

**The Nation's Capital as a Constitutionalized Space and a Legal Norm**  
*:Pyongyang and Seoul*

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## I. Introduction

This paper analyzes how the location of a capital city, Pyongyang or Seoul, is positioned as a legal and social norm, and how national identity becomes instrumental in normalizing the nation's capital as a fixed and permanent place. This is interdisciplinary work that straddles the boundaries of law and the social sciences. I will look at the 2004 Constitutional Court decision of South Korea (2004Hun-Ma554, 566), which held that the relocation of a capital city was unconstitutional, and examine the North Korean Constitution, which states that Pyongyang is the nation's capital, and other related statutes. Both Seoul and Pyongyang have revisited and invented national history in order to normalize the capital space and constructed it in a symbolic form of national identity through legal narratives. I argue that *national identity shapes and constitutes a capital city, and the Constitution fortifies a boundary of the nation through a construction of a capital city, a miniature of the nation.*

The questions that I raise in this paper are as follows. What does it mean to constitutionalize the location of a national capital either in the written form (*Pyongyang*) or even in the unwritten form (*Seoul*) based on the custom? Why is it important to enforce the location of a national capital as a legal norm? How are the Constitution, the location of a national capital, and national identity interrelated? What is a symbolic meaning of a capital city and a representation of the space? How do space and law interplay? As for the concept of the nation, this paper assumes that the nation is a social and historical construction (Hobsbawm & Ranger 1983; Anderson 1983; Smith 1991; Shin 2005); Benedict Anderson (1991: 7) defines a nation as "imagined communities" which are "conceived as a deep, horizontal comradeship."<sup>1</sup> Also, the paper accepts the idea that ethnic nation is "a primary source of collective identity among Koreans on both sides of the peninsula" (Shin 2006: 225), and has "a strong sense of oneness based on shared bloodline and ancestry" (223). Throughout this paper I will explore the nexus between a capital city and Constitution from national identity. National identity provides a condition to interconnect between space and law.

## II. Background

On October 21, 2004 the South Korean Constitutional Court held that Seoul is a capital city in the Republic of Korea and the relocation of a national capital is unconstitutional based on the "Customary Constitution," which is unwritten but binding. This lawsuit was made in August 2004, when the South Korean government announced that Gongju would be a capital city in 2007 to reduce concentration and overpopulation of Seoul as the former president, Roh Mu-Hyun, pledged in a presidential election campaign. Roh's administration proposed the Special Act on the Establishment of the New Administrative Capital. In December 2003 this special act was enacted at the National Assembly, and in January 2004 it was promulgated. The new administrative capital is planned to have the pivotal political and administrative function of the nation. In August 2004 this statute was challenged by public officials, members of the Seoul City Council and some other citizens. They filed a constitutional complaint on the ground that the Act was unconstitutional in its entirety, and it violated the right to vote on referendum and the right of taxpayers.<sup>2</sup> In October 2004 the South Korean Constitutional Court held that Seoul is a capital city in the Republic of Korea, and the relocation of a national capital is unconstitutional because

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<sup>1</sup> Anderson says that a nation is "imagined as *limited* because even the largest of them, encompassing perhaps a billion living human beings, has finite, if elastic, boundaries, beyond which lie other nations," BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 7 (London: Verso 1991) (1983).

<sup>2</sup> They claimed the unconstitutionality of the Act in its entirety as the government sought to relocate the capital without the constitutional revision procedure.

the Special Act violates the right to vote on national referendum, which is required for a formal constitutional revision process according to Article 130 of the Constitution.

### III. Literature

The cases of North and South Korea reflect how space interacts with society, and space is socially constructed. The literature covering interrelation between law, space and society has introduced an insight that law is relational and, law produces space. A conventional idea of space sees it as absolute, objective and scientific. Space is also prepolitical and external.<sup>3</sup> Critical geographers have challenged this orthodox thought that space is an immutable and fixed place. They see that there is a problem with “ignoring spatiality of social life and the politicized nature of space.”<sup>4</sup> For them space interacts with society, and space is socially constructed. For example, Henri Lefebvre views space as inseparable from ideology and politics while challenging a neutral concept of space:

“Space is not a scientific object removed from ideology or politics; it has always been political and strategic. If space has an air of neutrality and indifference with regard to its contents and thus seems to be ‘purely’ formal, the epitome of rational abstraction, it is precisely because it has already been occupied and used, and has already been the focus of past processes [...] Space has been shaped and moulded from historical and natural element, but this has been a political process. Space is political and ideological. It is a product literally filled with ideologies.”<sup>5</sup>

