Does Trade Trump Law in the Protection of Human Rights? International Trade, Law, and Human Rights in South Africa and South Korea

Cristina Campo

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DOES TRADE TRUMP LAW IN THE PROTECTION OF HUMAN RIGHTS? INTERNATIONAL TRADE, LAW, AND HUMAN RIGHTS IN SOUTH AFRICA AND SOUTH KOREA

International relations have become categorically dependent on the sophisticated trading systems that interconnect and empower sovereign states. Thus, a state’s focus on protecting the rights of its individuals comprising and affected by that system would appear to come secondary to the economic decisions involved in conducting trade agreements. This article asks whether the international trade regime can be used to further the protection of human rights or whether such protection should be better left in the hands of legal entities in international bodies and sovereign states. I analyze South Korea and South Africa’s legal and trade regimes—two of the world’s largest and most integrated economies and two countries with remarkably different development histories—to underscore the responsibility of governments in their international transactions and domestic relations and to outline the future role and mandate of the world’s most significant international institutions.

Cristina Campo

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I. INTRODUCTION

On November 16, 2015, in Geneva, Switzerland, the United Nations held its annual three-day “Forum on Business and Human Rights” that brought together over 2,000 participants from all over the world—including executives of
international business organizations, government officials, experts in trade, nongovernmental organizations, and interested third parties—to discuss the intersection of business and human rights. The goal of the forum was to tease out how the respect of human rights could become “fashionable” in the business world. According to Arancha Gonzalez, Executive Director of the International Trade Centre, “fashion [itself] can be a means to address human rights.” Across the world in New York City, a few months before the forum, Pope Francis declared that “[e]conomic and social exclusion is a complete denial of human fraternity and a grave offense against human rights.” These two events echo growing sentiment in recent years that human rights, though theoretically respected in serious international agreements, are continuously threatened by the pace and depth of globalization.

All of the players gathered at the United Nations conference interact on the stage of the international political economy, the integrated international system of economics that is categorically propelled by the politics of the countries who interact in the business world. Given that the international political economy is inherently driven by economic theories of interest and comparative advantage, it and the actors interacting in it (that is, trading with one

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2 Id.
another) have facilitated the creation of winners and losers in the system: parties who either benefit greatly or lose greatly from these interactions. Human rights often tend to be the biggest loser in this system.

A case-in-point that demonstrates the vulnerability of the human actors who perpetuate the existence of the international political economy would be the 2013 disaster at Rana Plaza in Bangladesh. Rana Plaza was one of the largest clothing factories operating in Bangladesh, in which fashion brands such as Benetton, El Corte Inglés, Mango, and Walmart manufactured merchandise for their stores around the world. The building collapsed in April 2013 due to structural inadequacies, a lack of appropriate surveillance and inspection, overcrowding, and overworking: “poor

construction and a lack of oversight.”6 More importantly, it was, in some ways, the result of “a growing global desire for more cheap fashion” to profit the big companies.7 The more workers could be crammed into a building, and the less the building needed to be inspected for building code violations, and the less the machines and humans working them needed to stop working for improvements to the building structure, the more big businesses profited from cheap labor in selling cheap fashion. Though progress has been made to improve factory conditions in all of Bangladesh over the past four years, there is still much room to improve the whole of the garment industry in general. This includes simply reforming the structures of factories, but more importantly, reform involves pushing responsibility for human rights onto both small and large players in trade. More broadly, this highlights the critical role that economics, trade, and law can play in the protection against human rights violations all over the world.

The World Trade Organization (“WTO”) is, today, the mammoth international body for matters of trade, economic relations, and the international political economy. It was established in 1994, following the Uruguay Round negotiations of the previous international institution for international trade, the General Agreement on Tariffs and Trade. The Marrakesh Agreement that established the WTO states in its preamble that the parties to the agreement (members of the WTO) recognize “that their relations in the

7 Id.
field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income.”8 Some success has been met in this endeavor. More generally however, the success of the WTO in general in subsequent years has ushered in an era where consumers are conscience of the international reach that their purchases have and of the extent to which their currency helps the employees of the biggest businesses in the world. Consumers are motivated to demand fair and free trade.9 Quite simply then, one can venture to say that the WTO has set out internationally recognized obligations and objectives to protect the economic, social, and cultural rights of human beings.10 Kofi Annan, Secretary General of the United Nations from 1997 to 2006, himself has warned that the “failure to act on human rights . . . will undermine the credibility of the global trading system.”11

In international law, since the establishment of the United Nations (“the U.N.”) in 1945, human rights have been at the forefront of international geopolitical concern—in theory, if not in practice. The Preamble to Charter of the U.N.

