocracy in South Korea

38 Tom Ginsburg, *Constitutional Courts in East Asia: Understanding Variation*, 3 *Jour. Comp. L.* 2, 85 (2008).

39 Counted from the South Korean Constitutional Court decisions database. See Constitutional Court of the Republic of Korea, *Major Decisions List*, (Constitutional Court of the Republic of Korea 2021), available at <http://english.court.go.kr/cckhome/eng/decisions/majordecisions/majorList.do#none> (visited Mar. 15, 2021).

40 See José Alemán, *Korea's Candlelight Protests in Context: Evidence from the Asian Barometer Survey and Global Events Data*, 평화연구, 319 (Spring 2019).

41 See *Id.* at 324.

leading up to 1987 has disenfranchised the South Korean public to a great extent, but with a new constitutional court that redefined its position in legal proceedings to “treating the state no differently than a private citizen or corporation,”⁴² the constitutional court became a legal institution capable of empowering the public to voice their social woes in a peaceful way within the confines of the law.

The constitutional court is further strengthened by its independent nature. While the president appoints the nine court judges on the constitutional court, the National Assembly and Chief Justice offer three candidates each to be confirmed by the president, therefore equally dividing the influence from the executive, judicial, and legislative branches of government on the constitutional court.⁴³ Additionally, the government cannot impede on how the procedures of the constitutional court are performed, as the constitutional court “may establish regulations relating to its proceedings and internal discipline and regulations on administrative matters within the limits of law.”⁴⁴ These constitutional provisions allow the constitutional court to maintain its impartiality in government and social matters, empowering people to trust the constitutional court further.

This raises the question of to what extent can the constitutional court maintain peaceful discourse in some of the most controversial and polarizing social issues? The South Korean case study presents a positive result to this inquiry, as the constitutional court has successfully managed the controversial issue of the National Security Act within its jurisdiction and has continued to promote peaceful discourse in South Korean society. The resilience of the constitutional court is tested heavily by this controversial issue that still perils the nation to this day.

A. Testing the Constitutional Court: The Conflict Between the National Security Act and Fundamental Rights Protected by the Constitution

The influence of the constitutional court has been put to the test by the discussion surrounding the validity of the National Security Act (국가보안법), as it conflicted with constitutional rights to various freedoms. The National Security Act was established in 1948 as an anti-communism tool to secure democracy in

42 Tom Ginsburg, *Constitutional Courts in East Asia: Understanding Variation*, 3 *Jour. Comp. L.* 2, 85 (2008).

43 Daehanminkuk Hunbeob [Hunbeob] [Constitution] art. 111, §2, 3 (S. Kor.).

44 *Id.* art. 113, §2.

South Korea, but authoritarian administrations during most of the latter half of the 20th century abused this legal tool to consolidate their political power. The National Security Act became an unchecked political tool for the authoritarian regimes and was “used to suppress independent political organizations by providing draconian sanctions against dissenters and loosely-defined illegal associations.”⁴⁵ The people recognized the dangers of the National Security Act and as South Korea democratized in 1987, the political elite got involved, making the National Security Act the first law demanded to be abolished or amended by the democratization movement.⁴⁶ However, due to the unique nature of the National Security Act being a *de facto* constitution, tackling the question of abolishing the law became tricky and landed in the constitutional court for review. Ever since its inception, the constitutional court has been entrenched in the battle between protecting constitutional rights and assessing the limits of the National Security Act and “the debate surrounding abolition of the [National Security Act] became heated.”⁴⁷

The National Security Act is difficult to dismantle because it is highly political, especially with the looming threat of North Korea. Ardent supporters of the National Security Act continue to present evidence of North Korean insurgencies for the requirement of the National Security Act in ensuring security in South Korea, as “the North Koreans have launched thousands of infiltration operations against the south since 1953.”⁴⁸ This has led to the National Security Act becoming an element in the political battles between liberals and conservatives of South Korea, where when liberal policymakers make amendments to the National Security Act, conservative policymakers revert the amended mechanisms. For example, in 1993, the National Security Act was revised to deny the National Security Planning Board to investigate alleged violations of Article 7, but this was soon reverted three years later, when conservative policymakers reinstated these powers to the National Security Planning Board.⁴⁹ This has made Article 7 of the National Security Act the most controversial element in South Korean law,

45 Tom Ginsburg, *Constitutional Courts in East Asia: Understanding Variation*, 3 *Jour. Comp. L.* 2, 86 (2008).

46 See Won-soon Park, *National Security and Constitutional Rights in Korea – National Security Law, Past and Present* (Core.ac.uk 2002), available at <https://core.ac.uk/download/pdf/156617383.pdf> (visited Mar. 15, 2021).