Critical geographers do not agree with a transcendental, asocial, and abstract concept of space, and emphasizes importance of local settings and multiplicity of spatial contexts. There is a similarity with critical legal scholars (Blomley 1994: 43). Nicholas Blomley finds common ground between critical geographers and critical legal scholars. He raises a question about objectivity of law, which makes it difficult to discuss politics of law, while critical geographers problematize removal of social relations from space and assumption of prepolitical thought of space.<sup>6</sup> Critical legal studies also view that law is not independent of society. They fundamentally confront a liberal concept of law: formality, determinacy, neutrality, and objectivity of law.<sup>7</sup> Law is indeterminate, and legal rules as premises are inherently inconsistent and incoherent. Social forces, power relations, language, philosophy, or history are underlying determinants in laws.<sup>8</sup> Similarly, Blomley asserts that “[l]aw is cast as relational, that is, as acquiring meaning through social actions. To this extent, law is viewed as socially constructed and therefore analytically inseparable from social and political relations.”<sup>9</sup>

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<sup>3</sup>NICHOLAS BLOMLEY, Introduction, Part I, LAW, SPACE AND THE GEOGRAPHIES OF POWER 42-43 (Guilford Press 1994).

<sup>4</sup>See *Id.* at 4.

<sup>5</sup>Henri Lefebvre, *Reflections on the Politics on Space*, 8(2) ANTIPODE (1976) at 43.

<sup>6</sup>See *supra* note 3, at 43.

<sup>7</sup>J. Paul Oetken, *Form and Substance in Critical Legal Studies*, 100 YALE L. J., 2209-2212 (1991).

<sup>8</sup>See *Id.* at 2211.

<sup>9</sup>See *supra* note 3, at 11.

In reference to critical geography and critical legal writing, I take a position that law and space in North Korea and South Korea are constructed by a political, historical and social context. It is not “empty,” “passive” or “prepolitical.”<sup>10</sup> For example, space in North Korea is filled with socialist ideology while space in South Korea is developed within a capitalist framework. The construction of space in North Korea reflects socialist concerns about regional disparities, and social and economic inequality: any classes or regions shall not be isolated from socialist urban planning.<sup>11</sup> The socialist ideology underlies urban planning and migration policies.

## VI. The Nation’s Capital as a Constitutional Space and National Identity

North and South Korea have constitutionalized the location of the nation’s capital despite two different ways of expression (unwritten and written): one is in Seoul and the other is in Pyongyang. The North Korean Constitution states in Article 166 that Pyongyang is a capital of the Democratic People's Republic of Korea. On the other hand, in South Korea the location of a capital is unwritten in the Constitution. Rather it is recognized as the Customary Constitution by the constitutional court which declares that Seoul is the nation’s capital, unless there is a formal constitutional revision process through national referendum. This decision could replace the absence of a provision in the Constitution in regard to where a capital city should be located, unlike the written Constitution of North Korea. As a result of the Constitutional Court decision, a constitutional legal norm obligates the executive as well as legislative branches to prevent the transfer of a national capital to another city. This raises a question of why a powerful legal apparatus of the Constitution, which is the highest in the hierarchy of laws, involves in the process of making the status of capital cities legally unchallenged. What are the social and historical necessity of constitutionalizing the location of capital cities and creating this space in which a legal force is embedded? This paper uses the term constitutionalization in the way in which Alec Stone Sweet explains: “By constitutionalization I mean the process through which:

- constitutional norms come to constitute a source of law, capable of being invoked by litigators and applied by ordinary judges to resolve legal disputes, including in the domain of private law;
- the constitutional court, through its jurisdiction over concrete review referrals and individual complaints, comes to behave as a kind of supercourt of appeal for the judiciary, involving itself in the latter’s tasks of fact finding and rule application; and
- the techniques of constitutional decision-making become an important mode of argumentation and decision-making in the ordinary courts.”<sup>12</sup>

In the South Korean case, the majority opinion (seven Justices out of nine) asks whether the location of a capital is a fundamental constitutional law matter. They draw a line between the national identity and the location of a capital city. National identity acts as a barometer that determines whether this issue falls within the constitutional matters which the Constitutional Court can review. The Court sees the location of a capital as a substantive constitutional matter expressing the identity of the nation because the nation’s capital is a place where the highest constitutional institutions, for example the National Assembly and the President, are located. The only female Justice, Hyosook Joen, opposes the

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<sup>10</sup>See *Id.*, at 15, n.5.

<sup>11</sup>KIM HYUNSOO, *Bughan-ui Dosigyehoe-g-e Gwanhan Yeongu*, A STUDY ON THE URBAN PLANNING OF NORTH KOREA, PhD thesis 14 (Seoul National University 1993).

