Translating constitutional norms and ideas: Genesis and change of the German 'Free Democratic Basic Order' in Korea

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Abstract: It is a well-known fact that German law and adjudication, and concepts of the German legal tradition more generally, have played an important role in Korean constitutional theory and practice. What is less clear is how exactly this presumed *in*-fluence actually took shape, and, more radically speaking, whether it should not better be understood as a kind of '*within*-fluence'. Against this backdrop, this article traces the development of one of the most notable references to German legal institutions as they can be found in the Korean Constitution(s) – the concept of the "*free democratic basic order"* or fdBO. The fdBO depicts the core constitutional principles on which a certain country's democratic system is based on, such as human rights, people's sovereignty, separation of powers, parliamentary system, election system, multiparty system, and independence of the courts. The fdBO-formula in 1960 was introduced to the Korean Constitution, and, as in Germany, over time it disseminated from the initial constitutional provision to other articles of the Constitution, diffused into common laws, and dispersed into socio-political discourses. Drawing on comparative constitutional law literature and by the approach of discursive institutionalism I inquire into the transformation of the fdBO in Korea since 1960 until today. The analysis will show how and why the "same" fdBO-formula has different as well as similar characteristics across polities and over time. It will become evident that the fdBO in Korea is a *translation* of its German counterpart, while it is at the same time genuinely *made in Korea*.

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A. Introduction

In 2013, both the German and South Korean authorities submitted a petition to their respective Constitutional Court requesting the dissolution of a minor party. While the ban in Germany was aimed at a right-wing party and in South Korea at a left-wing party, and while Germany and South Korea are quite different countries, the two cases have in common that they are based on the allegation that the parties violated the free democratic basic order (fd-

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BO; freiheitliche demokratische Grundordnung). The fdBO is one of the most notable references to German constitutional norms and ideas in South Korea (hereafter: Korea). German law and adjudication, and concepts of the German legal tradition more generally, have played an important role in Korean constitutional theory and practice for reasons explained in more detail below. While there have been influences on Korea's legal culture from various countries, one of the most central and lasting impacts can be traced back to the German legal tradition.[1] What is less clear is how exactly this presumed *in*fluence actually took shape and, more radically speaking, whether it should not better be understood as a kind of '*within*-fluence'. Comparative research on the transfer of constitutional norms and ideas is usually conducted on "[w]hat happens when it does happen".[2] However, there is still a void when it comes to addressing what happens *after* it happened. Thus, the question this article sets out to answer is: What takes place in the "open-ended phase of re-contextualization" when the constitutional ideas and norms "undergo a process of transformation 'by its new uses, its new position in a new time and place'".[3] To do so, this case study analyzes the translation of the "free democratic basic order" from the German (in)to the Korean legal system.[4]

The fdBO formula is one way of addressing the difficulties involved when demarcating the necessary limits of freedom in order for a (liberal) democracy not to fall prey to itself, and it represents a discursive battlefield for finding the 'appropriate' remedy. How much security and how much freedom ought a liberal democracy to have? Who is to determine and to oversee the extent of (non-)liberty, and based on what? These are fundamental questions that are being posed repeatedly in democracies around the world. Naturally, answers vary across space and time. Against this backdrop, this case study answers the following questions: How was the fdBO initially introduced to Korea? How has its usage and meaning developed since its introduction? How were these changes generated?

The article is structured as follows: The succeeding section explains the background of the notion of the fdBO in Germany and Korea, and introduces the existing literature on the

1 See *Chongko Choi*, On the reception of Western law in Korea, Korean J. Comparative L. 151 (1981); *Hyo-Jeon Kim*, Hundert Jahre Verfassungsrecht in Korea und Deutschland: Ein Beitrag zur Rezeptionsgeschichte deutschen Rechts in Korea, in: Peter Häberle (ed) Jahrbuch des Öffentlichen Rechts der Gegenwart. Neue Folge, Band 35, Tübingen 1986; *Hannes B. Mosler*, Deutsch-koreanische Geschichte im Licht verfassungsrechtlicher Übersetzungen, in: Hannes B. Mosler and Eun-Jeung Lee (eds). Facetten deutsch-koreanischer Beziehungen – 130 Jahre gemeinsame Geschichte, Bern 2017.

2 *Günter Frankenberg*, Constitutional transfer: The IKEA theory revisited, ICON 8 (2010), p. 579.

3 *Frankenberg*, note 2, p. 575.

4 As will be discussed in more detail below, I adopt the metaphor of "translation" as the most potent heuristic device available in the comparative (constitutional) law literature. See also *Hannes B. Mosler*, Translations of constitutional ideas: the genesis of the 'Free Democratic Basic Order' in Germany, Korea and Taiwan, in: Eun-Jeung Lee and Marion Eggert (eds), The Dynamics of Knowledge Circulation – Cases from Korea, Bern 2016; *Hannes B. Mosler*, Legal translations 'Made in Korea', in: Eun-Jeung Lee and Hannes B. Mosler (eds), Lost and Found in Translation, Bern 2015.

fdBO in Korea. This is followed by a discussion of the study's theoretical concepts. Based on an institutionalist approach the heuristic device of 'constitutional translation' will be introduced for guiding the investigation. In the following section, the analysis is conducted in four succeeding steps dealing in turn with the translation of the fdBO across countries, within the constitution, and into common law, as well as to the wider public political discourse. The essay concludes with a summarizing discussion of the findings.

B. Background: The free democratic basic order in Germany and Korea

German law and legal traditions started to be encountered in Korea even before its opening up at the end of the 19th century, when knowledge of Western law was diffused to Korea through various channels. The first profound encounter between the two legal systems did not take the form of direct contact, but instead was mediated by Japanese occupation at the beginning of the 20th century. Legal scholars and professionals received their education at Japanese universities from Japanese professors who had often studied in Germany. Later, these students became professors themselves and taught their students German law. Since then it became mandatory for law students to study German in order to be able to read works in their original language. After the end of the Japanese occupation the *interlegality*[5] between Korea and Germany did not only continue, but intensified. Now, the linkage was direct and not mediated through Japanese occupants any longer. For a long time it was quite popular among law students to go to Germany and study law. Today, in many different areas of Korean law – in theory as well as in practice – German legal norms, legal culture, and legal institutions still play an important role.

The fdBO is a case in point. It was initially established in the German Basic Law in 1949 against the historical backdrop of Nazi dictatorship and to protect its new born democracy based on the concept of "militant democracy" or "defensive democracy",[6] namely the idea that a democracy has to be 'vigilant' enough against its enemies from within, in order not to abolish itself due to the liberties it guarantees. Hitler and the NSDAP were able to legally take over the government and install a dictatorial terror regime. This was to be prevented in the future by determining fundamental principles of the democratic system that are non-negotiable and subject to the Basic Law's so-called eternity clause. The most prominent cases in which the fdBO was invoked and applied to protect the state were the ban on a neo-Nazi party and a communist party in the 1950s, immediately after the war;

5 *William Twining*, Globalisation and Legal Theory, Cambridge 2000; *Boaventura De Sousa Santos*, Toward a new legal common sense, New York 2002. For a detailed account of the norm diffusion process between Germany, Japan, and Korea see *Mosler*, note 1.

6 *Max Lerner*, It Is Later Than You Think: The Need for a Militant Democracy, New York 1938; *Karl Loewenstein*, Militant democracy and fundamental rights I, Am. Polit. Sci. Rev. 31 (1937); *Karl Loewenstein*, Militant democracy and fundamental rights II, Am. Polit. Sci. Rev. 31 (1937); *Karl Mannheim*, Diagnoses of Our Time: Wartime Essays of a Sociologist, London 1943.

other cases in the 1970s and 1980s involved civil servants, such as teachers, who were barred from teaching because they allegedly violated the fdBO.

When the concept of the (free) democratic basic order was introduced to the Korean constitution in 1960 it was explicitly meant as a safeguard to protect, in particular, parties against state arbitrariness.[7] According to the new constitution, a party could only be banned if it violated the fdBO. Two years earlier the minor opposition Progressive Party (PP) was dissolved by state authorities based on the allegation that leading party members were involved in pro-North Korean anti-state activities. In actual fact, however, the PP was banned because it became a threat to the authoritarian government of President Rhee Syngman. Until half a century after its introduction in 1960 the fdBO had never been invoked to dissolve a party – not even during succeeding authoritarian governments between 1961 and 1987. Only in 2014, almost thirty years after transition to formal democracy, for the first time the Korean Constitutional Court decided to dissolve the minor left-wing Unified Progressive Party (UPP) because it was supposedly pro-North Korean and existed to subvert the state. For the Constitutional Court it thus posed a "concrete threat" to the (*free) democratic basic order*.[8]

Ultimately the fdBO is an ‘ensemble of those normative guarantees […] that constitute the freedomness (Freiheitlichkeit) of our political order" (translation mine).[9] It is the core of

7 See *Seog-Yun Song*, Chŏngdanghaesansimp'an-ŭi siljeyoggŏn. Chŏngdanghaesansimp'anjedo-ŭi jwap'yo-wa kwallyŏnhayŏ [Tatbestandsvoraussetzungen des Parteiverbots: in Bezug auf den heutigen Standpunkt des Parteiverbots], Seoul Law Journal 51 (2010), p. 34. The actual wording of the article on political parties was the "Constitution's democratic basic order" and did not include the adjective "free". However, transcripts of the respective committee meeting (cf. *Ippŏpchosaguk*, Kukhoedosŏgwan (ed), Hŏnbŏpkaejŏnghoeŭirok. Che-4-daegukhoe, Seoul 1968, pp. 86, pp. 154) as well as the majority of the constitutional literature (cf. *Hyo-Jeon Kim*, Han'gukhŏnŏp-kwa togil kibonbŏp [The Korean Constitution and the German Basic Law], Justice 33 (2000), p. 89, 91; *Tongsŏk O*, Taehanmin'gukhŏnbŏp-ŭi minjujuŭi [Democracy in the Republic of Korea's Constitution], in: Ch'inil-tokchaemihwa-wa kyogwasŏgaeak-ŭl chŏji-hanŭn yŏksajŏngŭisilch'ŏnyŏndae chŏndch'aekwiwŏnhoe charyo [documentation], p. 2; *Hee-Yeol Key*, Hŏnbŏphak (sang) [Constitutional Theory I], Seoul 1995, p. 229; *Sang-ryong Kim*, Togil kibonbŏp-esŏ-ŭi minju-jŏk chilsŏ-wa chayuminjuju-jŏk kibonjilsŏ [The democratic basic order and the free democratic basic order in the German Basic Law], Public Law 41 (2007), p. 281; *Yŏng-sŏng Kwŏn*, Hŏnbŏphakwŏllon [Constitutional Study Theory], Seoul 2000) agree on the fact that the "free democratic basic order" was meant, while there is a minority that argues for distinguishing dBO and fdBO (*Chul-soo Kim*, Chayuminjuchŏk kibonjilsŏ-wa minju-chŏk kibonjilsŏ [Free democratic basic order and democratic basic order], Kosiyŏngu [Legal Exam Studies] November (1979); *Kim*, note 7, p. 92).