9 Cephas Lumina, Free Trade or Just Trade? The World Trade Organisation, Human Rights, and Development (Part 1), 12 L., DEMOCRACY & DEV. 20, 26-28 (2008) (defining fair trade as a regulating mechanism in trade that is formulated to achieve “justice” in economics, and defining free trade as a regulating mechanism in trade that concerns itself with achieving “justice” in human rights).
10 Id. at 33. See also Ernst-Ulrich Petersmann, The WTO Constitution and Human Rights, 13 EUR. J. INT’L L. 19, 24 (2002).
11 Lumina, supra note 9, at 28.
starts with the reaffirmation of “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”12 The body was established with an eye to “promote social progress and better standards of life in larger freedom”: to promote progress in human rights and establish long-lasting institutions that would protect human rights.13 Going even further, when the 1948 U.N. General Assembly adopted the Universal Declaration of Human Rights (“UDHR”), it laid out that this hortatory declaration was understood to be “a common standard of achievements for all peoples and all nations.”14

Where the protection of human rights has found most support has been in the international declarations, guiding principles, and general international law that have come after the U.N. and UDHR in the 1940s. One can argue that the

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12 U.N. Charter preamble.
13 Id.; See also id. art. 1-2 (elaborating on the purpose of the United Nations as an international body and the responsibilities and principles of its members in achieving this higher respect and protection of human rights); International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S 171 (entered into force March 23, 1976) (the covenant proposed by the Office of the High Commissioner for Human Rights and adopted by the U.N. General Assembly defining humans’ civil and political rights and laying out the responsibilities of governments in the protection of these rights); International Covenant on Economic, Social, and Cultural Rights, opened for signature Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) (the covenant proposed by the Office of the High Commissioner for Human Rights and adopted by the U.N. General Assembly defining humans’ economic, social, and cultural rights and laying out the responsibilities of governments in the protection of these rights).
UDHR itself has become customary international law in subsequent years; it encapsulates *erga omnes* obligations: “those obligations binding on all states and in whose observance all states have a legal interest.” First, this is underscored by the fact that human rights standards themselves seem to “have achieved the status of *jus cogens*” — of “preemptory norm[s] of general international law” — because of rather-recent international judicial opinions that underscore the incontrovertible primacy and irrefutability of human rights. Second, the *erga omnes* status of the UDHR finds support in the fact that experts in human rights, international law, and trade have recognized the responsibility of governments 1) to protect their citizens from mass atrocities (only if they cannot first prevent the mass atrocities) and 2) to help other states that do not have the capacity or willingness to do the same. Briefly, governments have a “responsibility to protect” (“R2P”).

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15 See Lumina, *supra* note 9, at 31-32 (proposing that the principles in the UDHR are binding on any significant player in the international political economy).

16 See id., *supra* note 9, at 34 n.83 (listing a few international judicial opinions from the International Criminal Tribunal for the Former Yugoslavia and the Inter-American Commission on Human Rights that have underscored the primacy of human rights); See also Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (stating that treaties drafted in conflict with general international preemptory norms are void).

Gareth Evans, a key figure in the development and adoption of R2P as a principle, describes it as an international norm because it is a principle which touches on “our common humanity.” Indeed, the concept was unanimously adopted at the 2005 U.N. World Summit. For this reason, Evans believes it is a universal concept that supersedes states’ nationalistic, realpolitik interests; to a certain extent, he argues, it is or should be logically understood as an integral part of states’ nationalistic, realpolitik interests. Alex Bellamy, another key figure in the development of R2P, explains that as the norm becomes more central to the way the international community functions and responds to the challenges of human rights violations, its implementation in differing contexts becomes more and more complex. Nevertheless, or because of that very challenge of increasing complexity, R2P as a guiding principle for sovereign governance evolves, is strengthened, and moves to the forefront of the international conversation on law, policy, trade, and geopolitical and geoeconomical governance. Significantly, R2P rests fundamentally on customary and written international law; it is nothing new.

R2P finds an important extension in the U.N.’s Guiding Principles on Business and Human Rights. The very contents of the document are divided into “the state[s] duty to protect human rights” and “the corporate responsibility to respect human rights”—and includes an “access to remedy”

18 Evans, supra note 17, at 298.
19 Bellamy, supra note 17, at 13.
20 Bellamy, supra note 17, at 22-24.
21 Bellamy, supra note 17, at 16.
for parties whose rights have been violated. The extension of R2P into the realm of corporate responsibility is incredibly significant given that, generally, only states are responsible for their corporations’ extraterritorial violations of international human rights law. That is to say, given that “human rights treaty obligations are generally understood as falling on States only,” companies and corporations often escape liability for their international human rights violations. They cannot be tried in courts under international law. Thus, there is a gap in the jurisprudence of international courts. However, “economists increasingly emphasize the important role of legal institutions in economic growth,” giving the world of human rights hope that such institutions could have a profound, positive impact.

International trade, law, and human rights can be complimentary, and the growth of one helps, and in fact, directly leads to the growth of the other. There is

25 McCorquodale and Simons, supra note 23, at 598.
27 See Ernst-Ulrich Petersmann, Human Rights and International Trade Law: Defining and Connecting the Two Fields, in HUMAN RIGHTS AND
“foundational substance in international trade law that can be interpreted to support the protection of human rights.”28 This article sets out to demonstrate that both trade and law can work in tandem for the protection of human rights in every country around the world.