<sup>12</sup> Alec Stone Sweet, *Constitutional Courts and Parliamentary Democracy*, 25(1) WEST EUROPEAN POLITICS, 77, 96 (2002).

majority opinion.<sup>13</sup> Her dissenting opinion is that the location of a capital is not a fundamental matter of the Constitution. She states that the fundamental purpose of the Constitution is the realization of the liberty and rights of the citizens through the control and the rationalization of state power. For her, the location of a national capital is no more than a “tool” for realizing such a purpose. She points out that the Act was passed by the members of the national assembly from both the ruling party and the opposition party by overwhelming support to the bill for the Act. She argues that it is unreasonable to say that there is a legal conviction: Seoul is a capital. She further says that even though the customary constitutional law is recognized, there is no ground that it is identical to the written constitution because the code of written constitution has ultimate superior. Customary Constitutional law only supplements the written constitution. She does not connect national identity to a constitutional matter. This case indicates how national identity provide a linkage between a constitutional norm and a capital city, and how national symbols become the substances of the national Constitution.

The majority adds the official national name, the official national language, the limits of the national borders, and the declaration of sovereignty into the list of the constitutional matters subject to the constitutional review.<sup>14</sup> These are the invented symbols of the modern nation. The following phrase explains a connection between national symbols, such as flag, anthem and emblem, and identity and sovereignty of a nation.

“The National Flag, the National Anthem and the National Emblem are the three symbols through which an independent country proclaims its identity and sovereignty, and as such they command instantaneous respect and loyalty. In themselves they reflect the entire background, thought and culture of a nation” (quoted in Hobsbawn, 1983: 11).

Eric Hobsbawn (1983: 13) describes the notion a nation as “comparatively recent historical innovation” which is related to “phenomena: nationalism, the nation-state, national symbols, histories and the rest.” Standard national language is an example of “innovative” and “deliberate” constructs of the modern nation (13-14). Also, flags, images, ceremonies and music are used in symbols and semi-ritual practices for the citizens’ membership (Hobsbawn 1983: 12). A national city is not different in terms in which is created in the modern arena. But, more interesting in this decision is that the modern capital is grafted on custom and traditions, and the Court uses the Constitution as a process to formalize the location of a capital. In fact, not all national symbols are regulated in the Constitution: the regulation of a national flag is written in the statute as the Justice HyosookJoehn points out.

Nevertheless, it is not unusual that the Constitution reflects national identity (McGoldrick 2000: 14). The Constitution is viewed as a foundation and an origin of the nation; it is bounded by a national territory and people living there. For example, the English Constitution, which is unwritten, describes and reflects an existing nation through practices, habits, and traditions, while the American Constitution forms nation through the written words (Irving 2007: 212). North and South Korea are not exceptions. The Preamble of the South Korean Constitution, enacted on July 17, 1948, begins with the words: “[w]e, the people of Korea, proud of a resplendent history and traditions dating from time immemorial.”<sup>15</sup> The North Korean Constitution expresses self-perception or identity through the *Juche* idea. The preface of the Constitution, adopted in 1972 and revised in 1992, starts by saying that “[t]he Democratic People's Republic of Korea is a socialist fatherland of *Juche* which embodies the idea of and guidance by the great

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<sup>14</sup>Historical roots of the Constitution come from “the Provisional Republic of Korea Government born of the March First Independence Movement of 1919” and the April Nineteenth Uprising of 1960.” The missions of the Constitution is “peaceful unification of our homeland” and the consolidation of national unity with [...] “brotherly love.” The South Korean Constitution, para 7, available at <http://english.court.go.kr/home/english>.

<sup>15</sup>See Id.

leader Comrade Kim Il Sung.”<sup>16</sup> *Juche* is translated as “self-determination” or “autonomy as identity,” and “national, rather than individual or class, self-determination in politics, self-sufficiency in the economy, and self-defense in security” (Lynn 2007: 105). Article 3 of the Constitution defines the *Juche* idea as a “a world outlook centred on people, a revolutionary ideology for achieving the independence of the masses of people.” The nation is realized through the *Juche* idea which is filled with nationalistic inspiration. Although North Korea initially hesitates to use the words nationalism or nation because they were considered bourgeois ideology (Shin 2006: 88), by the mid-1980s North Korea officially used nationalist languages (89). In 1992, the Constitution was revised in a way to remove all mention of Marxism and Leninism after North Korea began to use the phrase, “Our Own Socialism” in 1991 (Lynn 2007: 107; Shin 2006: 94).

Yet, it is also true that the status of the Constitution in North is not the same as in South Korea. The Constitution of North Korea is not regarded as the highest norm in the hierarchy of laws because laws are understood as a by-product of politics (Haksung Kim, 2003: 15). Despite this difference between two Koreas, national identity is the overarching idea of constructing the nation’s capitals in the Constitutions. The Constitutional Court in South Korea defines the identity of a nation as “the characteristic nature of the nation, as the source of emotional unification of the nation, which is formed by the composite expression of history, experience, culture, politics, economy, power structure and spiritual symbols, and so forth, of its people.” The majority of Justices defines that national identity is based on the nation which is formed and shared by “history, experience, culture, politics, economy, power structure and spiritual symbols.” The majority’s notion of a nation is “limited” and “sovereign” because it assumes a “finite” territorial boundary, and relies on a political authority (Anderson 1991: 7). In comparison, North Korea includes “bloodline” in the definition (Shin 2006: 89). This was added in 1973 into Stalin’s definition: “a historically constituted, stable community of people, formed on the basis of a common language, territory, economic life, and psychological make-up manifested in a common culture” (cited in Shin 2006: 82). While ethnicity is not listed in the definition of the South Korean Constitutional Court, both North and South Korea assume that there is a common nature of the nation which is fixed and immutable over time, and they see the nation as the “the source of emotional unification.”