8 *Constitutional Court*, T'onghapchinbodang haesan [Dissolution of the United Progressive Party], P'allyejip 26–2 (ha) (2014), p. 218. For a detailed discussion of the party ban case see *Hannes B. Mosler*, Das Verbot der Vereinten Progressiven Partei in der Republik Korea, Zeitschrift für Parlamentsfragen 1 (2016). For how the South Korean Constitutional Court interpreted the FDBO see *Seokmin Lee* and *Birgit Daiber*, Neue Entscheidungen zum Verbot politischer Parteien in Korea und Deutschland – eine rechtsvergleichende Untersuchung, Handoksahoegwahaknonch'ong 27 (2017), and *Hwang Hee Lee*, Minju-jŏk kibonjilsŏ wibae-ŭi ŭimi – hŏnbŏpchaep'anso-ŭi haesŏk (The meaning of "being contrary to the fundamental democratic order"), Pŏpcho 65 (2016).

9 *Martin Morlok*, Das Parteiverbot, Juristische Ausbildung 4 (2013), p. 321.

democratic principles that are excluded from an otherwise tolerant and liberal democracy, which is necessary to guarantee tolerance and freedom and, thus, to protect democracy against its enemies from within. According to the German Constitutional Court,

"[t]he free democratic basic order can be defined as an order which excludes any form of tyranny or arbitrariness and represents a governmental system under a rule of law, based upon self-determination of the people as expressed by the will of the existing majority and upon freedom and equality. The fundamental principles of this order include at least: respect for the human rights given concrete form in the Basic Law, in particular for the right of a person to life and free development; separation of powers; responsibility of government; lawfulness of administration; independence of the judiciary; the multi-party principle; and equality of opportunities for all political parties."[10]

In its 1991 decision, the Korean Constitutional Court provided an almost identical definition of the fdBO.[11] Also the majority of legal scholars in Germany and Korea subscribe to this definition.[12] In Korea, there is a wide array of mostly legal studies on the (f)dBO. Some of the works are concerned with how it is interpreted in Germany, how it was 'adopted' and how it ought to be understood in Korea.[13] Alternatively, the meaning of the fdBO is investigated as a principle of the constitution, and it is examined whether it has the same meaning in all constitutional provisions where it is mentioned.[14] Others are interested in determining

10 BVerfGE 2, 1, 12; translation: Markus Thiel, Germany, in: Markus Thiel (ed). The 'Militant Democracy' Principle in Modern Democracies, Farnham 2009, p. 116. Interestingly the initial interpretation by the German Constitutional Court was itself in part a modified adaptation from Art. 92 of the German Penal Code.

11 *Constitutional Court*, Kukkaboanbŏp che-7-jo-e taehan wihŏn simp'an [Constitutional decision on NSA Article 7], P'allyejip 2 (1990), p. 64. For distinctive differences see section below.

12 *Nak-In Sung*, Hŏnbŏphak [Constitutional Law], Paju 2014, p. 143.

13 *Hyo-Jeon Kim*, Das Bonner Grundgesetz und die koreanischen Verfassungen, in: Battis/Mahrenholz/Tsatsos (eds), Das Grundgesetz im internationalen Zusammenhang der Verfassungen. 40 Jahre Grundgesetz, Berlin 1990; *Soon-Ok Kuk*, Chayuminju-jŏk kibonjilsŏ-ran muŏsin'ga [What is the free democratic basic order?], Minjubŏphak [Democratic Legal Studies] 8 (1994*); Kwan-hee Lee*, Bonn kibonbŏp-e issŏso chayuminju-chŏk kibonjilsŏ [The Korean Constitution and the Bonn Basic Law], pangsan kubyŏngsak paksa chŏngnyŏnginyŏm kongbŏpiron-ŭi hyŏndae-chŏk kwaje, Seoul 1991; *Pyoung-seop Park*, Togil kibonbŏp-sang-ŭi chayurob-ko minju-chŏgin kibonjilsŏ [The free and democratic basic order of the German Basic Law], Kongbŏpyŏngu [Public Law Research] 23 (1995); *Kyu-ha Park*, Sŏdok kibonbŏp-sang-ŭi chayuminju-chŏk kibonjilsŏ [The free and democratic basic order of the west German Basic Law], Kosiyŏngu [Legal Exam Studies] June (1990).

14 *Tae-youn Han*, Taehanmingukhŏnbŏp-ŭi kibonjilsŏ [Basic order of the Republic of Korea], Kukhoebo [Journal of the National Assembly] (1958); *Song-bang Hong*, Chayuminju-chŏk kibonjilsŏ [Free and Democratic Basic Order], Hallimbŏphak Forum [Hallim Law Forum] 2 (1992); *Chul-soo Kim*, Minju-chŏk kibonjilsŏ [The democratic basic order], Pŏpjŏng [Law Court] January (1964); *Chul-soo Kim*, Chŏngdang-ŭi sinhŏnpŏp-sang-ŭi chiwi [Status of political parties according to the new Constitution], Kosigye [Legal Exam Studies] January (1975); *Chul-soo Kim*, Minju-chŏk kibonjilsŏ [The democratic basic order], Sŏuldae pŏphak [SNU Law] 20 (1979); *Kim*, note 7; *Nam-chin Kim*, Minju-chŏk kibonjilsŏ-wa kaejŏnghŏnbŏp [Democratic basic order and the reformed Constitution], Saebyŏk [Early Morning] 7 (1960).

its meaning and function for one particular provision in the constitution.[15] There is, however, in both countries no complete consensus on what the fdBO includes and excludes, in particular when it comes to its application to specific cases.[16] To the knowledge of the author, there is, however, no study on the question of how and why the (f)dBO, since its introduction to Korea, has developed over time in regard to its spread within the constitution, to other laws, and into public political discourse. One exception is *Seong-Tae Lee*[17], who does trace the fdBO's introduction to the constitution and to other laws over time in the context of democratic institutionalization, from a discursive perspective. However, his focus is on the role the fdBO played in maintaining the ideology of anti-communism in Korea. This is an important aspect of the fdBO, and thus this study will serve as an aid to the present investigation.

C. Theoretical conceptualization: the translation of constitutional norms and ideas

Comparative studies on constitutional transfers have come a long way since Montesquieu. They were reborn in the Legrand-Watson controversy[18] and are steadily being sharpened by the ongoing debate on the most suitable metaphor as a heuristic device to analyze how and why constitutional norms and ideas are transferred from one local context to another. By now there is, by and large, consensus on the fact that law cannot be transplanted, because

15 *Kim* 1962, note 14; *In-jae Lee*, Yŏktae taehanminguk hŏnbŏp-ŭi minjujuŭi-wa chayuminju-jŏk kibonjilsŏ [Democracy and the free and democratic basic order in the history of the Republic of Korea's Constitution], Yŏksa-wa hyŏnsil 82 (2012); *Seog-Yun Song*, Togilhŏnbŏpsang chŏngdangjohang-kwa kŭ han'gukchŏk isik. Pigyobŏpsahoehak-chŏk chŏpkŭn [The German Constitutional Provision on Political Parties and its Transplantation to Korea: A Comparative Socio-Legal Approach], Sŏuldaehakkyo pŏphak [Seoul National University Law Journal] 41 (2000); *Song*, note 7; *Sung*, note 12.

16 For representative positions of the Korean case see *Chul-soo Kim*, Hŏnbŏphakkaeron [Introduction to Constitutional Theory], Seoul 1999; *Yŏng-sŏng Kwŏn*, Hŏnbŏphakwŏllon [Constitutional Study Theory], Seoul 2000; *Sŏng-bang Hong*, Hŏnbŏp I [Constitution I], Seoul 1999; *Key*, note 7; for the German case see *Erich Kaufmann*, Die Grenzen des verfassungsmäßigen Verhaltens nach dem Bonner Grundgesetz, insbesondere: was ist unter einer freiheitlichen demokratischen Grundordnung zu verstehen (1951), Verhandlungen des 39. Deutschen Juristentages, Tübingen 1952; *Gerhard Stuby*, Bemerkungen zum verfassungsrechtlichen Begriff 'freiheitliche demokratische Grundordnung', in: Römer, Peter und Wolfgang Abendroth (eds), Der Kampf um das Grundgesetz, Frankfurt a.M. 1977; *Helmut Ridder*, Die soziale Ordnung des Grundgesetzes, Bad Wildunger Beiträge zur Gemeinschaftskunde 5 (1975), Verfassungsrecht, Opladen.

17 *Seong-Taek Lee*, Han'guk sahoe-ŭi chayuminjujuŭi tamnon-kwa minju-jŏk konggohwa iron [The jayu-minjujui discourse and the democratic consolidation discourse in the Korean society], Sahoewa iron [Society and Theory] 5 (2004); *Seong-Taek Lee*, The discourse of jayu-minjujui and the specificity of democratic institutionalization in Korea. PhD thesis, University of Manchester, Faculty of Humanities 2005.

18 *Otto Kahn-Freund*, On uses and misuses of comparative law, Mod. L. Rev. 37 (1974); *Pierre Legrand*, The Impossibility of "Legal Transplants", Maastricht J. Eur. & Comp. L. 4 (1997); *Alan Watson*, Legal Transplants – An Approach to Comparative Law, Edinburgh (1974); *Alan Watson*, Legal Transplants and European Private Law, Elec. J. Comp. L. 4 (2000).

what happens when legal transfer takes place cannot be equated with the process of transplantation. Rather, scholars came to conceptualize the transfer process in stages of an upload of constitutional ideas and norms onto a global hub that builds a reservoir from which those ideas and norms can be downloaded again. It is thought to work like shopping at IKEA: after coming home with the purchases the shopper reassembles the items according to the needs of their home's particular locality.[19] This process does not have to unfold in a one-way fashion, but may be reciprocal, develop into an open jaw path with several stopovers in different legal systems, and feed into a global overall circulation of norms and ideas. One can distinguish instances in which the customer brings home an item by accident, or when local drafters just want to emulate a foreign idea or norm completely or in parts, or when actors intend to "reengineer", i.e. to appropriate a foreign constitutional idea and to "modify it in an important respect to meet the goals of or constraints imposed by the domestic legal and political environment".[20]

In the literature on comparative constitutional law this has commonly been depicted by terms such as "borrowing", "transferring", "migrating", "ex/importing", or "transplantation", to name only the most widely used conceptual terms.[21] The shortcomings that can be found with many of these conceptualizations are "questionable basic assumptions about the diffusion process"[22], including shortcomings due to assumptions about a certain ontology.[23] Against this backdrop, this study adopts the heuristic device of "translation"[24] that enables the analyst to capture the complexity of the process of the dissemination of legal norms and ideas without resorting too much to positivistic or naturalistic thinking. Translation "may be

19 *Günter Frankenberg*, Constitutions as commodities: notes on a theory of transfer, in: Günter Frankenberg (ed), Order from Transfer Order from Transfer. Comparative Constitutional Design and Legal Culture, Chaltenham/Cemberly 2013; *Frankenberg*, note 2; *Günter Frankenberg*, Autorität und Integration. Zur Grammatik von Recht und Verfassung, Frankfurt am Main 2003.