The next section in the article will elaborate on the two-pronged method of analysis for this study that will illuminate the ways in which trade and law can complement each other in the system of establishing human rights protections.

II. METHOD OF ANALYSIS IN THE ARTICLE

As this article comparatively investigates how trade regimes and legal regimes impact the protection of human rights,29 I will first conduct a purely statistical analysis tracking South Korea’s and South Africa’s trade regime growth and how it has affected their human rights outcome.


28 Abadir M. Ibrahim, International Trade and Human Rights: An Unfinished Debate, 14 HeinOnline GER. L. J. 321, 331(2013). See also Cross, supra note 26, at 95, for the proposition that “the presence of an express constitutional protection still has no significant effect on the actual protection of constitutional rights.”

I thus employ two variables for this analysis: an independent and a dependent variable. The two variables will track the growth of trade in a country and the human rights outcome.

The independent variable, representative of a country’s trade regime, is “trade agreements.” I use the World Trade Organization’s (“WTO’s”) definition of trade agreement for my study: “measures, policies, or laws” that a country enacts having to do with trade in and out of that country. This includes regional trade agreements (e.g., the North Atlantic Free Trade Agreement), multilateral trade agreements, and bilateral trade agreements the country has been involved in from 1995 to 2014, the WTO’s first eleven years of formal operation.

The dependent variable in this analysis is the country’s human rights record, representing the country’s human rights protection regime. I use Freedom House’s *Freedom in the World* report to measure this variable: I chose to employ

30 I include certain control variables in the analysis as well, but refrain from extensive explanation of the variables for the sake of clarity and space. These control variables are 1) regime type (democracy), 2) GDP per capita, percent annual growth, 3) GDP per capita, current USD, 4) labor unrest (strikes and lockouts), and 5) economic complexity.


32 I operationalize “trade agreements” by drawing on records from the WTO and governments’ foreign affairs websites from the years 1995 to 2014. The number inputted into my data set corresponds to the number of trade agreements in operation for the country in question at the specific year in time, noting that these are the agreements conducted outside of membership of the WTO.
the data set (along with its coding methods) for each country for the same time period: from 1995 to 2014.33

I use a simple regression model because of the physical limits of this paper, but I argue that it is representative and foolproof enough to have its outcomes respected. A regression model correlates one set of data with another specified set of data, detailing the specific correlation that one can make between the two. The statistics of significance that it puts out are an x-variable coefficient, a P-value, and a lower and upper 95% confidence variable. The x-variable coefficient is the “slope” of the correlation, the mean, and thus it signifies how well the two sets of data in question can be correlated. The P-value denotes the percent of error from 100 for which you can say your data is accurate. The lower and upper 95% confidence variables are the two x-variable points between which 95% of the x-variable coefficient correlation lies.

Using a simple regression analysis, I hope to find a negative correlation among the data. Specifically, the best

33 Specifically, I look at the score given for a country’s “civil liberties rating.” The Freedom House Freedom in the World data set defines a civil liberty as “freedoms of expression, assembly, association, education, and religion. [The state has] an established and generally fair legal system that ensures the rule of law . . . allow[s] free economic activity, and tend[s] to strive for equality of opportunity for everyone, including women and minority groups.” Methodology: Freedom in the World 2016, FREEDOM HOUSE, https://freedomhouse.org/report/freedom-world-2016/methodology (last visited Jan. 12, 2018). Using this definition, the analysts compiling the Freedom in the World report decide on “Civil Liberties Rating” by looking at news articles, academic analyses, reports from nongovernmental organizations, and individual professional contacts. The analyst then assigns a total score based on this information, ranging from 1 (“the greatest degree of freedom”) to 7 (“the smallest degree of freedom”).
outcome would be that the “human rights record” score decreases (i.e., protection of political rights and civil liberties improves) with an increase in the number of trade agreements a country signs on to. The negative correlation would signal that trade can be a proper vehicle to implement significant protections for human rights.

After quantitatively evaluating South Africa and South Korea’s economic development and tracking it with each country’s human rights outcome, I move to qualitatively investigate the historical, economic, and social development of both countries. The purpose of moving to a second analysis is to complement the rather-limited statistical analysis I conduct in the first part of the paper. A more thorough discussion of these limitations is included below. Through the case study analysis, I will investigate each country’s history of economic development, trade relations, legal regime, governmental evolution, societal composition, and societal relations. I will “examine particular issues or phenomena in two . . . countries with the express intention of comparing their manifestations in different socio-cultural settings (institutions, customs, traditions, value systems, life styles, language, thought patterns), using the same research instruments.” This will allow me to extrapolate the results to other comparatively similar countries—with similar political, economic, and social conditions—and to draw significant policy and legal recommendations for those classes of countries.

The next section in the article lays out the statistical outputs for South Africa and South Korea and the implications of these results for the rest of the study.