47 *Id.*

48 See Diane B. Kraft, *South Korea’s National Security Law: A Tool of Oppression in an Insecure World*, 24 *Wis. Int’l L.J.*, 628 (2006).

49 *Id.*

not only because of political reasons, but also because of the clashes Article 7 has with constitutional rights of South Korean citizens.

In the midst of this political issue, the constitutional court has had significant impact in limiting the implementation of the National Security Act to protect fundamental constitutional rights. Even though the National Security Act “is inferior to the constitution..., no legal enforcement agencies [nor] the court could ... challenge the unconstitutionality of the law”⁵⁰ and this has raised difficulty in abolishing the law in its entirety by the constitutional court. While the constitutional court “did not strike the [National Security Act, the court] rather sought to limit and channel its application to constitutional purposes.”⁵¹ The constitutional court has had significant progress in limiting the influence of Article 7 of the National Security Act that defines “any person who praises, incites or propagates the activities of an antigovernment organization”⁵² will be punished. Historically, the vague language of the article allowed the law to be loosely interpreted, resulting with many arrests of opposition political leaders, social movement organisers, and innocent people, but following the creation of the new constitutional court, the constitutional court became the platform for revising the interpretation of this law.⁵³ In 1990, the constitutional court announced a decision to cautiously interpret Article 7, Sections 1 and 5 of the National Security Act. In their decision, the constitutional court recognized the spirit of the preamble “calling for unity of the Korean race through justice, humanity, and national brotherhood pursuant to the mandate of peaceful unification”⁵⁴ and further referenced Article 4 of the constitution on peaceful reunification to justify their decision. The constitutional court identified that “expressions such as ‘member,’ ‘activities,’ ‘sympathizes with,’ or ‘benefits’ used in the challenged provisions are too vague and do not permit a reasonable standard for ordinary people with good sense to visualize the covered types of conduct”⁵⁵ and, therefore, the provisions must be applied “only to the limited circumstances threatening national security and the basic

50 Won-soon Park, National Security and Constitutional Rights in Korea – National Security Law, Past and Present (Core.ac.uk 2002), available at <https://core.ac.uk/download/pdf/156617383.pdf> (visited Mar. 15, 2021).

51 Tom Ginsburg, Constitutional Courts in East Asia: Understanding Variation, 3 *Jour. Comp. L.* 2, 86 (2008).

52 Kukga Boanbeob [National Security Act] art. 7, §1 (S. Kor.).

53 See Won-soon Park, National Security and Constitutional Rights in Korea – National Security Law, Past and Present (Core.ac.uk 2002), available at <https://core.ac.uk/download/pdf/156617383.pdf> (visited Mar. 15, 2021).

54 Hunbeobjaepanso [Const. Ct.], Apr. 2, 1990, 1989HunKa113, 2 (Hunjip 2, 49) (S. Kor.).

55 *Id.* at 1-2.

order of free democracy.”⁵⁶ This decision somewhat applied a tourniquet to the jurisdiction of the National Security Act, but, most importantly, it became the trigger for further discussion on the validity of Article 7 of the National Security Act in modern South Korean law, which is still active today.

The National Security Act has mounted great pressure on the constitutional court and yet, the constitutional court has shown great tenacity in upholding the spirit of the constitution in legal matters and providing a platform for continued organized peaceful discourse. There is a significant difference in attitude between the political elite and the general South Korean public in regard to the National Security Act and its controversial Article 7, which raises the question whether a clash of grievances may occur between the public and the political elite who protect the law. But possibilities of violent conflict have been diminished because of the constitutional court that has become the arena for peaceful discourse. For the South Korean public, the National Security Act is a painful memory of an oppressive history. During the era of dictatorships from the 1960s to 1980s, the National Security Act was the dictatorship’s tool to oppress the people and left irreparable damages on innocent individuals.⁵⁷ Seeing that the National Security Act is still enforced, many members of the South Korean public have voiced the urgent need to abolish the law and this is continuing to be done through solidarity with independent institutions and organisations.⁵⁸ Notably, large civil organisations like the People’s Solidarity for Participatory Democracy (참여연대) and YMCA Korea (YMCA 전국연맹) have organized numerous social movements

over the years to raise awareness on the issue.⁵⁹ By allowing independent institutions and organisations to lead the debate on the National Security Act on behalf of the public, the debate on the National Security Act is successfully restricted to constitutional court proceedings, where 11 cases are currently active and under review in the constitutional court.⁶⁰ This attitude upholds the spirit

56 *Id.* at 1.