20 *Scott Stephenson*, Constitutional reengineering: Dialogue's migration from Canada to Australia, International Journal of Constitutional Law 11 (2013), p.874.

21 This is in particular true for "transplantation". See *Maximo Langer*, From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure, Harvard International Law Journal 45 (2004), p. 5, fn. 22; see also *Frankenberg*, note 2, *Michele Graziadei*, Comparative Law and the Study of Transplants and Receptions, in: Reimann, Mathias and Reinhard Zimmermann (eds). The Oxford Handbook of Comparative Law, Oxford 2006, and *Vlad F. Perju*, Constitutional Transplants, Borrowing, and Migrations, Rosenfeld, Michel and András Sajó (eds), The Oxford Handbook of Comparative Constitutional Law, Oxford 2012.

22 *William Twining*, Diffusion of law: A global perspective, Journal of Legal Pluralism 49 (2004), pp. 3. These assumptions include conceptions on aspects such as "*identifiable exporter and importer*", "*export-import between countries*", "*direct one-way transfer*", "main *objects* of a reception are legal rules and concepts", "main *agents* […] are *governments*", "*formal* enactment or adoption at *a particular moment of time*", "the object of reception *retains its identity without significant change*" (p. 3).

23 *Langer*, note 21, pp. 5.

24 *Langer*, note 21; *Mosler*, note 4. *Richard Freeman*, Policy Moves: Translation, Policy and Politics, University of Edinburgh, typescript, Edinburg 2006.

understood as a theoretical specification of the process of institutionalization"[25], depicting the process of transposing norms or ideas from one context to another. Similar to the concept of "cultural translation"[26], it enables us to distinguish between source and target legal systems, including source language and grammar; between a "set of initial instances"[27] and the translated idea, as developed in the source and target context respectively; and between possible transformations in the process of translation.[28] We can capture the actors involved, including their dispositions, the institutional settings in which the processes occur, and thus grasp the mechanisms that lead to the "localization"[29] of the norms and ideas in question.

One of the central features of law is its discursive characteristic. It has to be interpreted by actors such as lawyers, judges, or prosecutors. Not only does law depend on how it is interpreted, but it might also change with each new interpretation. In the process, sometimes, law is even created.[30] Translation is a dynamic, ongoing process that can happen between various dimensions, levels, or realms.[31] In this way, the genesis and change of legal norms and ideas can emerge over time, across space, according to its interpreters. The translated idea's "authority comes not from originality, but from authoritative translation".[32] An authoritative translation is "always entangled in a specific local context and informed by its particular political and socioeconomic power constellations and historical traditions".[33] This article adopts an institutionalist approach and understands the phenomenon in question as the genesis and change of legal institutions. Institutionalization can be defined as a "social process by which individuals come to accept a shared definition of social reality".[34] This social reality is constructed through an interactive process of discourse competition[35] that can only succeed if actors possess the necessary institutional power to produce justifi-

25 *Freeman*, note 24, p. 7.

26 See *Walter Benjamin*, Medienästhetische Schriften, Frankfurt a.M. 2002; *Homi K. Bhabha*, The Location of Culture, London 1994.

27 *Frankenberg*, note 2, p. 570.

28 *Langer*, note 21, pp. 33.

29 *Amitav Acharya*, How ideas spread: whose norms matter? Norm localization and institutional change in Asian regionalism, International Organization 58 (2004).

30 Interpretation becomes particularly important in regard to the constitution, since it is the most abstract legal norm of a legal system. The constitution provides the framework for all other laws, and thus necessarily leaves more room for interpretation.

31 *Freeman*, note 24, p.5.

32 *Freeman*, note 24.

33 *Frankenberg*, note 2, p. 563.

34 *Scott* 1987 cited in *Nelson Phillips, Thomas B. Lawrence* and *Cynthia Hardy*, Discourse and institutions, Academy of Management Review 29 (2004), p. 638.

35 *Phillips et al.*, note 34, p.645.

able and legitimate texts[36] "leaving traces"[37] that determine a hegemonic discourse.[38] Institutional change is induced by critical junctures that provide preconditions for a new interpretation of existing norms and ideas. A critical juncture emerges out of an external and/or internal shock to or the accumulation of incremental changes in the antecedent conditions of a particular realm that leads to a crisis, i.e. a decision situation that is interconnected with a turning point.[39]

D. Data and method

After the fdBO was introduced to the Korean legal system for the first time in explicitly adding it to the constitution in 1960, the phrase increasingly found its way into domestic legal norms also outside the constitution. In a descriptive fashion figure 1 presents the accumulated frequency of the fdBO phrase in the texts of Korean legal norms (black graph) and the press (grey graph) over time. In phase 1 the fdBO is introduced to the Constitution. This was part of the attempt to democratize the political system after twelve years of authoritarian government under President Rhee Syngman, a strongman who reigned the country as Korea's first president between 1948 and 1960 when he was toppled by popular uprising leading to the democratic though short-lived Second Republic (1960–1961). Phase 2 encompasses 26 years of consecutive authoritarian governments (1961–1987) during the Third and Fourth Republic, under President Park Chung-hee, and the Fifth Republic, under President Chun Doo-hwan. When, under Park in 1972, the Yushin Constitution was drafted as part of the authoritarianization of the political system, another fdBO phrase was added to the constitution as well as to a couple of common legal statutes. Phase 3 begins with democratic transition in 1987 and yet another fdBO formula added to the constitution. Thereafter there is a sudden surge in numbers of fdBO phrases exclusively limited to common legal statutes that lasts until the early 2000s (1987–2004). Phase 4 begins to develop under the new liberal government of Roh Moo-hyun that had followed right after the first turnover to the liberal government of Kim Dae-jung in 1998, and starts with a halt in increase, after which the upward trend continues at a somewhat slower pace (2004–2014).

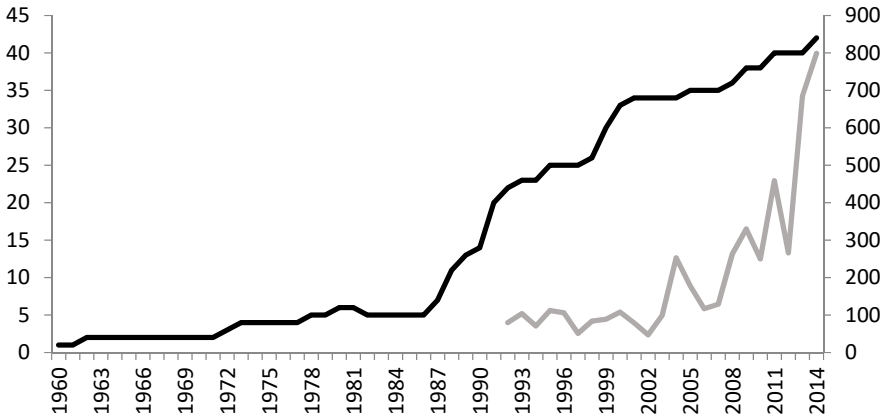
36 *Vivien Schmidt*, Discursive Institutionalism: The Explanatory Power of Ideas and Discourse, Annual Review of Political Science 11 (2008), p. 313.

37 *Phillips et al.*, note 34.

38 *Antonio Gramsci*, Selections from the Prison Notebooks, International Publishers 1971.

39 *Ruth Berins Collier* and *David Collier*, Shaping the political arena. Critical junctures, the labor movement, and regime dynamics in Latin America, Princeton, New Jersey 1991.

Figure 1



First graph (black): Number of fdBO-phrases in Korean Laws (1949–2014; accumulated; left scale); second graph (grey): Number of fdBO-phrases in Korean Newspapers (1992–2014; right scale; KINDS)

The second graph (grey) displays the numbers of fdBO phrases used in newspaper articles. Here we can discover a strong increase of fdBO usage in the press – in particular after the conservative President Lee Myung-bak took over office in 2008 – reaching its highest peak for the time being in 2014, when the UPP was disbanded. In other words, during this fourth phase the fdBO was increasingly disseminated from common legal norms into public political discourse. Based on the proposition that translation is a dynamic ongoing process that can happen between various dimensions, levels, or realms[40], these four phases can be identified as subsequent orders of translation: across ('national') legal systems, within the constitution,[41] over various legal statutes, and into public discourse.

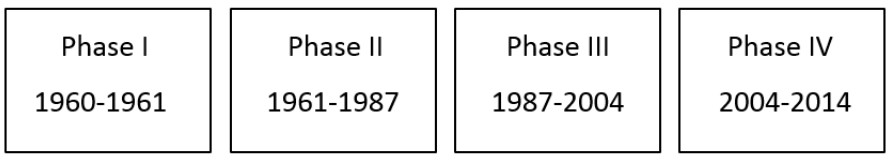
To answer the study's question regarding the genesis and change of the fdBO in Korea the investigation deals with one phase after the other in form of a time series analysis (see figure 2). Based on the theoretical assumptions discussed above, the analysis is structured around the following five elements: shocks to an existing equilibrium, critical junctures as opportunity structures, empowered actors taking opportunities, discourse competition between rivaling advocacies, and contents of change or no change in norms and ideas, i.e. the interpretation of the fdBO. Concretely speaking, the enactment or reform of legal norms that contain the fdBO phrase as well as its interpretations and applications are scrutinized

40 *Freeman*, note 24, p.5.

41 For an overview of the "pathways of constitutional development" in South Korea see *Albert H. Y. Chen*, Pathways of Western liberal constitutional development in Asia: A comparative study of five major nations, International Journal of Constitutional Law 8 (2010), p. 867–871.

by examining the surrounding political context and dynamics including the activities of central actors in the process.