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34 ALAN BRYMAN, SOCIAL RESEARCH METHODS 58 (3rd ed. 2008).
III. **Statistical Outputs for South Africa and South Korea**

Figure 1 and 2 below tabulate the data collected for South Africa and South Korea, respectively, from 1995 to 2014.

**Figure 1 South Africa**

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<th>Regime type</th>
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<th>GDP per capita, current USD</th>
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<td>1</td>
<td>2.46</td>
<td>25997.88</td>
<td>72</td>
<td>1.70</td>
</tr>
<tr>
<td>2014</td>
<td>8</td>
<td>2</td>
<td>1</td>
<td>2.89</td>
<td>27970.50</td>
<td>111</td>
<td>..</td>
</tr>
</tbody>
</table>

Figure 3 tabulates the regression model outputs from the data.

Figure 3 Regression model outputs

<table>
<thead>
<tr>
<th>Unit of Analysis</th>
<th>X-variable coefficient</th>
<th>P-value</th>
<th>Lower 95%</th>
<th>Upper 95%</th>
</tr>
</thead>
<tbody>
<tr>
<td>South Africa</td>
<td>0</td>
<td>#NUM!</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>South Korea</td>
<td>0</td>
<td>#NUM!</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>
Both South Africa and South Korea’s statistical outputs are incredibly significant, because the data shows that there is no correlation between the two variables—trade agreements and human rights record—whatsoever. That is to say, regardless of the number of free trade agreements that the government has entered into over the years, and despite the fluctuations in the control variables, each country’s human rights record has not changed.

Looking at South Africa, South Africa has maintained a constant, higher-than average human rights record as reported by Freedom House’s *Freedom in the World Report* (the average being 3.5, with ratings possible out of 1 to 7), despite the increasing number of free trade agreements since 1995. Below I list the control variables for further inspection:

1. **CV1.** According to Freedom House, South Africa has been considered an electoral democracy since 1995.
2. **CV3.** Its GDP per capita has almost doubled over the past 11 years (from $3973.93 to $6482.82).
3. **CV4.** The amount of labor unrest has significantly decreased from a high of 1324 in 1997 to 88 strikes or lockouts reported in 2014.
4. **CV5.** And its economic complexity has remained virtually unchanged, with an average of 0.21 and a standard deviation of 0.16 over the 11 years investigated.

Given that these control variables do not quite explain the reason for South Africa’s 0 x-variable coefficient, I argue that more sophisticated quantitative data is needed to make a definitive study of the human rights situation in the country since the end of apartheid in 1994. For this reason, I will
conduct an investigation into the history of the country, its politics, its economic development, and the particular trade relations it has had since 1995, as reported by the WTO and other academic journals. I hope to discover the reasons why trade agreements have had no effect on the human rights outcomes of South African people.

Looking at South Korea, South Korea has remained relatively free with a constant, higher-than-average human rights record (the dependent variable) as reported by Freedom House’s *Freedom in the World* report (the average being 3.5, with ratings possible out of 1 to 7). When looking at the control variables, one can see that:

- **CV1.** Regime type has remained constant – since 1995, South Korea has been considered an electoral democracy.
- **CV3.** GDP per capita has more than doubled: $12,403.91 in 1995 versus $27,970.50 in 2014.
- **CV4.** The amount of labor unrest has fluctuated, with high variance, but went back down to a relatively low number in 2014 (111 strikes and lockouts), the average being 168.75 and the standard deviation 108.9939.
- **CV5.** Economic complexity has remained somewhat the same, with an average of 1.41, and a standard deviation of 0.30.

Because there is such significant variance in the control variables, I move to study South Korea in a qualitative analysis. Looking at the Republic of Korea’s history in the 20th century, trade activity since 1995 as reported by the WTO, and a variety of scholarly articles discussing the development of the economy and human rights norms in South Korea, I hope to find why the level of human rights protections in the
country has remained virtually unchanged over the past 11 years.

Generally, though the study’s results are illuminating, it is important to note that there is a rather significant limitation in this analysis, namely the lack of sophisticated quantitative human rights data. There exist many precedents with regards to quantifying human rights violations, but there are strides yet to be made within this particular practice.35 For this reason, the correlation between my independent and dependent variables is not entirely demonstrative. There is a great need for more sophisticated data, rather than just a whole number estimation of a “human rights record.” However, for reasons of time, scope, and feasibility, I was not be able to remedy this situation to any extent for my own study. On the other hand, qualitative studies, though less systematized, are necessary for a more dynamic understanding of “outlier” countries’ particular historical developments. The next section dives in to a greater analysis of these countries, using historical documents, legal documents, scholarly articles, and news reports.

IV. QUALITATIVE CASE STUDIES, SOUTH AFRICA AND SOUTH KOREA

This section will qualitatively analyze the social, economic, and legal development of South Africa and South Korea, respectively. The analysis will focus on attempting to reconcile the results of the quantitative analysis above—showing no correlation between economic development and

35 Todd Landman & Edzia Carvalho, Measuring Human Rights (2010).
growing protection for human rights—with each country’s complex historical and legal record.