57 See Sang-Jeong Kim, 국가보안법 7조 폐지, 국회와 헌법재판소에서 다룬다, 노동과 세계, (Dec. 1, 2020), <https://worknworld.kctu.org/news/articleView.html?idxno=402185> (visited Mar. 15, 2021).

58 *See Id.*

59 See People’s Solidarity for Participatory Democracy, 참여연대를 소개합니다: 주요 연대활동 소개 (Mar. 6, 2021), http://www.peoplepower21.org/about_PSPD/1257575 (visited Mar. 15, 2021). *See also* Sang-Jeong Kim, 국가보안법 7조 폐지, 국회와 헌법재판소에서 다룬다, 노동과 세계, (Dec. 1, 2020), <https://worknworld.kctu.org/news/articleView.html?idxno=402185> (visited Mar. 15, 2021).

60 The 11 ongoing constitutional court reviews of the National Security Act are the following cases: 2020 Hunba230, 2019Hunga6, 2018Hunba225, 2018Hunba116, 2017Hunba443, 2017Hunba432, 2017Hunba431,

of peace embodied by the constitution and shows the continued dedication and faith the political elite and public have in maintaining peaceful discourse with the constitutional court becoming the mediator required to maintain the peaceful status quo in the nation while developing social change.

B. A Growing Precedent for the Preamble to be of Legal Value: How National Spirit in the Preamble is Preserved by the Constitutional Court

The controversial nature of the National Security Act has placed a political flair to the constitutional court and its proceedings, but this should not take away from the precedent the rulings of the constitutional court on the National Security Act have placed on the importance of the preamble in supporting general judgements of the constitutional court. While the debate over the National Security Act exhibits the strength of the constitutional court in protecting the fundamental rights and laws of the people, the cases also paved way for the preamble to become a useful and effective legal tool in court proceedings. Exploring all constitutional court cases that use the preamble as support for their decisions is beyond the scope of this paper, but briefly highlighting a couple cases that are based on upholding the spirit of the constitution is warranted to describe how the preamble is becoming a prevalent tool in constitutional court proceedings.

Cases regarding property and financial rights between Koreans and Japanese opened avenues for the constitutional court to remind the people and the government of the national spirit of social movements and public protests in the preamble. Despite independence in 1945, hostility between South Korea and

Japan is still prevalent and many Koreans are still waging legal battles against Japan regarding their right to certain lost properties and damages encountered from the era of occupation. Notably, the atrocities performed by the Japanese during the era of occupation is still an area of concern for the South Korean population and the constitutional court ruled on two major cases regarding unruly acts of contemporary Japanese occupants using the spirit of Korean social movements embedded in the preamble to justify their decisions.

2017Hunga27, 2017Hunga366, 2017Hunba294, and 2017Hunba42.

The first case was on the confiscation of property awarded to certain individuals for their pro-Japanese collaboration during Japanese occupation, where the constitutional court stated the spirit of the March First Independence Movement of 1919 preserved in the preamble outlined the duty of the South Korean government to rectify the situation. The consolidated cases of *2008Hun-Ba141*, *2009Hun-Ba14-19-36-247-352*, *2010Hun-Ba91* ruled that the South Korean government was permitted to confiscate the properties in question under the reason of the basic ideologies and principles explicitly outlined in the preamble of the constitution. Specifically, the constitutional court argued that the interpretation of “‘uphold the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919’ of the preamble means that the existence of our present nation was based on the contributions and sacrifices of the independence activists against Japanese imperialism and furthermore, the spirit of the Provisional Republic of Korea Government denouncing Japanese colonial rule and pursuing our nation’s independence is the foundation for the present Constitution.”⁶¹ Thus, the constitutional court outlined two interpretations of the March First Independence Movement of 1919 that they deemed of significant legal power: the sacrifices of the people gave legitimacy to the power of the South Korean government and, therefore, it is the duty of the modern South Korean government, born from the Provisional Republic of Korea Government, to protect the rights of South Koreans. The court proceedings ruled that the preamble of the constitution had significant context to upholding the court’s decision and this became an important legal factor for subsequent cases regarding property and economic struggles between South Koreans and Japanese.