Figure 2



Four phases of fdBO translation in Korea (1960–2014)

Source: author

E. Reconstructing the translation of the fdBO between 1960 and 2014

I. First-order translation: introducing the (f)dBO to 'ensure' party protection (1960–1961)

In Korea, the fdBO-formula[42] was introduced to the Constitution for the first time by the Constitutional Reform Committee in 1960. The constitutional amendment followed the April Revolution in the same year that ousted the authoritarian President Rhee Syngman, who had ruled the country for twelve years since its establishment in 1948. When Rhee attempted to prolong his presidency for a third term at the March 15 elections in 1960 by severe fraud and abuse, such as ballot-stuffing, group voting and removing ballot boxes, students protested nation-wide, ultimately leading to the overthrow of the Rhee government. The opposition *Democratic Party* (DP) that had been challenging Rhee's rule and his *Liberal Party* (LP) now became the key actor and took the initiative in the national assembly to change the constitution. It is a noteworthy detail in this regard that these actions already took place in June – even before the general elections at the end of July – since it shows that the key actor was empowered, i.e. was endowed with the respective legitimacy for changing the status quo, even without formal power (e.g. having the majority in parliament). In the course of this the government system was reformed from a presidential system to a parliamentary cabinet system with a bicameral legislative. As a kind of antithesis toward the power structure up to this point, the intention was to decentralize and divide discretion and thus prevent another authoritarian ruler. With regard to the fdBO, it is important to note that the function and rights of political parties were strengthened. For the first time in Korea the constitution included a provision for political parties (Art 13) partly modeled on that of the German Basic Law,[43] stating that

42 As mentioned earlier, it is important to notice the difference between fdBO and dBO. However, in fact, they are interpreted and treated the same. There is only a small minority of constitutional scholars that dissent in this regard.

43 The selection of wording can be traced back quite clearly to the fdBO-formula of the German Basic Law. While there is still dispute over the question why the formula did not include the word

> *"[i]f the objectives or activities of a political party are contrary to the Constitution's democratic basic order, the government may bring action against it by obtaining the approval of the president, and the dissolution of the party is ordered through the decision of the Constitutional Court".*

As transcripts from assembly meetings show,[44] the introduction of the fdBO-formula was one of the central countermeasures against the recurrence of an authoritarian government such as that under Rhee in general; and, in particular, the new constitutional norm aimed at preventing state despotism, as manifested in the arbitrary dissolution of the oppositional *Progressive Party* (PP) in 1958. Cho Bong Am, the leader of the PP, was a strong contender against Rhee Syngman at the 1956 presidential elections. Afterwards, even though Cho did not win, he used the public support he had received at the elections and established the Progressive Party for building an effective opposition force against the authoritarian ruler. Rhee perceived Cho and his party as a serious threat to his rule. The party was dissolved and Cho executed. To declare the PP illegal and to dissolve it, and the decision to sentence Cho to death, were all based on the allegation that the PP and its leaders, first and foremost Cho, would have been involved in espionage for North Korea, would have violated the National Security Act, would have planned to overthrow the South Korean government, and prepared to unify the peninsula according to the intentions of North Korea.[45] It is these developments that triggered the introduction of the constitutional norm on political parties, with the fdBO at its center, during the constitutional amendment process.

At this point in time the difference in the interpretation of the fdBO in Korea and Germany is only one of emphasis and can be revealed easily by way of taking into account the general socio-political background of the introduction or change of the norm, as well as its immediate history (generative-historical interpretation). In Germany the introduction of the fdBO was a reaction to the NSDAP's terror and a countermeasure against the potential threat of communist bloc parties, and it thus stressed the protection of the constitutional order against extremist parties. Meanwhile, in Korea, it was a reaction against terror by the state and thus focused on protecting political parties against state despotism.[46] Neverthe-

"free" as the German version did, it appears to be confirmed that the framers intended not less than the fdBO (*Ippŏpchosaguk*, note 7, pp. 154; *Il-kyoung Park*, Chukjo hangukhŏnbŏp [Building the Korean Constitution], Seoul 1960, p. 28; *Kim*, note 14, p. 164).

44 *Ippŏpchosaguk*, note 7, pp. 57, pp. 86.

45 *Tae-pok Kwon*, Chinbodang. Tang-ŭi hwaldong-kwa sakŏngwangye charyojip [Progressive Party. Documents on the party's activities and its dissolution], Seoul 1985, pp. 160. In this way, the case of the PP ban in 1958 resembles the case of the UPP ban in 2014. Both parties were progressive minor parties and their leader had openly challenged the government. In both cases high ranking party members were accused of having violated the NSA because they allegedly acted as spies for and followed orders from North Korea to overthrow the South Korean government. One exception in the resemblance is that, in 2014, the UPP's party leader, *Lee Seok-ki*, was not executed, but only sentenced to a jail term.

46 *Tae-youn Han et al.*, Han'guk hŏnbŏpsa (ha) [Korea's constitutional history II], Seoul 1991; *Ippŏpchosaguk*, note 7, p. 75.

less, the fdBO in Korea did also include the idea of protecting the constitutional order, which (as well as in the German case) becomes obvious when analyzing the literal interpretation of the legal text according to the rules of semantics, grammar, morphology, and syntax, along with the logical interpretation of the legal text within the system of legal texts or in relation to other norms (semantic-logical interpretation).[47] Put differently, at its introduction in 1960 the semantic-logical and the generative-historical interpretation of the (f)dBO's meaning coincided with its subjective-teleological interpretation, or the immediate purpose of the initial lawgiver. In summary, in this first phase the introduction of the fdBO to the Korean constitution in 1960 was initiated by the DP and was meant to ensure a free democratic political and social order in general, and the protection of political parties against state arbitrariness in particular.

II. Second-order translation: appropriating the fdBO to 'assure' anti-communism (1961–1987)

1. Maintaining the free democratic basic order in the constitution's article on political parties

After the military coup in 1961, the new authoritarian leadership under General Park Chung-hee reformed the constitution once more, bringing the presidential government system back in. At the same time, the constitution of the ensuing Third Republic (1963–1972) now included a stand-alone provision on political parties (Art. 7) that almost perfectly resembled Article 21 of the German Basic Law. While the dBO-formula in the provision remained almost the same as before, and still no notable wider discourse emerged on the dBO, the fact that President Park Chung-hee officially stated that he wanted to "serve liberal democracy (*chayuminjujuŭi*)", and that the first article of his Democratic Republican Party's platform stated the aim to establish a "liberal-democratic political system (*chayuminjujuŭi-jŏk chŏngch'ijedo*)" points to the beginning of the re-interpretation of the (f)dBO.[48] It is generally acknowledged in the literature that the notion of "liberal democracy" had been used by opposition forces to resist and criticize the authoritarian government of President Rhee Syngman and that of President Park Chung-hee. However, it was soon co-opted by the authoritarian forces to whom liberal democracy was tantamount to anti-communism.[49] The shift in interpretation becomes even more apparent in the Demonstration Act that was

47 It was also made explicit that the purpose the immediate lawgiver had in mind was explicitly focused on the formation of a "free and democratic social order and political order (*chayusŭrŏp-ko minju-jŏgin sahoejilsŏ-wa chŏngch'ijilsŏ*)", and did not aim at regulating any economic order (*Ippŏpchosaguk*, note 8, pp. 154). See for example *Song*, note 7, p. 42.

48 *Lee*, note, 15, p.456.

49 See *Chae-ho Chun*, Chayuminjujuŭi-wa minjuhwaundong: je-1-konghwaguk-esŏ je-5-konghwaguk-kkaji [Liberal democracy and the democratization movement: from the First to the Fifth Republic], in: Jung-in Kang, Woe-sun An, Chae-ho Chun, Tong-ch'ŏn Pak, Sang-ik Yi (eds) Minjujuŭi-ŭi han'guk-jŏk suyong [Korean reception of democracy], Seoul 2002; *Dae-sik Lim*, 'Chayu-

put into force in 1961 and prohibited "rallies and demonstrations violating the Constitution's *democratic basic order*" (Art. 3; emphasis mine). Here, the fdBO was for the first time explicitly related to areas other than political parties. Put differently, an interpretative shift of the fdBO's function occurred to protect the state against potential threats from civil society.[50]

2. The free democratic basic order in the constitution's preamble

At the end of the 1960s détente politics in international relations following the Nixon Doctrine on the one hand and increasing resistance to autocratic rule domestically on the other – Park's rule was criticized as "fake liberal democracy" – resulted in an intensifying legitimacy crisis of the Park administration. Park reacted to the challenge by reinforcing his autocratic style and institutionalizing it through another constitutional reform in 1972, leading to the Fourth Republic (1972–1979). The resulting Yushin Constitution is regarded as a blunt "non-democratic constitution" due to the undemocratic reform process as well as its contents providing the – now practically lifelong – president with even more authority and power. The main narrative of justifying the constitutional reform was that, since the country had to prepare for unification, it had to be made stronger in order to be able to compete with the strong opposite, North Korea. Part of the reform was to add an fdBO-formula to the constitution's preamble, which states that,

> *"[w]e the people of Korea [...] having determined to [...] afford equal opportunities to every person and provide for the fullest development of individual capabilities in all fields, including political, economic, civic and cultural life by further strengthening the free democratic basic order conducive to private initiative and public harmony [...]." (emphasis mine)*

With this new fdBO-formula placed in the preamble, the discursive shift finally comes explicitly to the fore.[51] It is important to note that this second fdBO-formula in the constitution was placed into the preamble, since the contents of the preamble go beyond a simple normative statement, but have the function of providing the basic principles of the constitu-

minjujuŭi'-wa kukkajŏngch'esŏng nonjaeng [Liberal democracy and the state identity controversy], Yŏksa-wa pip'yŏng [History and Criticism] 73 (2005), pp. 12; *Chi-yŏng Mun*, Han'guk-ŭi minju-hwa-wa chayujuŭi: chayujuŭi-jŏk minju-hwa chŏnmang-ŭi ŭimi-wa han'gye [Democratization and Liberalism in Korea: the meaning of liberal democratization and its limits], Sahoeyŏn'gu [Research on Society] 11 (2006), p. 82.

50 The Demonstration law also included the outlawing of "demonstrations for achieving the aims of a disbanded political party" (Art. 3).

51 See *Min-bae Kim*, Chayu minjujŏk kibonjilsŏ-wa kukkaboanbŏp [Freiheitliche demokratische Grundordnung and National Security Law], Inha Pŏphakyŏn'gu 4 (2001), p. 113.

tion.[52] While there is some speculation and unofficially made comments on who determined what the fdBO-formula in the preamble was supposed to mean, there are no records available of the constitution making processes proving a specific re-interpretation explicitly. However, the very fact that it was part of the autocratic Yushin reform allows cautious reasoning that it was part of appropriating the narrative of liberal democracy and conflating it with anti-communism. This is also in line with the rationale of the North Korean Defector Compatriots Act (1978) that regulates the rejection of applications by defectors whose "ideology violates the *democratic basic order*" (Art. 2; emphasis mine).