First, I begin with South Africa and then go on to study South Korea. Briefly, and without failing to acknowledge that much of the following was achieved after immense political and social strife, South Africa was colonized by the Dutch in 1652, and was later forcibly taken over by the British in, officially, 1806. The British first created a nominally independent Union of South Africa in 1910; they then granted the nation full independence in 1931. South Korea, on the other hand, had always maintained independence since prehistoric periods until it was occupied by Japan in 1910, after the First Sino-Japanese Wars of 1894 and 1895 and the Russo-Japanese War of 1904 to 1905. Japan maintained control over the united country until it surrendered to Soviet and American forces at the end of World War II in 1945.

Though the two countries achieved independence within, roughly, the same few decades, the historical contexts behind the reason for independence and the development after independence differ drastically. Furthermore, the development of the peoples themselves differs drastically as well. In South Korea, the Korean people had always maintained a sense of unity and homogeneity throughout Japanese occupation—and indeed, had maintained a sense of hostility against the Japanese. Contrastingly, the South African people had always been either formally or informally segregated along racial, ethnic, and economic lines: blacks, Afrikaners and whites had always been at odds. These differences between the two countries contribute to distinct ideologies, strategies for economic growth, models for social development, processes for legitimizing institutions, legal systems and so forth. These differences will be highlighted below and at the conclusion to the section.
A. SOUTH AFRICA, CASE STUDY

South Africa achieved independence from Britain in 1931, and soon thereafter the National Party took control of the government in 1948.36 This party formally adopted a policy of “apartheid”—separateness—that segregated the country into its different racial and ethnic groups: blacks, whites (Europeans), and Afrikaners (descendants from the mainly white Dutch settlers whose mother tongue is Afrikaans, a mix of a southern Dutch dialect, Indonesian, and other African tongues brought over by slaves from Indonesia and Madagascar). Apartheid, government-institutionalized segregation, led to an incredibly divisive and abusive public state of affairs that benefitted the white population at the expense of the black population. Whites enjoyed the highest standard of living in all of Africa, a standard comparable to the advanced Western societies, while the blacks were intensively disadvantaged in every sector: health, education, income, housing, et cetera. In all, the “system bred intolerance, a culture of violence, and lack of respect for life and, indeed, rights in general.”37

Throughout apartheid, domestic national movements (e.g., the African National Congress, also known as the “ANC”), international movements through non-governmental organizations (“NGOs”), and governments and populations from across the world criticized and oftentimes violently protested the South Africans’ policies.38

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38 South Africa Country Profile, supra note 36; Sarkin, supra note 37, at 660.
Indeed, many governments such as the United States also put in place heavy economic sanctions against South Africa in an effort to destabilize, or at the very least paralyze, the country’s economy. Because of this immense international pressure and vigilance which continued for a period of more than 40 years, the South African government began to negotiate with liberation movements over policies that would aid in the transition of the country to a democracy.39

The process of transition began in 1990 when the Constitutional Assembly (the “CA”), made up of 490 elected members from the National Assembly and the Senate of South Africa, set out to draft a new constitution that would ensure public participation “to observe the democratic principles of openness and inclusiveness.”40 The amount of public participation achieved by the CA was commendable: “over 1.7 million submissions, mainly petitions, were received from citizens before a draft text was published . . . In the subsequent drafting phase, the CA received over 1500 submissions and petitions.”41 The “Final Constitution” which entered into force on February 4, 1997 contains a Bill of Rights establishing certain political, socioeconomic, and children’s rights, as well as a basic, fundamental respect for human dignity.42

Significantly, the Constitution is justiciable: the institution of the judiciary and its court system became empowered, by new constitutional mandate, to reach the

39 Sarkin, supra note 37, at 631.
40 Id.
41 Id.
substantive merits of cases and evaluate the fairness of the law.\textsuperscript{43} Prior to the “Final Constitution,” judges had been seen as “mere technicians” who had the expertise only to ensure that procedure and technicalities were respected, while parliamentarians were the supreme voices of the substance and fairness of law.\textsuperscript{44} In particular, the establishment of the Constitutional Court in February 1995 signaled the end of parliamentary supremacy and the introduction of a true constitutional democracy to a degree that would ensure the respect of all constitutional human rights in all South African courts.\textsuperscript{45} What makes this empowerment additionally powerful is that the constitution outlines that the respect of socioeconomic rights applies to relations between the state and the citizen (a vertical protection) as well as between citizens themselves (a horizontal protection).\textsuperscript{46} This means that, in dealing with cases that directly implicate constitutional law, the Constitutional Court has the power to rule on government policy.\textsuperscript{47} Indeed, “[i]n the realm of overtly ‘political’ cases, the . . . Court has shown itself to be eager to deliver decisions as quickly as possible,”\textsuperscript{48} and it “has shown itself to be both a libertarian court and one that is at ease, to some degree, with the job of striking down apartheid-era statutes.”\textsuperscript{49} Problematically however, the criminal justice system trails behind the Constitutional Court with regards to ensuring the protection of human rights. Failed prosecutions