In addition, one concurring opinion from Kim Yong Il, a Justice of the South Korean Constitutional Court links a relation between the location of a capital city and the social cohesion of ethnic nation. He states that the location of the capital means the existence of a nation and a core element in determining a national identity. Following his reasoning, the fortification of a capital city is considered vital to the security of the entire nation, which regards the location of the capital as central to an existence of the nation.<sup>17</sup> It is not a coincidence that the self-definition of a nation often relies on external and internal enemies (Hobsbawm & Ranger 1983: 279). The Justice Kim writes that even after unification the location of the capital has a greatly significant meaning in the process of unification. He concludes that Pyongyang and Seoul will be the central cities and candidates for the location of the capital of the unified Republic of Korea.

However, as Bang (2005: 161) points out, having a national capital in a different city would not lead to a change in the national identity of the Republic of Korea because the new capital would also be geographically bounded by national territories. Following the reasoning of the decision, only Seoul can provide the source and origin of national identity; Seoul is the only place where national identity is realized and sustained. At this point, national identity is an instrument to justify and legitimize the

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<sup>16</sup> The Constitution, *NAENARA*, MY COUNTRY (Official Portal of North Korea), available at <http://www.kcckp.net/en/great/constitution.php?2> (last visited on Sept. 10, 2009).

<sup>17</sup> He agrees on the unconstitutionality of the statute but his basis is not Article 130 but Article 72. Because he believes that the relocation of the capital is a matter of national security and unification, he sees the statute is in violation of Article 72. Article 72 provides “the President may submit important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny to a national referendum if he deems it necessary.”

location of a capital city rather than a substantial reason for the unconstitutionality. In other words, the Constitutional Court uses national identity, which has been constructed from the historical context on the Korean peninsula, as a mechanism to constitutionalize the nation's capital. As a result, the status of Seoul as a capital is not disputed because this space was prepolitically and naturally assumed as part of the formation of national identity.

A national identity, a sense of belongingness to a nation, is symbolically represented in a condensed way in one particular place, a capital city.<sup>18</sup> The nation reveals its identity through a national space and the Constitution,<sup>19</sup> because nation is “an entity which would provide the sources of their identity.”<sup>20</sup> But when it is assumed that a national identity is represented in wherever a capital city is located, the question moves to a symbolic meaning of Seoul, its unilateral relation to the nation. The Constitutional Court decision views that a national identity is attached and embedded in Seoul, not in other cities. This is connected to how Seoul, this particular city, has been explored and invented for the representation of a national identity; in this sense Seoul is a gatekeeper to maintain the authority of national identity.

## V. Constitutional Custom and Invented Traditions

The majority opinion of the Court held that the fact that Seoul is the capital is a constitutional custom that has traditionally existed as a norm even prior to the establishment of the written Constitution. The definition of a customary constitution interplays with a tradition which shows the continuity of the past. It requires an element of a tradition. The Constitutional Custom consists of (1) existence of a certain practice about the fundamental constitutional law matter, (2) repetition and continuation of the practice, (3) maintenance of the practice (*maintainability*), and (4) unequivocal and clear content of the practice (*unequivocalness*). The majority opinion concludes that the fact that Seoul is a capital city amounts to a continuing practice which has been traditionally formed in the nation (*continuance*). Such a practice has never been interrupted (*maintainability*). The practice was clear to the extent that no citizens would hold a different opinion over it (*unequivocalness*). There has been national consensus over a long period of time (*national consensus*). They view this as a self-evident and presupposed norm in the Constitution despite the absence of an expressed constitutional provision.

The third requirement, repetition and continuation, is an essential part of a tradition. Eric Hobsbawm (1983: 2) states that the nature of traditions is “invariance” while customary law is flexible in substance up to a certain point where is limited by precedent. He argues that “[t]he past, real or invented [traditions] [...] imposes fixed (normally formalized) practices, such as repetition.” He furthermore

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<sup>18</sup>Anthony D. Smith explains that “[...]‘national’ identity involves some sort of political community, however tenuous. A political community in turn implies at least some common institutions and a single code of rights and duties for all the members of the community. It also suggests a definite social space, a fairly well demarcated and bounded territory, with which the members identify and to which they feel they belong.” Anthony D. Smith, NATIONAL IDENTITY 9 (London and New York: Penguin, 1991).