After the death of President Park in late 1979, Chun Doo-hwan, again a military officer, subsequently seized power through another coup. The ensuing Fifth Republic (1980–1987) basically resembled the preceding one. However, there was a clear shift to increased usage of soft power instruments in order to appear different from the preceding Fourth Republic. Brutal methods in the suppression of popular protests had resulted in the Kwangju Uprising, or Kwangju Massacre, in 1980 and made clear that this traditional way of authoritarian rule was not feasible anymore. This is why the Chun administration – in addition to making some softening changes in the Constitution – set up a 'satellite party' system[53], enacted the Political Funds Act (*chŏngch'ijagŭmbŏp*) to make parties more dependent on state funding, and introduced official slogans and campaigns for a "just society", to name only a few initiatives. As regards the question of the fdBO, the introduction of the Media Basic Law (*ŏllonbangsongbŏp*) in 1980 was part of this overall soft power strategy for cooptation. Most decisively the law included the regulation that media outlets had to register with the authorities as a precondition to operate legally. The authorities could cancel registration of an outlet under certain circumstances, and the law prescribed that "broadcasting must respect the *democratic basic order*" (Art. 4; emphasis mine).[54] Obviously, the statute was meant to provide the government with an instrument for controlling the media industry as part of its overall media policy.

The characteristic of this second phase can be summarized by stating that the additional fdBO phrase in the constitution's preamble in 1972 and a few subsequent supplements to common legal statutes served to silently appropriate the concept of the fdBO to reconfirm South Korea's opposition to North Korea, and to reassure its commitment to the Cold War alliance with the so-called "free world", as well as to reassure non-tolerance towards any

52 *Seong-Taek Lee*, Han'guk sahoe-ŭi chayuminjujuŭi tamnon-kwa minju-jŏk konggohwa iron [The jayu-minjujui discourse and the democratic consolidation discourse in the Korean society], Sahoewa iron [Society and Theory] 5 (2004), p. 250.

53 *Giovanni Sartori*, Parties and Party Systems, Cambridge 1970, p. 231.

54 The Media Basic Law was substituted in 1987 by the Broadcasting Act (*pangsongbŏp*) that inherited this passage; later, in 2000, it was added that review regulations on broadcasting contents must include the criterion of "maintaining the democratic basic order of the constitution" (Art 33). Interestingly enough, in this second revision, the dBO-formula replaced the formulation "increase liberal democracy" that had been added in 1987.

forces that challenge the government domestically.[55] The initial meaning of the fdBO – protecting political parties against state arbitrariness – was implicitly changed to "Korean style democracy" and anti-communism. It is a "silent" appropriation, because up to the end of the 1980s the fdBO was not used actively or explicitly in court proceedings or other legal action. Until then the authoritarian governments had access to a variety of other means to suppress and control opposition; so there simply was no need to explicitly invoke the fdBO, yet.

III. Third-order translation: installing the fdBO to 'insure' against democratic challengers (1987–2004)

1. Including the free democratic basic order in the constitution's new article on unification

As a result of the growing democratization movement, culminating in the June Struggle of 1987, the authoritarian Chun Doo-hwan government was finally pressed for procedural democratization, entailing yet another reform of the constitution. While the democratization movement encompassed various strata of society, the actual constitutional amendment process was monopolized by the two major parties, i.e. the ruling conservative *Democratic Justice Party* (DJP) and the opposition liberal *Democratic Party for Unification* (DPU).[56] A Special Committee on the Reform of the Constitution (*hŏnbŏpkaejŏngt'ŭkpyŏlwiwŏnhoeŭi*) was established and four parties submitted amendment proposals that were deliberated in respective sub-committees. The fundamental questions, however, were decided by an exclusive group of eight, consisting of four representatives of each major party, who were to make sure that their party's interests were secured in the long term and to disperse any danger in case they were defeated in the process of political competition.[57]

This is the immediate historical background against which the third and last addition of the fdBO-formula to the constitution has to be understood. It was introduced into the constitution in 1987 as part of the new provision on unification (Art. 4):

> *"The Republic of Korea shall seek unification and shall establish and carry out a policy of peaceful unification based on the* ***free democratic basic order****." (emphasis mine)*

55 *Hyun-yeon Cho*, 'Chayujuŭi' chibaedamnon-ŭi yŏksa-jŏk kwejŏl-kwa chibae hyogwa [The historical tracks of the hegemonic discourse and ruling effects of 'liberal democracy'], in: *Hee Youn Cho* (ed), Han'guk-ŭi chŏngch'isahoe-jŏk chibaedamnon-gwa minjujuŭi tonghak [Politico-societal hegemonic discourse and the dynamics of democracy in Korea], Seoul 2003, p. 356.

56 The DJP was led by later President Roh Tae-woo, while the DPU was led by the most prominent leaders of the democratization movement, Kim Dae-jung and Kim Young-sam.

57 *Jang-jip Choi*, Minjuhwa ihu-ŭi minjujuŭi [Democracy after democratization], Seoul 2004, p. 112; see also *Jang-jip Choi*, Han'gukminjujuŭi-ŭi iron [Korean Democracy Theory], Seoul 1993, pp. 271; *Kwang-seok Cheon*, Hŏnbŏp-kwa han'guk minjujuŭi: 1987-nyŏn hŏnjŏngch'eje-rŭk chungsim-ŭro [Democracy in the constitutional law of 1987], Constitutional Research [Hŏnbŏphakyŏn'gu] 12 (2006), p. 227.

This corresponded to the government's strategy towards North Korea. In particular, it was in line with succeeding President Roh Tae-woo's one-counter-policy that intended to monopolize unification activities within the hands of the government, and to control or exclude any non-government activities.[58] The new Article 4 provided the basis for blocking any interaction with North Korea that was not approved by the government.

The following facts suggest that adding the fdBO to the Article on unification goes back to the ruling DJP. First, since its appropriation during the Third Republic, the fdBO almost exclusively served as a strong narrative in the interests of the authoritarian forces. This manifests itself clearly right after the establishment of the oppositional DPU in May 1987, when the Ministry of Justice, as well as the prosecution, accused the party of pursuing a pro-North Korea policy that violated the constitution as well as the National Security Act.[59] The basis for the allegation was the DPU's platform that stated that the party "takes a unification that transcends any ideology or system as primary government objective [once it took power, HBM]" (ibid.).[60] In the context of the controversy over the party's platform the Minister of Justice argued that, according to the constitution, a party can be banned if it violates the democratic basic order of the constitution.[61] The prosecution posited that the DPU's platform violated Article 7 of the National Security Act (NSA; *kukkaboanbŏp*), because it included a plan for unification under a system other than liberal democracy. The Minister of Unification stressed that a unified fatherland's political ideology and system has to be based on liberal democracy.[62] If the DPU would not comply the government would have to take all necessary steps to defend the nation's basis (*kukki*). After the June Struggle (1987), however, the explicit threat of banning the DPU vanished from the political discourse. Nonetheless, President Chun Doo-hwan, explaining that to advocate unification by way of other than liberal democracy is "worrying and deplorable", made clear that he would not allow further "leftist tendencies (*chwagyŏng*)" in politics and society.[63] In a nutshell, for the authoritarian ruling camp any activity in respect of North Korea or unification necessarily and explicitly had to be based on the fdBO interpreted as anti-communism.

Secondly, among the four proposals on the constitutional amendment, only the oppositional DPU proposed an article on "peaceful unification",[64]although not including the fd-

58 *Ch'ŏn-sik Kim*, Roh Tae-woo chŏngbu-ŭi nambukgyoryuhyŏmnyŏkpŏp chejŏng-e kwanhan yŏn'gu [Study on the legislative process of the Inter-Korean Exchange and Cooperation Act under the Roh Tae-woo government], PhD thesis, University of North Korean Studies, Seoul 2014, p. 98.

59 *Donga Ilbo*, May 13, 1987, p. 1.

60 Ibid.

61 *Kyunghang Sinmun*, May 12, 1987, p.1.

62 *Maeil Kyŏngje*, May 15, 1987, p.1.

63 *Maeil Kyŏngje*, August 21, 1987, p. 1.

64 The government party's initial proposal did not provide any change regarding the fdBO-formula (*Kukhoesamuch'ŏ*, Taehanminguk. Hŏnbŏpgaejŏngt'ŭkbyŏlwiwŏnhoehoeŭirok [Minutes of the Special Committee on the Constitutional Amendment], August 31, 1987, p. 3; p. 17). It also did

BO-formula.[65] What is more, the DPU proposal also changed the preamble's fdBO phrase from "further strengthening the free democratic basic order (*chayuminjujuŭi-jŏk kibonjilsŏ*)" to "establishing a liberal democratic system (*chayuminjujuŭi ch'eje*)".[66] Also, only the DPU proposal on the preamble included an explicit reference to the legacy of the April 19 Revolution (1960) and to the Kwangju Uprising (1980). This is noteworthy, since the authoritarian government under Chun Doo-hwan had been portraying the Kwangju Uprising as an insurrection stirred up by pro-communist forces, including Kim Dae-jung.[67] Taken together, these amendment proposals suggest that the DPU intended to break with the existing usage and interpretation of liberal democracy and fdBO, tantamount to anti-communism.[68] Against this backdrop, though lacking explicit evidence, it is reasonable to conclude that it must have been the ruling DJP that added the fdBO formula to the constitution's article on unification. It was to make sure that unification would occur only according to rules of liberal democracy in the way it is interpreted in Korea[69], and thus prevent too much loss of political power or influence despite changes at that time.[70]

not include any provision on unification. The same applies for the conservative opposition Korea National Party (ibid., p. 76).

65 *Kukhoesamuch'ŏ*, note 64, pp. 29.

66 *Kukhoesamuch'ŏ,* note 64, pp. 29. This statement has to be qualified, though, because the DPU-proposal's liberal democracy phrase was embedded in a particular narration that not only related to the March First Movement and the April 19 Revolution, but also explicitly put forward the legacy of the Kwangju Uprising and was stated to be "against soldiers engaging in politics", and in favor of the idea of a "civil government" (ibid.). Seen in this light, the liberal democracy phrase has a clearly different meaning to that of the authoritarian forces.

67 The Kwangju Uprising, as well as Kim Dae-jung, is also mentioned in news reports, using it as an example of illegitimate violent protests that are contrary to the free democratic basic order (see *Donga Ilbo*, 6 December 1980, p. 3; *Kyunghyang Sinmun*, 4 December 1980, p. 3).