The second case expanded on the initial understanding of the importance of the spirit of the March First Independence Movement of 1919 in forging modern Korea and led the constitutional court to rely on this interpretation to protect Korean rights in the case regarding atrocities carried out by the Japanese occupation personnel against Korean women. The March First Independence Movement of 1919 was reintroduced during case *Lee v. Ministry of Foreign Affairs and Trade* in 2011, when the constitutional court justified their ruling utilizing the spirit of the March First Independence Movement of 1919 in the preamble. As outlined in case *Lee v. Ministry of Foreign Affairs and Trade*, the constitutional court interpreted the preamble of the constitution that “specifies

61 Hunbeobjaepanso [Const. Ct.], Mar. 31, 2011, 2008Hunba141, 2009Hunba14-19-36-247-352, 2010Hunba91 (consol.) (Hunjiip 23-1, 276) (2011) (S. Kor.).

that ‘the people of Korea uphold the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919’⁶² as the duty of the nation to “restore human dignity and worth of the victims who suffered tragic lives for a long period by being forced into sexual slavery during Japan’s colonial rule in which the state failed to fulfill its most basic duty to protect safety and life of the people.”⁶³ Similarly to the decision of cases of *2008Hun-Ba141*, *2009Hun-Ba14-19-36-247-352*, *2010Hun-Ba91*, held just prior to this case, *Lee v. Ministry of Foreign Affairs and Trade* amplified the importance of the March First Independence Movement of 1919 in defining the modern Korean nation and, therefore, underlined the important role of the South Korean government in upholding the spirit sprouted from that social movement. The final judgement of the constitutional court was the unconstitutionality of the Ministry of Foreign Affairs and Trade in failing to resolve the damage claims by Lee for damages done regarding women safety. The decision of *Lee v. Ministry of Foreign Affairs and Trade* added further definition to how far the duty of the nation reaches and to what extent the nation should take responsibility for the protection of the welfare of the South Korean people, only expanding on the interpretation of the preamble to form a stronger national spirit and culture of solidarity in the protection of Korean morals, values, and culture in a court of law.

These two cases provide significant additional context that highlight the various motivations behind the constitutional court in utilizing the preamble in their judgements. These cases present the power of the preamble in upholding the spirit of the Korean people rooted in the nation’s history and the role the constitutional court has undertaken to uphold the spirit of the Korean nation to keep the South Korean government in check with their duties for the people. This example is among the growing list of constitutional court cases that utilize the preamble and the preamble is becoming a more vastly used tool in the South Korean court of law under various contexts, which raises the question of how the interpretation of the preamble develops over time and how the need for modernization is addressed. This will be discussed in the next section.

62 Hunbeobjaepanso [Const. Ct.], Aug. 30, 2011, 2006 Hunma788 (Hunjip 23-2, 366) (S.Kor.).

63 *Id.*

V. The Need for Modernization: New Dedication to Democracy through President Moon's Amendments

There is no doubt to the dedication of the South Korean public in fostering and protecting their peaceful participatory democracy. The identification of the March First Independence Movement of 1919 and the April Nineteenth Uprising of 1960 as two outstanding examples of Korean social movements in the preamble assists in describing what values South Korean people hold close to their national identity and having a constitutional court that assesses South Korean law based on these principles assists in creating a community dedicated to peaceful discourse. However, in 2016-2017, the South Korean public noticed the need to modernize their democracy, as the public rose up against the corrupt and scandalous political behavior of the Park administration, organizing social movements in peaceful spirit to oust the controversial president. The South Korean people believed their democracy was undermined and called for a reestablishment of a new and improved regime.