<sup>19</sup>For example, Larry P. Arnn explains how America's national identity is connected to the Constitution: “America's character as a nation and as a people is fundamentally defined by the inextricable connection between our country's Constitution and its ‘constitution,’ that combination of qualities, dispositions, habits and self-understanding, which constitutes our national identity,” available at <http://www.heritage.org/press/events/ev041305a.cfm>.

<sup>20</sup>CATHERINE DAUVERGNE, HUMANITARIANISM, IDENTITY, AND NATION: MIGRATION LAWS IN CANADA AND AUSTRALIA 51 (UBC Press 2005) (quoting Jane Kelsey, “Restructuring the Nation: The Decline of the Colonial Nation-State and Competing Nationalisms in Aotearoa/New Zealand” in Fitzpatrick, Nationalism, Racism and the Rule of Law (Aldershot, UK: Dartmouth Press, 1995) 177 at 183).

argues that a tradition is routinely interlinked with custom, and the death of custom eventually changes the tradition. The majority holds that the fact that Seoul is a capital city has been traditionally established in the nation without interruption, which satisfies the elements, repetition and continuation, and maintenance of the practice.

The majority's reasoning is that Seoul has been a capital for over six hundred years since King *Lee SeongGye* established the *Chosundynasty* in 1392 AD, and chose *Hanseong*, the old name of Seoul, as a capital. The status of *Hanseong* was reflected in the *Gyeong-gook-dae-jeon*(經國大典), which was the first code of the laws in the *Chosundynasty* and was completed during the period of King *Seongjong*. The Constitutional Court makes a connection to *Gyeong-guk-dae-jeon*, which was used from the year 1486 during the *Chosundynasty*.

Moreover, the majority states that Seoul has been maintained as a capital even during the colonial period since Seoul remained to function as the center of the administration. They also emphasize a historical fact that shows that Seoul is the place where thirty three representatives gathered and declared the independence of the nation from the colonizer, Japan, on March 1, 1919. Even after independence from Japan, Seoul was the Special Metropolitan City and the "capital of *Chosun*" in Article 2 of U.S. Military Order No.106, which was issued by the U.S. Military government regime in 1946.

The majority revisits and invents the past of Seoul during the *Chosun* dynasty, and draws a connection between the old Korean history and the present city. The element, continuation and repetition, is found on the commonality of the physical space between *Hanseung* and Seoul. There is also assumption that *Hanseung* and Seoul share the symbolic meaning as the center of the nation; this disregard the context that Seoul has been built in the form of a contemporary national capital in the modern nation while *Hanseung* was structured for the King's governing role over the rest of the country in a centralized way. In order to prove continuation with the past the Court refers to the old materials, and revives its symbolic meaning from the monarchy and applies it in the contemporary nation's capital despite the contextual difference. By taking reference to the past the national status of Seoul is institutionalized and formalized through a legal process.

In this case, national history plays an important role in constructing the modern nation's capital. Eric Hobsbawm argues that "appropriate and, in general, fairly recent symbols or suitably tailored discourse such as national history" is related to the subjective components of the modern nation (Hobsbawm & Ranger 1983:14).<sup>21</sup> He also says that without taking a look at the invention of traditions "national phenomenon" cannot be properly explained (14). Invention of traditions refers to "a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past" (Hobsbawm & Ranger 1983: 1). These invented traditions usually try to set up "continuity with a suitable historic past" (Hobsbawm & Ranger 1983: 1). The South Korean Constitutional Court uses a uniform and unified narrative, the history of Seoul, which meets the requirements of the Customary Constitution. It revives a collective memory from the past, invents the continuity, and legitimizes permanent existence of Seoul as a capital city. Consequently, the fact that Seoul is the capital is an invented truth which the nation as recent innovation creates and constructs with the traditional and historical components establishing the continuity with the past.

## VI. The Spatial Heart of the Nation, History, and Invented Traditions

In both North and South Korea national history is used to establish cohesion of ethnic nation and legitimize the authority of a capital city where the legislative, judicial, and executive branches are located. Hobsbawm argues that "[a]ll invented traditions, so far as possible, use history as a legitimator of action and cement of group cohesion" (Hobsbawm & Ranger 1983: 12). He introduces the types of invented

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<sup>21</sup>ERIC J. HOBBSAWM, Introduction, THE INVENTION OF TRADITION (Eric J. Hobsbawm and Terence Ranger, eds., Cambridge: Cambridge University Press 1983).

traditions. The types that are used for Seoul and Pyongyang are “those establishing or symbolizing social cohesion or the membership of groups, real or artificial communities” and “those establishing or legitimizing institutions, status or relations of authority” (1983: 9).<sup>22</sup>Hobsbawm (1983: 7) also insists that in many cases political institutions and ideological movements have invented the continuity of history by making a past “by semi-fiction” or “by forgery.”