68 The proposal by the other opposition party, the *New Korea Democratic Party* (NKDP), took the fdBO-phrase completely out of the preamble; it did not mention at all a provision for unification (*Kukhoesamuch'ŏ*, note 64, p. 63). There is no documentation on whether the NKDP was against the fdBO, and if so, for what reason. However, there is proof of the fact that MPs of the NKDP were enraged due to the fact that the draft for constitutional amendment was prepared by the two large parties only, and in a closed session of only eight representatives (*Kukhoesamuch'ŏ*, Taehanminguk, Hŏnbŏpgaejŏngt'ŭkbyŏlwiwŏnhoehoeŭirok [Minutes of the Special Committee on the Constitutional Amendment], September 17, 1987, pp. 6).

69 *Kyong Son Kang*, Hŏnbŏp chŏnmun-ŭl t'onghae pon taehanminguk-ŭi kwagŏ-wa mirae [The Constitution of the Republic of Korea, past and future through the constitutional preamble], Yŏksabip'yŏng [History Criticism] (2011), pp. 50.

70 See *Song*, note 7, p. 52; For a detailed examination of the fdBO and unification in Korea see *Hannes B. Mosler*, Decoding the 'Free Democratic Basic Order' for the Unification of Korea, Korea Journal 57 (2017).

2. Saving and strengthening the National Security Act by 'fdBO grafting'

After the introduction of the article on unification to the constitution the dissemination of the fdBO formula extends to a wide array of common legal norms and the establishment of respective policies and organizations[71] concerned with the media and the arts, education and textbooks, unification and North Korean defectors, democracy and human rights, and judicial concerns (see appendix). Over the course of the following twenty years the number of legal provisions that contain the fdBO-formula doubled (see figure 1 above).[72]

The most crucial change, however, is the 1991 reform of the powerful *National Security Act* (NSA) that represents a decisive alteration in interpretation and usage of the fdBO. The Act's official purpose is to "suppress anti-State acts that endanger national security and to ensure the nation's security, people's life and freedom" (Art 1). Since its first enactment in 1948, however, it has mostly been used to suppress individuals or organizations critical of the ruling government.[73] In 1980, through legislation passed by the National Security Legislative Council (NSLC)[74], the NSA was merged with the Anti-Communism Act (ACA)

71 On the level of general law, the 1988 enactment of the Regulation on the Democratic Ideals Development Committee (minjuinyŏmbaljŏnwiwŏnhoegyujŏng) can be understood as restrictively regulating any North Korea related activities. The mission of the Democratic Ideals Development Committee (DIDC) was to inform and educate the populace about the constitution's basic principle of the fdBO. The reasoning was to establish the notion of the fdBO and thus to "lessen the confusion about communism that has been emerging since democratization" (*The Office for Government Policy Coordination* (2003), p. 156; *Lee*, note 17, pp. 146; *Daily Mail,* 28. Dec. 1988, p. 1). In support of this endeavor, in 1989 the Organization Regulation of the Administrative Management Office (ORAMO; *haengjŏngjojŏngsiljikje*) was changed to include a fifth Administrative Management Office within the Office of the Prime Minister that manages the establishment, propaganda and development of information, programs and policies regarding the fdBO (Art. 8).

This measure can be understood in the same vein as those since the beginning of the 1980s to overcome the legitimacy crisis of domestic anti-communist propaganda, when the official anti-communism education program was renamed. There are convincing accounts of how, since 1981, the anti-communism education scheme (*pan'gongkyoyuk*) was renamed the unification scheme (*t'ongilgyoyuk*) as a reaction to a perceived legitimacy crisis of the authorities, manifesting in the increasing rejection of blunt anti-communism education, especially among younger generations (*Lee* 2004, note 17, pp. 150; *Lee* 2005, note 17, p. 257). Important to note in this respect is the fact that, while the education scheme's name and some of its contents were changed, its core idea of anti-North Koreanism remained mostly untouched (*Lee*, note 17, pp. 150).

72 A recent attempt by a lawmaker from the ruling party to introduce the *Democratic Basic Order Maintenance in the National Assembly Special Act* in 2011 did not succeed but provides a good example of this trend.

73 The NSA was based on the Peace Preservation Act (PPA) introduced during Japanese Occupation (1910–1945) in 1925 for suppressing forces that "aim at changing the political system or deny the institution of private property" (Art 1). The PPA, in turn, harks back to the German Anti-Socialist Laws (Gesetz gegen die gemeingefährlichen Bestrebungen der Sozialdemokratie or Sozialistengesetz) (see *Hak-Jae Kim*, Migration of Non-Liberal Emergency Powers. Cross-Regional Resonance of the Bismarckian system with Japan and Korea (1871–1987), unpublished paper 2015).

74 The NSCL was established by the Emergency Committee for National Security Measures that had been put in place after Chun Doo Hwan seized power through a military coup on May 17, 1980.

that had been enacted after the military coup by Park Chung-hee in 1961. While the law retained the name NSA, the former ACA constituted the largest share of its contents. In particular, Article 7 and Article 8 of today's NSA (see below) had not been part of the NSA before 1980 but were adopted from the ACA's Article 4 and Article 5 respectively. The 1991 amendment involved adding the fdBO-formula to five articles of the NSA. According to the reformed version a person is punished with at least five to ten years, or life imprisonment, or the death penalty, if he or she "while knowing that this [action] jeopardizes the state's existence or security, or the *free democratic basic order* [emphasis mine]" "voluntarily supports or receives money or valuables" from (Article 5), "infiltrates or escapes" into/from (Article 6), "praises or incites" (Article 7), or "meets or corresponds" with (Article 8) anti-state groups or individuals.[75] The officially stated reason for adding the precondition of violating the fdBO was to prevent the provisions from being interpreted too broadly, and thus misused, suppressing virtually any activity critical of the government (NSA bill).

Here it is important to examine the process that led to the NSA reform to understand the meaning of its actual outcome that harks back to several developments ensuing after formal democratization in 1987. One important development is the July 7 Declaration (*ch'ilch'ilsŏnŏn*) of 1988, after which the Roh Tae-woo government began to change its policy on North Korea that later would develop into *Nordpolitik*, aiming at reopening the dialogue with North Korea and at improving relations between South Korea and the socialist countries.[76] Consequently, the NSA reform proposal submitted by the Roh-government[77] explicitly excluded communist countries or parties of communist states other than North Korea from the definition of "anti-state groups", as well as other alterations that were proposed in order to only punish acts actually endangering the South Korean state. This advance from the government side and several other developments[78] triggered a lively debate

75 Here "anti-state groups" or "anti-state individuals" depicts the North Korean government or North Koreans. This relates to Article 3 of the Constitution, which states that "[t]he territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands," which thus includes North Korean territory, and, ergo, makes the North Korean government an "anti-state group", because it claims to be the legitimate ruling authority over this territory (see *Kuk Cho*, Tension between the national security law and constitutionalism in South Korea: Security for what?, Boston University International Law Journal 12 (1997), pp. 158).

76 This new policy was obviously closely modeled on the German Chancellor Willy Brandt's *Ostpolitik* and its basic strategy of "Change through Rapprochement".

77 The proposal was submitted to the national assembly by MP Lee Han Dong and 47 other MPs on December 13, 1988.

78 In January 1989 the entrepreneur Chung Ju-yung, in March pastor Moon Ik-hwan, and later in July the student Lim Su-gyung visited North Korea. While the visit of Chung had been authorized by the government the latter two visits were part of the unofficial unification movement, without official permission. Both Moon and Lim were indicted on charges of violating the NSA once they came back to the South. In the case of Moon his lawyers had challenged the accusation, amongst others, by claiming that the NSA would be contrary to the Constitution. The court, however, contended that the NSA would be necessary in order to prevent upheaval activities by North Korea,

in society and in the national assembly on how to change the NSA, or whether to abolish it altogether.[79]

Meanwhile, on November 10, 1989, the Masan District Court requested the constitutional court to review the constitutionality of the NSA in respect of Article 7.[80] The very fact that the NSA was put into question at the constitutional level was yet more stimulation for the NSA reformation/abolishment debate. In expectation of the court ruling the NSA unconstitutional, the opposition Democratic Party for Peace (DPP), led by Kim Dae-jung, submitted a law proposal to the national assembly on December 4, 1989 for substituting the NSA with the Democratic Order Protection Act (DOPA; *minjujilsŏbohobŏp*). The intention was to replace the ambiguous, and thus dangerous, NSA with a more clearly formulated statute that would minimize the threat of misuse. To do so, the dBO-formula was put at the center of the act, which is reflected in its title. In this way, it was apparently thought, applying the law would have to be based on the elements constituting the dBO, as defined in the DOPA. The definition of the dBO, for the most part, coincides with the definition by the German Constitutional Court.[81] Only a couple of months after the opposition had submitted the DOPA-bill the ruling *Democratic Liberal Party* (DLP)[82] submitted a NSA reform bill

which "neglects peaceful unification and the free and democratic basic order" (*Kyunghyang Sinmun,* 10 Jun. 1989, p. 1). In the case of Lim the court was even more explicit when it stated in the verdict that Lim "completely neglected the legal order of the Republic of Korea and caused social disorder, jeopardizing the free and democratic basic order" (*The Hankyoreh* 06 Feb. 1990, p. 1).

79 See *Donga Ilbo* (Dec. 4) 1989, p. 4.

80 This harks back to a trial against a person possessing certain indexed books. Even before that, the trial at the Seoul Criminal Court (against the student Kim Chung Ki; January 23, 1989; *Constitutional Court*, Kukkaboanbŏp che-7-jo che-1-hang che-5-hang wihŏnsimp'anjech'ŏng [Referral for judgement on unconstitutionality of NSA Article 7, Sentence 1 and 5], P'allyejip 4 (1992), p. 4 -35; decision rendered only on January 28, 1992) led to the first ever constitutional trial on the NSA (*The Hankyoreh,* Dec. 30 (1989), p. 11). However, the verdict was ruled later than the Masan case. There was a third case requested by the Seoul Court on January 5, 1990 that was rendered by the Constitutional Court (*Constitutional Court*, Kukkaboanbŏp che-7-jo che-5-hang-ŭi wihŏnsimp'an [Constitutional decision on NSA Article 7, Sentence 5], P'allyejip 2 (1990), p. 165–177) on June 25, 1990.

81 DOPA bill 1989, p. 214. It is important to note that this definition differed in one point from the later definition by the Korean Constitutional Court on the Masan case (see *Constitutional Court*, note 13, p. 51) that also included the right to private property. Later, a representative of the DPP, who was involved in drafting the bill, stated that the dBO definition in the DOPA-proposal was borrowed from the German Constitutional Court (*Kukhoesamuch'ŏ*, Taehanminguk. Minjubaljŏnŭl wihan bŏmyul kaejŏngt'ŭkpyŏlwiwŏnhoe hoeŭirok [Minutes of the Special Committee for the Reform of the Act for Development of Democracy] (July 9, 1990), p. 6), and that it deliberately excluded the property right item because this might lead to exclusion of any pursuit of ideas of democratic socialism (*Kukhoesamuch'ŏ*, Taehanminguk, Pŏpchesabŏpwiwŏnhoehoeŭirok [Minutes of the Legislation and Judiciary Committee] (February 1, 1991), p. 3).