\textsuperscript{43} Sarkin, \textit{supra} note 37, at 641.
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.} at 632.
\textsuperscript{47} \textit{Id.} at 643.
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} \textit{Id.} at 644.
have become the norm. It is a norm which “perpetuates a lack of respect . . . for the rule of law” and which threatens the judicial system in general.\textsuperscript{50}

Nevertheless, there is hope of accountability for South African courts and hope for the respect for human rights in two forms. First, the provisions in the Constitutional Bill of Rights inherently incorporate the international understanding of human rights as outlined in the U.N. Charter, the UDHR, the Marrakesh Agreement establishing the WTO, the ICCPR, and the ICESCR. The Final Constitution itself stipulates this specific relation between South African law and customary and institutional international law: “customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”\textsuperscript{51} In other words, customary international law–international norms–is as lawful and legitimate in the domestic space as it is in the international stage of law, and no court can subvert this international law to the law of the Republic because both are complementary. This means that, in theory, South African courts will be held accountable to the international treaties onto which they signed. Second, there is hope for the respect for human rights because the South African Parliament itself has implemented several human rights institutions to deal with the social reformation of the South African people. These

\textsuperscript{50} Id.
include the Truth and Reconciliation Commission, the Human Rights Commission, the Land Restitution Commission, the Public Protector, the Pan South African Language Board, and the Gender Commission. These provisions and institutions have been instrumental in successfully navigating the end and transition from apartheid to an era wherein a South African culture centered on human rights is fostered and promoted.

The Human Rights Commission in particular has “dedicated itself to . . . monitoring and assessing the observance of human rights . . . [and] addressing human rights violations” by helping citizens seek effective legal redress. It utilizes its “core operational programmes” to achieve these objectives, including the Legal Services Programme and the Research and Documentation Programme. The former operates on a basis of complaint-filing by individual citizens; the program then investigates the complaints by conducting public inquiries and issuing

52 Sarkin, supra note 37, at 640-41.
53 Id. at 662. Importantly, the South African government also signed in 1994 the ICCPR, the ICESCR, the Convention on the Elimination of All Forms of Racial Discrimination; in 1995, it ratified the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, the Protocols of the Geneva Convention, and, in 1996, the African Charter on Human and People’s Rights and the Convention Relating to the Status of Refugees. Id. at 635-36. This demonstrates how significantly the South African government considered its role in creating a revolutionary, expansively inclusive foundation for the protection of human rights in its society.
55 Id.
subpoenas, and it litigates in the instances where mediation and negotiation fail.\textsuperscript{56} It produces a Trends Analysis Report on an annual basis to “provide [to Parliament and the general public] statistical information regarding the number of complaints received, referred, and finalized by the Commission [and] . . . a narrative analysis” accompanying the statistics.\textsuperscript{57}

Over the past six years, beginning in the 2012-13 fiscal year, the number of complaints and enquiries (“cases”) has averaged to 8,888.25 per year.\textsuperscript{58} The fiscal year for 2015-16 has had the most number of cases since the 2011-12 fiscal year (9,238 versus 11,363, respectively).\textsuperscript{59} The highest number of complaints in the 2015-16 fiscal year—749 complaints, 16.06\% of total complaints—came from the category of the human right to equality.\textsuperscript{60} The same holds true for 2014-15, though the number of complaints is considerably lower: there were 493 complaints of violations in the category of the human right to equality, 13.19\% of the total number of complaints for the fiscal year.\textsuperscript{61} The commission signals and emphasizes that a significant number of complaints relate to the alleged violation of the right to equality and that this number has

\textsuperscript{56} Programmes: Legal Services Unit, SOUTH AFRICA HUMAN RTS. COMMISSION, https://www.sahrc.org.za/index.php/what-we-do#mymodal1 (scroll to “Legal Services Unit (LSU)” and click the hyperlink for “Read More”) (last visited Jan. 14, 2018).
\textsuperscript{57} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 23.
\textsuperscript{61} Id.
been increasing over the past five to six years.\textsuperscript{62} The commission further notes the following:

Despite the enactment of legislation [and the codification of every citizen’s right to equality in Section 9(2), 9(3), 16(1), and 16(2) of the South African constitution], there remain a number of considerable challenges in respect of the achievement of equality in South Africa. Inequality and discrimination remain a significant challenge to our democracy. According to the Gini coefficient, as well as other inequality measures, South Africa ranks as one of the most unequal countries in the world. These disparities are largely attributed to apartheid and its discriminatory laws and practices.\textsuperscript{63}