North Korea has used archeology and national history to show that Pyongyang is a place of the ethnic Korean origin so that it is destined to be a capital city. It reflects ethnic nationalism in North Korea which is “the epistemological basis for the development of *juch'e* ideology” (Shin 2006: 230). National history also links Pyongyang to the old capital of *Goguryo* Kingdom and Kim IlSung’s birth place, *Mankyongdae*, which is located in Pyongyang. Furthermore, Pyongyang is described to have been a heart of revolution since the beginning of the modern nation-state. Official literature depicts Pyongyang as a role model for the rest of the country and an educational field for revolution. Article 1 of the Capital Pyongyang Management Law, *adopted* in November 1998, states that Pyongyang is a sacred ground of revolution and a capital. These are the invented traditions establishing the status of Pyongyang for national purpose. It applies to Seoul, as well. A deliberate linkage between the status of *Hanseong*, drawn from *Gyeonggookdaejeon*, and the present status of Seoul, reflected in the Customary Constitution, is an invented continuity which makes up national history. These are the examples of how the nation’s capital turns out to be a “fictional space manipulating time and place, and re-presenting facts and events.” National history reproduces a mythical image of the capital city. Most of all, Pyongyang is invented with mythical and fictional traditions. Christine M. Boyer (1994) explains about the relationship between history and the present representation of a place:

“History fixes the past in a uniform manner; drawing upon its difference from the present, it then reorganizes and resuscitates collective memories and popular imagery, freezing them in stereotypical forms. Utilizing its distance from the past, history sets up a fictional space manipulating time and place, and re-presenting facts and events.” (Boyer 1994: 66- 67)

There has been a process of the creation of the new Pyongyang after a war. In the reconstruction of Pyongyang, Kim Il Sung, the former president from its founding in 1948 to his death, emphasizes coexistence between traditional/national traits and contemporary mode. As written in Great Leader and Pyongyang, in January 1951 he said that the important parts in reconstructing a destroyed city was to fit in a convenient, contemporary and civilized life style for workers and be suitable to the Chosun people’s life emotion (Kang et al.1986: 12). Also, Kim Il Sung instructed that architecture should be filled with socialist content in a national/traditional form. Furthermore, article 11(9) of the Construction Law, *adopted* in December 1993 by the Supreme People’s Assembly and last *amended* in June 2002, requires that a construction plan shall combine national characteristics with modern ones to the extent that it shows solidity, non-repetition, and unity. What constitutes national characteristics is national identity which *Juche* idea reflects. For example, a national library called *Inmindehaksupdang*, which opened in the Kim IlSung Plaza in Pyongyang in April 1982, symbolizes a national identity while it is located across from the *Juche* (self-sufficiency ideology) Tower. The design of the building, especially its roofs, reflects a national and traditional form. These kinds of monuments and education along with public ceremonies are part of invented traditions. Adaptation took place when North Korea attempted to embody national identity in the establishment of a modern nation state. Traditional characteristics have been used in the new condition and context for the formation of national identity.

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<sup>22</sup>The last type of invented traditions is “c) those whose main purpose was socialization, the inculcation of beliefs, value systems and conventions of behavior,” See Id.,



Public Library in Kim Il Sung Plaza  
(2005 HankyoreNewspaper: A Picture from 1991)

In the cases of North and South Korea the past becomes a source of a legal norm. Nicholas Blomley (1994: 17) said that “the past is frequently cast as a *privileged* source of normative values.”<sup>23</sup> In the South Korean case national history plays an important role in establishing the location of a capital city as an irreversible and incontrovertible truth, which is legally binding. The majority states that even before the Republic of Korea was established until now the fact that Seoul is a capital has been perceived as a historical and traditional norm in a conscious or unconscious way. Seungjoo Bang (2005: 167) disagrees with the majority opinion, and distinguishes a fact from a legal norm. He argues that the past constitutes a fact, not a norm. Bang (2005: 167) says that “Seoul is a capital” is simply a fact, and it has not been proven that the fact amounts to the formation of the Customary Constitution. He also asserts that it is not equivocal that there exists such a custom. *Unequivocalness* is a requirement which is lacking to be the Customary Constitution in this case. He says that it is not clear whether *opinio juris* has been established: *Opinio juris* is the belief that certain custom is legally binding (Bang 2006: 166). The revisited, invented, and constructed past revives a fact as a legal norm. National history contributes to this invention of traditions which is Seoul and consequently the formation of the Constitutional Custom.

I argue that both Seoul and Pyongyang have inconsistently used national history in order to normalize the capital space and construct capital cities by using a symbolic form of national identity through legal narratives. Pyongyang has been historicized by official narratives in which it is the origin of ethnic Koreans and Kim Il Sung (North Korea’s hero)’s birthplace as well as the location of the former capital in the *Goguryo* Kingdom. In South Korea, the 2004 constitutional court decision reproduced the symbolic meaning of a national identity and reinforced an exclusive boundary of the nation’s capital.