82 In January 1990, the government party DJP (125 seats) merged with two opposition parties, the conservative New Democratic Republican Party that was led by the former aide to Park Chung Hee, Kim Jong Pil (35 seats), and Kim Young-sam's liberal DPU (59 seats). The three heteroge-

that challenged the proposal of the opposition to substitute the NSA by the DOPA.[83] The ruling DLP instead proposed to add the fdBO-formula to certain articles of the NSA "to guarantee citizens' basic human rights to a maximum degree" by "punishing only those actions that violate the free democratic basic order".[84]

On April 2, 1990 the constitutional court's decision on the Masan case (see above) was announced. The Court rendered Article 7 of the NSA "limited constitutional", which meant that the NSA had to be reformed in due course.[85] This contributed greatly to generating the critical juncture that opened the window of opportunity for discursive competition over (re-)determining the fdBO's meaning. The Constitutional Court, for the first time, provided a comprehensive and explicit definition of what the fdBO was supposed to be encompassing. Here it is noteworthy that the court's definition was almost identical with the definition of the fdBO by the German constitutional court. The difference was that it added the meaning of an "economic order based on private property and market economy",[86] while excluding "responsibility of government" and "lawfulness of administration" as well as "self-determination of the people". It is at this point where the shift in meaning or interpretation becomes explicit. At the introduction of the fdBO in 1960 the lawgiver was quite explicit with regard to the fact that, firstly, the fdBO was not meant to be an order related to the economy; secondly, a responsible government as well as, thirdly, lawfulness of the administration were key to the fdBO, which was meant to ensure the prevention of state arbitrariness in the future (see above).

Finally, on 11 May 1991 the ruling DJP railroaded its NSA reform bill through parliament under the heavy protest of opposition members, who argued that the bill did not pro-

neous parties established the Democratic Liberal Party (DLP) that now possessed an overwhelming majority, with 218 seats out of 299 total seats in the national assembly. While the government party, after the successful presidential election in 1987, had also won the general elections in 1988, it had only acquired a simple majority in the national assembly that potentially entailed limited governance capacity. The advance by the DJP to merge with opposition parties led by former foes was openly explained as a strategy to regain governability. This aim was achieved. The DJP was so strong compared to the remaining parties that it could easily change laws the way it was preferred by the government.

83 This bill was submitted on March 14, 1990 by MP Yi Chin U.

84 National Security Act bill number 130830.

85 *Constitutional Court*, note 13, p. 51, p. 54, p. 60.

86 *Constitutional Court*, note 13, p. 49, p. 63. This decision effectively translated the initial German definition of the fdBO into the Korean context of the time. One reason that must not be underestimated is the fact that the Constitution of 1987 experienced consolidation of liberal market order (see *Hak-Jae Kim*, On the Contestation between Two Different Legal Traditions: The Diffusion Process of Socio-economic Rights in the Korean Constitutions (1948–1987), Tamnon 201 18 (2015)). Moreover, it is important to note that this decision was rendered only one year after the newly established Constitutional Court's first ever verdict (*Chong-tae Pae*, Tasi hanbŏn kukkaboanbŏp-ŭl marhanda [Once again speaking out about the National Security Act], Pŏp-kwa sahoe [Law and Society] 4 (1991), pp. 154).

vide for any improvement in vagueness compared to the existing NSA.[87] It did not take long until this concern proved valid. In 1995, the Pusan Regional Court appealed to the constitutional court because the notions in the NSA's Article 7, including the fdBO, were still polysemous.[88] Also, legal scholars have been pointing out this obvious deficiency,[89] as did international organizations, such as the United Nations[90], Amnesty International,[91] or recently the Carter Center (2014), and even the US State Department (2015).[92]

To sum up, the third phase (1987–2004) is characterized by the strong surge in numbers of fdBO phrases that dispersed into common laws once the new constitution received its third fdBO formula in 1987. The most decisive change was the reform of the NSA by adding the fdBO formula to its most poisonous articles. In this way, not only was the abolishment of the NSA avoided, but also, on the contrary, its reach was even extended and its immunity against constitutional challenges strengthened.[93] Both the constitutional article on unification and the NSA reform catered to the intention by the dominant lawgivers that, despite democratic transition, the implementation of the rules of the game remain determined by anti-communism or anti-North Koreanism and disguised in Korean style Cold War liber-

87 *Donga Ilbo*, 11 May 1991, p. 2. Former opposition leader Kim Young-sam, who had joined the ranks of the government party after the three-party-merger in January 1990, tried in vain to convince his new comrades to agree on abolishing the NSA (*The Hankyoreh*, February 4, 1990, p. 1).

88 *The Hankyoreh*, 18 January 1995, p.23.

89 *Ho-Soon Jang*, Kukkaanbo-rŭl wit'aerobge-hanun ijŏkp'yohyŏn-ui pŏmŭi [The scope of expression endangering national security], Minjusahoe-rŭl wihan pyŏllon [Pleas for a Democratic Society] (1999); *Jong-Seo Kim*, Kukkaboanbŏp p'yejiron: 7-cho-rul chungsim-ŭro [Abolishment of the NSA: focusing on Article 7], Kongbŏpyŏn'gu [Public Law Research] 29 (2001); *Kuk Cho*, Kukkaboanbŏp chŏnmyŏn p'yejiron [For the complete abolition of the NSA], Chŏngch'ibip'yŏng [Political Criticism] 8 (2002).

90 *Ch'an-hyŏng Maeng*, Yuen t'ŭkpyŏlbogogwan, kukkaboanbŏp 7-jo p'yeji [UN Special reporter recommends abolishment of NSA Article 7], Yonhapnews, 3 June 2011, http://www.yonhapnews.co.kr/international/2011/06/03/0601140100AKR20110603186300088.HTML (accessed: 14 January 2015); *Jong-Seo Kim*, Kukkaboanbŏp p'yejiron: 7-cho-rul chungsim-ŭro [Abolishment of the NSA: focusing on Article 7], Kongbŏpyŏn'gu [Public Law Research] 29 (2001); *Kuk Cho*, Kukkaboanbŏp chŏnmyŏn p'yejiron [For the complete abolition of the NSA], Chŏngch'ibip'yŏng [Political Criticism] 8 (2002).

91 *Yonhapnews*, Aemnesti, kukkaboanbŏp kaejŏng-p'yeji ch'okku [Amnesty urges reform/abolishment of NSA], Yonhapnews, 1999, http://news.donga.com/Series/List_70030000000243/3/all/19990817/7462628/1 (accessed: 14 November 2014).

92 The constitutional court in 1996, however, decided that due to the fact that the former provision of the NSA was amended, and now limited punishment to acts that were conducted with the knowledge of endangering the state's existence or its security or the free democratic basic order, and thus were clearly against the Constitution, the provision's unconstitutionality was removed (*Constitutional Court*, Kukkaboanbŏp che-7-jo che-1-hang tŭng wihŏnjech'ŏng [Unconstitutionality referral on NSA Article 7, Sentence 1], P'allyejip 8–2 (1996), p. 283–307). In most of the succeeding constitutional reviews of the NSA this decision has been cited as a binding precedent (*Lee*, note 17, p.173).

93 *Soon-Ok Kuk*, Chayuminju-chŏk kibonjilsŏ-ran muŏsin'ga [What is the free democratic basic order?], Minjubŏphak [Democratic Legal Studies] 8 (1994), p. 2.

al democracy.[94] This is the result of the hegemony of a small conservative elite that had the necessary agency at the critical juncture of democratization to install a "political insurance"[95] in their favor. As will be seen below, only fifteen years later, conservative forces would draw on this very insurance to escape their legitimacy crisis.

IV. Fourth-order translation: claiming the fdBO-insurance (2004–2014)

The liberal Kim Dae-jung-administration (1998–2003) that came to power in 1998 marked the first ever democratic government *turnover*[96] in Korea from the conservative ruling party to the liberal opposition party. During the succeeding liberal Roh Moo-hyun-administration (2003–2008), the fdBO-formula increasingly became part of the public political discourse. Put differently, the fdBO-notion was now used outside the purely legal context. Between 2004 and 2014, four consecutive controversies can be identified, which involved an increasing frequency of fdBO usage that found visible expression in the mass media (see diagram 3). The first controversy (2004–2005) revolved around the issue of "state identity" (*kukkajŏngch'esŏng*), which was brought against the Roh Moo-hyun-government by the then opposition conservative forces, including Park Geun-hye. Conservative circles used several decisions and statements by the government as an opportunity to allege the government for distorting the state's identity, which from their perspective was synonymous with liberal democracy, or the fdBO. The second controversy (2008–2009) arose after the conservative Lee Myung-bak-administration took over the government in 2008. President Lee had emphasized the importance of the "rule of law" (*pŏpch'ijuŭi*) since the presidential election campaign at the end of 2007. In early spring 2008, shortly after the inauguration of Lee, when the candlelight demonstrations against cow meat imports from the US grew bigger and triggered an early legitimacy crisis of the new administration, the government and other conservative circles began to increasingly emphasize the rule of law as the core of liberal democracy and the fdBO, which had to be protected against liberal challenges. The third controversy (2011) revolved around the question of whether, at middle and high school classes on contemporary history, "democracy" or "liberal democracy" (*chayuminjujuŭi*) should be taught. Forces from the conservative camp proposed not to use democracy, but liberal democracy, to distinguish Korea's democracy from socialist democracy. Again, the fdBO was invoked as an authoritative reference in the constitution. The fourth controversy (2013–2014) was triggered by the conservative Park Geun-hye-government, which pursued the dissolution of the minor leftist party UPP, based on article 8 of the constitu-

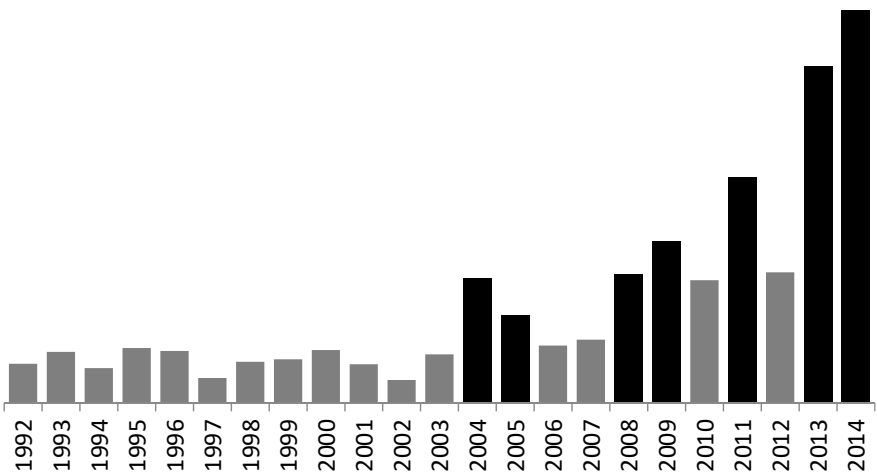
94 See *Lee*, note 15, p. 477; *Min-bae Kim*, Chibaeideologi-ro-sŏ-ŭi 'chŏnt'u-jŏk minjujuŭi'-ŭi nolliwa kŭ pip'an [The rationale and criticism of 'militant democracy' as ruling ideology], Minjubŏphak [Democratic Legal Studies] 4 (1990), pp. 9; *Anthony Arblaster*, The Rise and Decline of Western Liberalism, New York 1984, pp. 309.