The 2016-2017 Candlelight Revolution raised a precedent for reiteration and reevaluation of the peaceful democratic spirit of the nation and the Moon administration, established out of the 2016-2017 Candlelight Revolution, took the task of redefining South Korean democracy to fit with the modern beliefs of the South Korean public. Embracing the spirit of the peaceful social movement that ousted former President Park Geun-hye, the Moon administration presented amendments to the preamble of the constitution that included more social movements that introduced additional elements of democratic spirit and sacrifice to further underline the importance of solidarity of the South Korean people around participatory democracy. Essentially, the Moon administration pushed for the expansion of the definition of South Korean democracy to present the modern sentiments of the people. The Moon administration proposed the following as a new preamble of the constitution:

We, the people of Korea, proud of a resplendent history and traditions dating from time immemorial, upholding the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919 and the democratic ideals of the April Nineteenth Uprising of 1960, the Bu-Ma Democratic Protests of 1979, May Eighteenth Democratic Movement of 1980, and the June Tenth Uprising of 1987 against injustice, using the mission

of democratic reform and peaceful unification of our homeland as the basis and having determined to consolidate national unity with justice, humanitarianism and brotherly love, and to destroy all social vices and injustice, and to strengthen autonomy and decentralization, and to afford equal opportunities to every person and provide for the fullest development of individual capabilities in all fields, including political, economic, social and cultural life by further strengthening the basic free and democratic order conducive to private initiative and public harmony, and to help each person discharge those duties and responsibilities concomitant to freedoms and rights, and to elevate the quality of life for all citizens in every region equally and contribute to lasting world peace, improvement of the environment, and the common prosperity of mankind and thereby to ensure security, liberty and happiness for ourselves and our future generations forever, do hereby amend, through national referendum following a resolution by the National Assembly, the Constitution, ordained and established on the Twelfth Day of July anno Domini Nineteen hundred and forty-eight, and amended nine times subsequently.⁶⁴

The addition of three more social movements to the preamble adds further depth and history to the evolution of Korean democracy. While the March First Independence Movement of 1919 laid down the foundation of Korean democracy and the April Nineteenth Uprising of 1960 molded the participatory democracy the Korean people fought to protect, the Bu-Ma Democratic Protests of 1979, May Eighteenth Democratic Movement of 1980, and the June Tenth Uprising of 1987 all add further context to the Korean democratic system that survived an era of autocratic regimes and political corruption. The inclusion of such social movements emphasizes the importance of a democratic government supported by the people and brings the age of political scandals and schemes to bring injustice to the South Korean people to an end. Following the dismissal of President Park, the amendment symbolizes the zero tolerance to the undermining of South Korean democracy, a scheme that started in 1961 with President Park Chung-hee, the father of President Park Geun-hye.

64 Yoon Nayoung Kim, [전문] 문재인 대통령 헌법 개정안, *Pressian* (Mar. 22, 2018), available at <https://www.pressian.com/pages/articles/190024?no=190024#09T0> (visited May 8, 2020).

A. The Significance of President Moon’s Amendments: What Do These New Democratic Movement Inclusions Mean?

With the new inclusions outlined in the proposed amendments, President Moon is hoping to add the passion and the sacrifices civilians made in protecting South Korean democratic values during an era of autocracy to the preamble. Following the April Nineteenth Uprising of 1960, democracy was short-lived, when a dictator abused power and derailed the democratic system, displaying the loopholes and flaws in the South Korean political structure. The inclusion of the Bu-Ma Democratic Protests of 1979, May Eighteenth Democratic Movement of 1980, and the June Tenth Uprising of 1987 provides historical support on how hard people fought for South Korean democracy and not to forget the tyranny that periled the nation for approximately 25 years.

The instability in South Korea brought fragility to the political system, where in 1961, Park Chung-hee successfully led a coup d’ état to consolidate all political power around himself and the South Korean military. The struggling economy and chaotic political transition out of former President Rhee’s administration laid down fertile ground for a coup d’ état.⁶⁵ However, this was not accepted with open arms by the South Korean public and decades of social movements to oust President Park ensued, which were mostly organized by students, only to be met with fierce and powerful retaliation by the military dictatorship with the use of law enforcement and Korean Central Intelligence Agency (KCIA) assets.