## VII. The Status of the Modern Capital and the City Identity

Scott Campbell (2000) explains the concentrated power in one city as a result of the recent rise of the modern nation-state: “the capital city is the spatial concentration of this modern national power in single, specific location. It reinforces the spatial division of labor between the governing (in the city) and the governed (in the hinterland).”<sup>24</sup> At the top of the hierarchy among cities is the capital city (Campbell

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<sup>23</sup>See supra note 3, at 17 (quoting Kelman, M, *A Guide to Critical Legal Studies*, Cambridge MA: Harvard University Press (1987)).

<sup>24</sup>See Id.

2000).<sup>25</sup> Both Seoul and Pyongyang evolved as a capital city in the modernization process in history. The book, *Great Leader and Pyongyang*, states that in 1951 Kim Il Sung gave guidelines for the creation of new Pyongyang to the workers making construction plans (Kang et al.1986: 12):

“We should build Pyongyang first after the war. Pyongyang is the democratic capital city of our fatherland and the center of politics, economy, and culture in the state. Pyongyang is where the Party Central Committee and the Republic government are located, and in here all lines and guidelines are set up to build the rich and powerful, and the autonomic and independent state and struggle for the achievement of a great undertaking for our people appears to be organizational order. Pyongyang is a city which has immemorial history, brilliant culture, and beautiful scenery. We should restore and construct the democratic capital, Pyongyang, more splendidly, beautifully, grandly, and contemporarily than before the war (12).”<sup>26</sup>

Kim Il Sung also states that the central area of the city should be correctly decided in order to restore the Pyongyang province to a contemporary city. He suggested that it would be good to set the Pyongyang city center in front of the People’s Committee of the Pyongyang city or at the eastern foot of *Namsan* (the name of mountain) where *Inmindehaksupdang* is currently located (12).

Both Seoul and Pyongyang have the national institutions which administer the affairs of the nation as a whole. In “Monumental Europe: The National Years. On the Iconography of European Capital Cities,”GöranTherborn (2002: 26) argues that “[c]apital cities, qua capitals, are manifestations of political power. They are invested with symbolic functions of representing the polity and the country/the people they are capitals of.” The executive, legislative, and judicial buildings in capital cities provide geopolitical power such as in Seoul and Pyongyang. Therborn (2002: 35) says that a set of state buildings is one of the key components of a capital city. In addition, the size of buildings and monuments demonstrates not only the power of the city but also the power of the entire nation.<sup>27</sup> In the rise of the modern nation-state a function of city-state was to defend the city’s territorial boundary, but the role of a new capital city is to deal with administration over a national boundary (Campbell 2000). Campbell (2000) argues that the modern nation-state distinguished the city from the state, and it transformed from the city-state to the nation-state. The identity of citizens is also changed from the city-state to the nation-state context. From this point, citizens are first loyal to the state not to the city.<sup>28</sup> Taylor explains that “the state rules and commands personal ‘citizen’ identity, the city has minimal political power and its ‘citizens’ having first loyalty to state not city.”<sup>29</sup>

However, unlike in the modern nation-state Pyongyang maintains and strengthens the identity of the city-state without excluding the identity of the nation-state. The legal framework contributes to this identity of Pyongyang. The Capital Pyongyang Management Law (the CPML) suggests that the city

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<sup>25</sup>See Id.

<sup>26</sup> SEONGSAN GANG&YUNSEOGSEO&HUI-WON GANG,THE GREAT LEADER AND PYONGYANG, SULYEONGNIMGWAPYEONG-YANG12 (The Chosun Labor Party Publisher 1986).

<sup>27</sup>“The size of buildings, monuments and streets not only demonstrated the specific size and wealth of the city, but also served as a proxy, suggesting the size and wealth of the nation as a whole,” Scott Campbell,Draft Version 1,*The Changing Role and Identity of Capital Cities in the Global Era*, paper presented at the Association of American Geographers Annual Meeting, Pittsburgh, PA (April 4-8, 2000), available at <http://www-personal.umich.edu/~sdcamp/AAG2000.html>.

<sup>28</sup> Peter J. Taylor, *World Cities and Territorial States*, WORLD CITIES IN A WORLD-SYSTEM 55(P. L. Knox and P. J. Tayloreds.,Cambridge, UK and New York: Cambridge University Press 1995).

<sup>29</sup>Id.

government should manage the population of Pyongyang. This statute frames a registration system which strictly controls movement of the population in and out of Pyongyang. Through this registration system people in Pyongyang are given the status of permanent residence. A *Gongmin* (which literally means a citizen) who wants to live in Pyongyang, has to register as a resident (Article 28 of the CPML). Residents over 17 years old in Pyongyang are given a certificate of Pyongyang citizenship (Article 30). A *Gongmin* who wants to move from different regions to Pyongyang and from the suburbs to central areas even within Pyongyang, are required to have a permit from the city authorities (Article 29). The city statute has shaped the identity of Pyongyang residents.