There is general consensus among scholars and researchers in the field that the South African “inequality is both a cause and consequence of the lack of enjoyment of social and economic rights.”\textsuperscript{64} Most notably, “poverty and inequality stand together, and they have a racial quality” that stems from the long history of racial, ethnic, and gender discrimination that was institutionally perpetuated in South Africa for decades.\textsuperscript{65} Constitutional provisions seem to have no traction against “half a century of post-apartheid political leadership [that] has largely failed to change land and capital ownership patterns, or bridge the huge socioeconomic divide

\begin{flushright}
\textsuperscript{62} Id. at 24.
\textsuperscript{63} Id. at 25-26.
\textsuperscript{64} Id. at 31-33; Geoff Budlender, 20 Years of Democracy: The State of Human Rights in South Africa, 25 STELLENBOSCH L. REV. 439, 442 (2014).
\textsuperscript{65} Budlender, supra note 64, at 442.
\end{flushright}
that is still predicated on race.” 66 It was known from the outset that the post-apartheid political leadership and the corruption that ran rampant through that leadership structure would be a mountainous road block for realizing true change in the culture of human rights. 67 However, apart from the contemporary “kleptocrat president” and his “depredations on the public purse,” today’s social tensions also rise from “starving students living in crowded circumstances and saddled with mounting debt,” the poor living in townships who have never been able to take part in the public infrastructure projects, the poor who have been able to take advantage of government housing but who have been left abandoned and devoid of opportunity in crumbling structures on the outer rims of developed cities, and the “most privileged in . . . society [who] persistently refuse to acknowledge that their continuing privilege was achieved at the expense of the dignity and wellbeing of their compatriots.” 68 

The country has made much progress in its human rights achievement, but continued progress forward must be dictated by government policies and legal precedent that would reconcile social frustrations. On the whole, the demarcation between those who have and those who do not have is endemic. This is perpetuated by the government. This

68 Kajee, supra note 66.
demarcation seems insurmountable as it looms over all of society, the root of violent protests that have been crippling the country and threatening the stability of the legal system. In short, structural apartheid persists, and the law in South Africa has not lived up to its expectation.

B. SOUTH KOREA, CASE STUDY

From 1910 and throughout World War II, the Japanese occupied Korea. Upon Japan’s surrender in 1945 to the Allied Forces, Korea was divided at the 38th parallel, with the Soviet troops occupying the northern half of the country and American troops occupying the southern half. This temporary line of division was selected somewhat arbitrarily, because it did not conform to how the people saw themselves organized politically, culturally, historically, or traditionally. But with the development of the Cold War, however, the two halves of the country developed independently and along very different lines. The independent Republic of Korea (South Korea) was proclaimed in 1948, sparking the brutal three-year Korean War, pitting the Chinese-backed North Koreans, against the South Koreans, backed by the United Nations. The war never officially ended; an armistice temporarily calling off fighting was signed only by North Korea in 1953. Throughout this period, South Korea had been significantly backed by the United States which had shipped over economic, military,
and political support. By the stalling of the war in 1953, the whole country and nation of South Korean people was ravaged almost to obliteration. There was a pressing need to consolidate political power and create a platform and strategy for massive economic development.

South Korea adopted an essentially democratic constitution in 1948 when it proclaimed itself a republic. But the constitution was abolished in 1960 when President Sygnman Ree stepped down in response to massive student uprisings calling electoral fraud.\textsuperscript{71} The people saw President Ree’s government as a civic dictatorship that was forcibly anti-communist and anti-democratic. The student uprisings fueled the success of a military coup on May 16, 1961, which established General Park Jung Hee as the head of state for the Republic of Korea. Despite being a military dictatorship, General Park declared a Third Republic in December 1963 and held elections for a new civilian government. After General Park won the election, he implemented a third constitution and simultaneously implemented programs for massive industrial development.\textsuperscript{72}

The resultant rapid economic growth and proliferation of government policies aimed at supporting the growth “undoubtedly had spill-over effects in improving the quality of life of the people.”\textsuperscript{73} The President of the Korea

\begin{footnotesize}
\textsuperscript{72} South Korea Country Profile, \textit{supra} note 69.
\textsuperscript{73} Kim, \textit{supra} note 71, at 373. For details and a full report on the economic development of South Korea, the policies implemented by the government to facilitate social growth in tandem with economic development, and a study of the country’s economic success, see also Larry E. Westphal, \textit{The Republic of Korea’s Experience with Export-Led Industrial}
\end{footnotesize}
Development Institution at the time, Mahn Je Kim, wrote “the Park government realized economic development as the key to its own political success as well as to the establishment of political stability and . . . the means for overcoming negativism and frustration in the country.”

At a minimum, increased economic production provided Koreans with the opportunity to gain employment, transferable production skills, improved communication (e.g., telecommunications, roads, highways), access to education, and greater individual economic welfare. Annual population rates slowed because there was a decrease in mortality and birth rates; these declines were in turn associated with “better sanitation, public health services, and medical care in the case of death rates, and, for birth rates, with successful population planning programs and with development.”

Additionally, this rapid growth in economic production did not mean the typical rift in income inequality. Poverty levels decreased as a whole, though not entirely. “[E]vidence of relatively limited public expenditure for social and welfare purposes . . . indicate that redistributive fiscal policy [was not] important in curbing inequality.” In 1982, South Korea spent much less than Japan and

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Kuznets, supra note 73, at S14.