The first major breakthrough arose with the Bu-Ma Democratic Protests of 1979 (부마민주항쟁), where the political instability caused by the uproar led to the transition of presidents. In October 1979, students organized demonstrations in Busan to fight against the repressive measures utilized by President Park to silence the people. President Park immediately proclaimed a state of emergency in Busan and sent military units to contain the uproar. However, this was unsuccessful, as the neighboring towns, such as Masan, heard the outcries of the students and led protests of their own. The president proceeded to declare a state of emergency in the neighboring towns as well, which only brought further strain to the political power of the central government and the economy, as several export companies and industrial plants were located in those areas.⁶⁶

65 See Library of Congress, *South Korea: A Country Study*, (Andrea Matles et al. ed., GPO for the Library of Congress 1990).

66 See Eric Toussaint, *The South Korean Miracle is Exposed*, CADTM available at <https://www.cadtm.org/>

The tipping point of the administration appeared when the nation was alerted of many peaceful protestors, ranging from university students to citizens, lost their lives as President Park authorized the use of lethal force to silence the protests.⁶⁷ Enraged by the violence, students in Seoul peacefully marched to demonstrate for the removal of President Park.⁶⁸ Members of the central government began to lose faith in President Park and to salvage the situation, the KCIA director Kim Jae-kyu assassinated President Park on 26 October 1979.⁶⁹ The death of President Park raised optimism among the people, as they saw a window of opportunity to reinstall participatory democracy in their nation, but another dictatorship quickly took control under President Chun Doo-hwan, which was met with more protests.

Democracy was not yet reestablished and the South Korean people continued to protest for democracy until President Chun lost significant respect after brutally silencing protests in 1980. President Chun's reign was not accepted by the people, but the repression by the government continued to silence the voice of the people. In an effort to consolidate power around him, President Chun tightened his grip by declaring martial law in the nation, shutting down universities and parliaments, and arresting opposition leaders.⁷⁰ On 18 May 1980, people of Gwangju, the sixth largest city in South Korea, organized protests against the new president and his undemocratic measures. People in Gwangju, mainly students, led the democratic movement, but were besieged by military units and massacred. Hundreds of South Koreans lost their lives in the violent suppression and this sparked a battle between the South Korean people and the military dictatorship.⁷¹ However, with the South Korean news media silenced by martial law and the telephone lines severed between Gwangju and the rest

spip.php?page=imprimer&id_article=1847 (visited Sep. 25, 2020).

67 See Kwang-soo Kim, *Park Chung-hee Unlawfully Sent Airborne Troops to Quash Bu-Ma Democratic Movement*, Hankyoreh (Feb. 21, 2018), available at http://english.hani.co.kr/arti/english_edition/e_national/833067.html (visited May 9, 2020).

68 See Eric Toussaint, *The South Korean Miracle is Exposed*, CADTM, available at https://www.cadtm.org/spip.php?page=imprimer&id_article=1847 (visited Sep. 25, 2020).

69 See Michael Breen, *Assassination of President Park Chung-hee in 1979*, The Korea Times (Oct. 24, 2010), available at https://www.koreatimes.co.kr/www/news/special/2012/09/178_75100.html (visited May 9, 2020).

70 See Sang-Hun Choe, *In South Korea, an Unsung Hero of History Gets His Due*, N.Y. Times (Aug. 2, 2017), available at <https://www.nytimes.com/2017/08/02/world/asia/south-korea-taxi-driver-film-gwangju.html> (visited Sep. 25, 2020).

71 See Daryl Plunk, *South Korea's Kwangju Incident Revisited*, The Heritage Foundation (Sep. 16, 1985), available at <https://www.heritage.org/report/south-koreas-kwangju-incident-revisited> (visited May 9, 2020).

of South Korea, the South Korean people outside of Gwangju were unaware of the battle between the military and the citizens. The central government spun the situation as a fight to protect South Korea from “vicious rioters” and “communist agitators,” but the truth was unfolded when German journalist Jürgen Hinzpeter secretly documented the occurrences in Gwangju and published his findings and footages to the world and the South Koreans.⁷² As the South Korean people found out the truth, the May Eighteenth Democratic Movement of 1980 became the source of widespread protests in South Korea that would lead to fiercer confrontations between the South Korean public and the central government. During the 1980s, the conflict between the peacefully protesting South Korean public and the repressive central government continued to escalate.