Furthermore, this registration system works when the North Korean government screens population. In an essay, "Woman Who Crossed a National Border Three Times," Choi Jin Hee (2005), a former resident in Pyongyang, describes how she was expelled from Pyongyang with her husband. She was forced to move out of Pyongyang, when her husband got an exile order for failing to educate his son in a proper way (2005: 9). She explains that in the late 1990s Kim Jung Il wanted to reduce the population from 1.7 million to 1 million. Pyongyang identity means a social status and a privilege in the North Korean society. During the economic crisis, living in Pyongyang ensures access to food.

The exclusive boundary of Pyongyang has created the prerogative city identity. Pyongyang is officially regarded as the heart of North Korea. Pyongyang has the status and authority of the modern nation-state capital. Also, it has the most privileged identity in the hierarchy of the cities, which is supported by the quasi Confucian-monarchy system. The nature of Pyongyang as a monarchic city is expressed in the national song titled "Pyongyang is My Heart."<sup>30</sup>

#### Pyongyang is My Heart.

1. Always hugged so friendly  
Where our hope overflows,  
Pyongyang, where a hometown castle rises,  
shines all over the world  
My heart,  
Oh, Pyongyang is my heart
2. If I go alone to a lonely island on the far side of the sea  
I will go there with this mind.  
Say it, missing and say it, unforgetting  
Where the guidance shines from  
Oh, Pyongyang is my heart
3. My destiny is entrusted entirely,  
A star followed for my whole life  
Under this guidance  
Twinkling for a long long time  
Pyongyang is my heart.  
Oh, Pyongyang is my heart.

On the other hand, the centralized position of Seoul is not just a symbolic or geographic boundary, but also an economic and political boundary. The former administration (No Mu Hyun's regime) challenged spatial inequality (uneven regional development) and a cultural and symbolic norm embedded in a capital city. However, the Constitutional Court decision failed to bring attention to an equality issue

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<sup>30</sup>Du-il Kim, *Pyongyang is My Heart*, *Pyeong-yang-eunNa-uiSimjang*, THE CHOSUN SONG COMPLETE COLLECTION, JOSEONNOLAEDAEJEONJIB1056 (Literature and Art Publisher 2004).

while exposing a contradictory position between the legislature and the Constitutional Court. The Court also silenced about uneven development which resulted from the rapid modernization process throughout the history of Seoul. The issues of spatial equality should be part of substantive constitutional matters. In fact, 123 (2) of the Constitution states that “[t]he State has the duty to foster regional economies to ensure the balanced development of all regions.”

In essence, North Korea has created a privileged space which creates an exclusive boundary between “us” (the Pyongyang citizens) and “others” (the non-Pyongyang citizens) by normalizing a registration system under the Capital Pyongyang Management Law, while South Korea has been unevenly developed as a result of the capitalist and state-centered modernization process, which raises an issue of spatial equality in Seoul.

### **VIII. Conclusion**

One significant difference between North and South Korea is that the North Korean Constitution has an express provision of the nation’s capital in Article 166 while South Korea does not have it in the written Constitution. On the other hand, in South Korea the unwritten “constitutional custom” rules that Seoul is the nation’s capital based on the 2004 Constitutional Court decision. The Constitutional Court introduced the concept of the Customary Constitution as a justification for the unconstitutionality of the Special Act on the Establishment of the New Administrative Capital. I argue that the 2004 Constitutional Court decision reproduced a symbolic meaning of national identity, and reinforced an exclusive boundary of the nation’s capital. The constitutional norm on the Korean peninsula has inscribed the capitals as fixed places and historical monuments with national identity in written and unwritten forms.

The capital city represents and expresses a nation through legal narratives. Pyongyang and Seoul are filled with a symbolic meaning of national identity, which is embedded in the Constitution. Pyongyang is constructed as a mythical and historical place by linking it to the place of ethnic origin (where *Goguryeo*’s capital was located) and the birthplace of Kim Il’ Sung. An ethnic nationalism with the *Juche* ideology plays a role in this construction of space. This paper argues that both Seoul and Pyongyang have selectively used national history in order to normalize a capital city as it was and as it is, and constructed the capital as a symbolic form of national identity through legal narratives as well as spatial narratives in city design.

In the end, I raise an issue of spatial equality as a substantive constitutional matter, which was disregarded in the 2004 Constitutional Court decision. The centrality of Pyongyang and Seoul is not just a symbolic or physical boundary but also an economic and political boundary, which results in spatial inequality and uneven regional development. In particular, Pyongyang has developed an exclusive and prerogative identity, which draws a boundary between “us” and “others” in social and economic distributions: This refers to a violation of the right to food and the freedom of residence.

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