95 *Tom Ginsburg*, Judicial Review in New Democracies: Constitutional Courts in Asian Cases, Cambridge 2003.

96 *Samuel P. Huntington*, Political Order in Changing Societies, New Haven 1968.

tion.[97] In all of these conflicts the parties involved in the controversy were liberals on the one side and conservatives on the other, while the latter almost exclusively – sometimes directly, sometimes indirectly – drew on the "free democratic basic order" to establish its interests against the liberals.[98] Figure 3 three shows peaks in the frequency of usage of the fdBO phrase in the mass media that correspond to the four controversies mentioned above.

Figure 3



Number of fdBO-phrases in Korean Newspapers (1992–2014)

(KINDS)

F. Conclusion

This case study of constitutional translation presents a dynamic picture of the evolution of the free democratic basic order in Korea between 1960 and 2014. Adopting an institutionalist approach and drawing on the heuristic device of translation, the article analyzed the genesis and change of the fdBO along four subsequent phases of shifts in its meaning and usage. During the translation process that ensued over the following decades, elements of the initial set of norms and ideas of the fdBO that had been only dormant were brought to the fore and strengthened beyond the element of the protection of political parties. Increasingly, the emphasis was put on the protection of the state against its alleged enemies from within and outside, i.e. critical liberals and North Korea respectively.

97 Ultimately, the party was dissolved, and thus shows how discursive hegemony translated into changes.

98 A detailed investigation of the controversies since 2008 can be found in *Hannes B. Mosler*, Der Demokratiediskurs in Südkorea – Im Spannungsfeld von freiheitlicher und liberaler demokratischer Grundordnung, Politische Vierteljahresschrift, Sonderheft 51/2016, pp. 567–588.

In the first phase, after the April Revolution in 1960, democratic forces introduced the fdBO to the constitution to *ensure* the protection of political parties against state arbitrariness. This initial establishment was a reaction to the immediate historical events during the authoritarian rule of President Rhee Syngman, and in particular to the banning of the minor Progressive Party two years earlier. Thus, despite the fact that the potential meaning of the fdBO in the German context was well known to the domestic legal profession, its expressive interpretation was focused for the most part on the element of protection of parties against political repression by the state. In the second phase, the authoritarian governments of Park Chung-hee and Chun Doo-wan, between 1961 and 1987, appropriated the fdBO to *assure* their legitimacy against challengers in the domestic as well as the international realm. In the third phase, since democratization in 1987, the conservative forces installed the fdBO as the necessary measure and precaution to *insure* their power status (or at least to avoid their demise) despite the actuality of the new democratic era. In the fourth phase, since the early 2000s, after the first liberal government turnover, the conservative forces increasingly utilized the fdBO in political controversies for challenging the liberal (ruling) camp to *claim* insurance for their loss of power, and to reclaim their legitimacy to rule. The campaign for the dissolution of the UPP in 2014 represents a climax in this regard.

The ban of the UPP was history repeating itself – while the ban of the Progressive Party in 1958 was a "tragedy", the ban of the UPP was a "farce";[99] it constitutes a representative example of how the conservative forces were able to bring their discursive hegemony to the fore over the meaning of the fdBO. Except for its introduction in 1960, it has almost without exception been authoritarian and/or conservative forces that "reengineered"[100] and actively utilized the fdBO as a means to protect, extend or realize their interests and power. Despite minor exceptions, authoritarian and conservative forces have always had the upper hand in the balance of institutional power, which made it relatively easy to dominate the discourse, and to appropriate the fdBO for their own purposes by amalgamating it with Cold War anti-communism. In the process the fdBO was given an ideological twist biased towards the conservative-reactionary camp. Liberal or progressive forces, on the other hand, for the most part have been neglecting the fdBO altogether as an allegedly inherently suppressive concept. By doing so, they ultimately relinquished the discursive field to the conservatives and weakened their position in the discourse competition.

Against the backdrop of the above analysis of the translation of the fdBO over more than half a century the manifestation of this phenomenon is not at all surprising, because it proves the fact that, while the fdBO in Korea is a translation of the initial set of ideas and norms of the German context, it is at the same time genuinely *made in Korea*. In this way, this study was able to shed light on an open-ended process after constitutional transfer that

99 See *Karl Marx* and *Friedrich Engels*, Der achtzehnte Brumaire des Louis Bonaparte, in: same, Werke 8, Berlin 1972 (1852), p. 115.

100 *Stephenson*, note 20.

is exposed to, and thus dependent on, authoritative interpretation determined from *within* its immediate local context.

Appendix

Laws with provisions including the (f)dBO-formula (Compiled by the author. Source: database of the Ministry of Government Legislation (bŏpchech'ŏ); law.go.kr)[101]

Year	Law	Provision	Phrase
1960	Constitution (hŏnbŏp)	Art 13 (Art 7, 8)**	dBO
1962	Assembly and Demonstration Act (chiphoe mit siwi-e kwanhan pŏmyul)	Art 3 (deleted in 1989)	CdBO
1972	Constitution (hŏnbŏp)	Preamble	fdBO
1973	Constitutional Council Act * (hŏnbŏpwiwŏnhoebŏp)	Art 33	dBO
1978	North Korean Defector Compatriots Protection Act* (wŏllamgwisunyongsa t'ŭkpyŏlbosangbŏp)	Art 12 (deleted in 1982)	fdBO
1980	Media Basic Law* (ŏllon'gibonbŏp)	Art 3	dBO
1987	Constitution (hŏnbŏp)	Art 4	fdBO
1987	Broadcasting Act (pangsongbŏp)	Art 4	dBO
1988	Constitutional Court Act (hŏnbŏpchaep'ansobŏp)	Art 55	dBO
	Enforcement Regulation on the Democratic Ideals Development Committee (minju'inyŏmbaljŏnwiwŏnhoegyujŏng)	Art 1	fdBO
		Art 2, Item 1	fdBO
		Art 2, Item 2	fdBO
1989	Administrative Management Office Act (haengjŏngjojŏngsiljikche)	Art 8, Item 1	fdBO
		Art 8, Item 2	fdBO
1990	Broadcasting Act Enforcement Ordinance (pangsongbŏpsihaengyŏng)	Art 38–2	CdBO

Year	Law	Provision	Phrase
1991	National Security Act (kukkaboanbŏp)	Art 5	fdBO
		Art 6	fdBO
		Art 7	fdBO
		Art 8	fdBO
	Audio and Video Records Act (ŭmban mit pidiomul-e kwanhan pŏmyul)	Art 17	CdBO
	Cable Television Law (chonghapyusŏnbangsongbŏp)	Art 41	CdBO
1992	Enforcement Regulation for the Categorization, Punishment, and Treatment of Prisoners (suhyŏngjabullyu ch'ŏu'gyuch'ik)	Art 2	fdBO
	Cable Television Law Enforcement Ordinance (chonghapyusŏnbangsongbŏpsihaengyŏng)	Art 14	CdBO
1993	Law on the protection of repatriated North Korean compatriots * (kwisunbukhandongp'obohobŏp)	Art 12	fdBO
1995	Judicial Officers Ethic Program (bŏpkwanyulligangyŏng)	Art 2	fdBO
	Constitutional Order Destruction Crime Statute of Limitation Special Act (hŏnjŏngjilsŏ p'agoebŏmjoe-ŭi gongsosihyo t'ŭng-e kwanhan t'ŭngnyebŏp)	Art 1	fdBO
1998	Enforcement Regulation for Nationality Act (kukchŏkpŏpsihaenggyuch'ik)	Art 4	fdBO
1999	Unification Education Supporting Act (t'ongilgyoyukchiwŏnbŏp)	Art 3	fdBO
		Art 11	fdBO
	Audio,Video Record, and Games Act * (ŭmban.bidio mit geimul-e kwanhan bŏmyul)	Art 16	dBOV
	Movie Promotion Act (yŏnghwajinhŭngbŏp)	Art 21	CdBO
		Art 22	CdBO
2000	Broadcasting Act (pangsongbŏp)	Art 33	CdBO
	Democratic Movement Compensation Act (minjuhwa'undonggwallyŏnja myŏngyehoebok mit posing tŭng-e kwanhan pŏmyul)	Art 2	fdBO
	Enforcement Regulation on the Authorization of Books used for Teaching (kyogwayongdosŏ-e kwanhan kyujŏng)	Art 23–2	dBO
2001	National Human Rights Commission Act (kukka'in'gwŏnwiwŏnhoebŏp)	Art 1	dBO

101 The abbreviations in the far left column refer to "democratic basic order" (dBO), "free democratic basic order" (fdBO), "constitution's democratic basic order" (CdBO)", and "constitution's basic order" (CBO).

Year	Law	Provision	Phrase
2005	Promotion of Newspapers Act (sinmun tŭng-ŭi chayu-wa kinŭngbojangbŏp-e kwanhan bŏmyul)	Art 4	dBO
2008	Law Education Support Act (bŏpkyoyukchiwŏnbŏp)	Art 1	fdBO
2009	Law on the promotion of movies and video material (yŏnghwa mit pidiomul-ŭi chinhŭng-e kwanhan pŏmyul)	Art 29	CdBO
	Ethics charter for public servants of the election commission (sŏn'gŏ'kwalliwiwŏnhoe kongmuwŏn yulligangyŏng)	Preamble	dBO
2011	State Civil Servant Act (kukka'gongmuwŏnbŏp)	Art 26–3	CBO
	Regional Civil Servant Act (chibanggongmuwŏnbŏp)	Art 25–2	CBO
2014	Regulation on Broadcasting review (pangsongsimŭi-e kwanhan kyujŏng)	Art 7	CdBO
		Art 29–2	CdBO

* Abolished.