The June Tenth Uprising of 1987 (6·10항쟁) was the final straw for the South Korean people living under a constitutional dictatorship. In September 1980, President Chun pushed for a new constitution with a national referendum to approve it. While the draft constitution was very democratic with elements that were never seen before included, such as the constitutional guarantee of peoples’ democratic rights, a right to privacy in communications, the prohibition of torture, and the inadmissibility of using confessions obtained by force in court trials, the amendments regarding presidential power and election were still very autocratic.⁷³ The president was appointed by an electoral college and served a single seven-year term with the power of dissolving the National Assembly.⁷⁴ After seven years in office, President Chun was forced to pass on the presidency to a regime-appointed candidate, where President Roh Tae Woo took the presidency. However, as people found out about the rumoured enthronement of the president role ever since President Park “by members of *Hanahoe*, an unofficial private group of military officers headed by Army Major General Chun Doo-hwan,”⁷⁵ peaceful democratic movements resumed with greater force. The South Korean public were even more aggravated as clashes with police and KCIA grew more violent. The police had tortured student activist Park Jong Cheol to death and

72 See Sang-Hun Choe, *In South Korea, an Unsung Hero of History Gets His Due*, N.Y. Times (Aug. 2, 2017), available at <https://www.nytimes.com/2017/08/02/world/asia/south-korea-taxi-driver-film-gwangju.html> (visited Sep. 25, 2020).

73 See Library of Congress, *South Korea: A Country Study*, (Andrea Matles et al. ed., GPO for the Library of Congress 1990).

74 See *Id.*

75 Hyun-woo Nam, *Choi Kyu-hah: the President who was More Bureaucrat than Politician*, The Korea Times (Jan. 31, 2016), available at http://www.koreatimes.co.kr/www/culture/2020/02/317_196867.html (visited May 9, 2020).

Yonsei University student Lee Han Yeol was killed by a tear gas grenade.⁷⁶ Not forgetting the massacre that occurred from the May Eighteenth Democratic Movement of 1980, the South Korean people peacefully demonstrated for the removal of President Roh and the immediate enforcement of free and fair democratic elections. After three weeks, on 29 June 1987, President Roh gave in to the protestors' request and stepped down from the presidency.⁷⁷ Thus, the new and current-day South Korean democratic political system was born.

B. A New Korean Democratic Identity After the Impeachment of President Park

The significance behind President Moon's desire to include the three social movements is to modernize the definition of solidarity among the Korean public and the power of the Korean public in preserving and protecting participatory democracy against modern issues like autocracy in the preamble. Given the scandalous nature of the Park administration and how the people immediately turned to peaceful protests to oust the ineffective government, the 2016-2017 protests reflected the spirit of the three social movements greatly, which were iconic moments in South Korea's history where the people were able to overpower the autocratic government through peaceful means.

Despite corruption and schemes to undermine participatory democracy, the perseverance of the South Korean people to protect democracy is crucial to defining the modern South Korean nation. The Park administration represented a legacy of the corruption experienced under the regimes that sparked the Bu-Ma Democratic Protests of 1979, May Eighteenth Democratic Movement of 1980, and the June Tenth Uprising of 1987. Therefore, President Moon's amendments to the preamble encourages the South Korean public to not forget the journey the generations of people made to build the democracy in the nation today and to uphold the same peaceful spirit when fighting for social progress and changes. Furthermore, the amendments present a renewed promise to leaving the negatives of political scandals and corruption in the past and building a new, fairer participatory democracy supported by the positives from the historic social movements.

76 See Koreabridge, The 6.10 Democracy Movement (6.10 민주항쟁), Koreabridge (Jun. 10, 2011), available at <http://koreabridge.net/post/610-democracy-movement-610-%EB%AF%BC%EC%A3%BC%ED%95%AD%EC%9F%81-intraman> (visited Sep. 28, 2020).

77 See *Id.*

The constitutional court has presented similar sentiments and established a new precedent regarding the preamble of the constitution in being applied to modern problems. Ruling on the impeachment of President Park, the constitutional court referenced the preamble of the constitution in their decision. The constitutional court cited that “The Constitution sets forth the duty to ‘ensure security...for ourselves and our posterity forever’ (Preamble), and that, ‘The State shall endeavor to prevent disasters and to protect citizens from harm therefrom’ (Article 34 Section 6).”⁷⁸ The constitutional court proceeded to argue that President Park had failed to carry out her duties as the president, noting that her response to national crises were inadequate, where “such national crises not only include conventional security crises such as military threats, but also include security crises in the form of natural disasters, social disasters or terrorist attacks, and the significance of the latter is growing more evident in modern states.”⁷⁹ This concluded with a notable sub-conclusion of “reforming the power structure under the current constitution,”⁸⁰ raising the discussion of whether the modern South Korean democratic system, especially in regards to the executive, should be amended to become a more “modern decentralized nation.”⁸¹

In conjunction with President Moon’s amendments, the constitutional court has presented avenues for change in their ruling. Because the world changes, the interpretation and application of the constitution will change over time and the constitutional court has taken the leading role to change with the times. The new amendments from the Moon administration and the attitudes of the constitutional court present an eagerness to adapt with the changing world and displays a necessity for constitutions to amend with the changing environment. This affirms the dynamic attribute of the constitution, where depending on the decisions of the constitutional court and how they interpret the constitution in a certain time can make the constitution evolve.

78 Hunbeobjaepanso [Const. Ct.], Mar. 10, 2017, 2016Hunna1 (Hunjip 29-1, 66) (S. Kor.).

79 *Id.*

80 *Id.*

81 *Id.*

VI. Conclusions and Lessons

As the building block of any national legal and governing system, constitutions play a primary role in defining social attitudes to social change and how change will be introduced. Specifically, in the constitution, the preamble serves as the prelude to the laws and rights outlined in the constitution, adding morals, values, and spirits of the people to the interpretation of the constitution. While the preamble may be described as historical references to embellish the document, how the preambulatory clauses are utilized in a court of law can change the effectiveness and operative nature of the clauses. If the legal sphere of a nation values the preamble as a valid legal tool, then there is a greater dedication to upholding the national identity forged in the preamble.

The preamble can have greater legal value when a dedicated court of law, like the constitutional court, presides over cases specifically dealing with the interpretation and implementation of the constitution and utilizes the preamble in their decisions. As is seen in South Korea, creating the constitutional court has had many positive effects in developing social change and continuing peaceful discourse between the public and political elite. Furthermore, if a constitutional court has strong legal roots in impartiality and gains the trust of both the people and the political elite, then the constitutional court can be a powerful and extremely effective tool in promoting social change, even under polarizing circumstances. The way the South Korean Constitutional Court has dealt with the National Security Act to date is a positive sign to how efficacious the constitutional court can be to continue peaceful discourse to settle various social grievances.

Establishing a strong constitution and reliable legal bodies that spawn therefrom is an integral step many nations must face in their path of forging democracies. South Korea was able to swiftly transition from autocratic forms of government to a fully democratic system in 1987 because of the agreement between the people and political elite to establish a strong keystone to their legal system via the constitution and operationalizing the preamble to continue the nation's dedication to peaceful forms of discourse in the nation's legal system. This model can be applied to other democratizing and democratized nations as well.

The main challenge in a democratic system is balancing public participation and consolidating political power, which a strong legal system based in a constitution emanating peaceful sentiments and promises may be the

key to mitigating violence and internal conflict over domestic issues. Molding a constitution that embraces peace and allows for a constitutional court that is strongly linked to the constitution that derives its power from the people will be an immense support to the democracy of the nation. The combination of the constitution and the constitutional court will allow nations to focus their discontents and social issues in ways that reflect the sentiments displayed in the constitution and discourse will be confined within the realm of the constitutional court. This will encourage peaceful forms of discourse to be the primary avenue for social change, instead of violence being the immediate result.

This paper examined only an aspect of the preamble of the South Korean constitution and further avenues of investigation are noticeable. The discussion of the historical evolution of South Korean democracy outlined in the preamble displays the vital role of discourse between the public and political elite in forming a strong participatory democracy. The actions of a strong and impartial constitutional court identify the developing legal norms of the preamble in the constitutional court. Additional legal analysis to how the preamble of the constitution is interpreted based on Orgad's characteristics of a preamble may provide further context as to why and how the preamble of the constitution can be a powerful legal tool. This paper's exploration is rudimentary in these areas, but opens up possibilities of complementary research to be executed.

The world changes on a continuous basis and modernization efforts are important in continuing the evolution of a nation. National conditions and the necessities of people change over time and to adapt to these rapidly changing social issues, a strong legal basis that has the trust of the people and the political elite is pivotal. With a comprehensive constitution that serves as the backbone of a nation, society will be able to enact social change in an organized and controlled way.

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