75 Kuznets, supra note 73, at S14.

76 Id. at S15, S17.
considerably less than Taiwan in housing amenities, social security, and welfare: 10.5% compared to 12.6% and 32.5%, respectively. This can be attributed to a substantial decrease in labor surplus in the 1960s and 1970s, which led to real wage increases that most greatly benefited those “at the bottom end of the income scale.”\textsuperscript{77}

Despite the increase in economic power, the South Korean people had little opportunity to demand better human rights. After the period of rapid economic development, people lost freedom and democracy because of the persistence of the authoritarian military government in South Korea until 1992, tightly controlling everything from working hours, to children’s education, to housing arrangements based on workplace.\textsuperscript{78} In the late 1980s, South Koreans still saw widespread violation of human rights, the proliferation of government corruption, and the suppression of the opposition to government rule.\textsuperscript{79} However, with the rapid economic growth came a promising rapid growth in the growing middle class’s sensitivity towards human rights; they “tasted freedoms economically [and] began to press for widened freedoms politically.”\textsuperscript{80} In other words, this new middle class was “acquiring an economic stake in political stability,” and would use that stake to influence the political situation that was becoming increasingly intolerable. From the government’s perspective, this crisis of rising

\textsuperscript{77} Id. at S17; See also Soon-Won Kang, Democracy and Human Rights Education in S. Kor., 38 Comp. Educ. 315, 319 (2002).

\textsuperscript{78} Kang, supra note 77, at 315-316.


\textsuperscript{80} Id. at 1248.
expectations, when coupled with the assassination of General Park in 1979 and the political vacuum of instability that followed, proved to be a momentous challenge.

Scholars argue that the Olympic Games of 1988 became a government tool to legitimize power over the South Korean people in the eyes of the world. The government entered a bid to host the 1988 Olympics in Seoul for multiple purposes. First, the government sought to use the opportunity to bolster its image of economic superiority, and display the South Korean economic miracle to the world. Second, winning a bid for the Games would legitimize the government in the eyes of the world and serve as protection from North Korea. In effect, the increased scrutiny in the country from international press and the increase in pressure from Korean citizens for a change in political status had a “signal effect on the pace and peacefulness of the transition” to a democratic state. The Seoul Olympics were not the cause of democratization and political change in South Korea, but it certainly made all conditions for transition “ripe.”

The political and legal situation in South Korea began to change before and during the Olympics, and had its most dramatic change in 1992 when the military dictatorship officially ended. The new millennium ushered in a new era for South Korea: President Kim Dae-Jung was awarded the Nobel Peace Prize in 2000; Foreign Minister Ban Ki-Mon was appointed the Secretary General of the United Nations in 2006; South Korea concluded a free-trade deal with the United Nations.

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81 Id. at 1250.
82 Id.
83 Id. at 1254.
84 Id.
States in 2007; and South Koreans elected their first female president, Park Geun-hye, in 2012.\(^8\) The Constitution, as amended in 1987, outlined the “rights and duties of citizens” with regards to their dignity; pursuit of happiness; equality; personal liberty; integrity; freedom of occupation, privacy, religion, speech, press, and assembly; intellectual rights; and the right to vote, education, work, environment, housing, and health.\(^8\) Similar to the Constitution of the Republic of South Africa, the 1987 Constitution of the Republic of Korea guarantees that “treaties duly concluded and promulgated under the Constitution and generally recognized rules of international law shall have the same force and effect of law as domestic laws of the Republic of Korea.”\(^8\) Though current international norms maintain “persuasive authority” over Korean society and Korean courts of law,\(^8\) the constitutional recognition of the legitimacy and enforceability of customary international law will prove significant to the exercise of judicial activism that has recently developed in South Korea and, generally, to the development of the democratic legal system in coming years.\(^8\) Coupled with the codification of the supremacy of human rights, “[t]he making of the [South Korean] Constitution . . . was a historic event, for it restored political independence formally, while introducing a democratic form of government for the first time in Korean

\(^8\) Id.


history.” The constitution allowed the government to legitimize itself in the eyes of the world. Though it would take a few decades to achieve the theoretical democracy and protection of human rights laid out in the constitution after the Park period ended,

it must be stressed that the Korean legal system, as fraught with rampant political persecution and human rights violations as it was, did not, by any stretch, amount to an immoral legal order mired in genocide, slavery, racial discrimination, or the impudence of military dictatorship waging a so-called dirty war during which a massive number of people disappeared.

Indeed, the legal system struggled daily to maintain the minimum amount of due process throughout that period of most repressive authoritarian governmental rule. At the end of the day, the “preservation by the courts of the basic framework of legality” was essential to the transition of South Korea to a democracy in 1987.

Therefore, the most recent trend in South Korean jurisprudence of focusing on substantive justice—the merits of the law and of cases presented to the courts—rather than legal procedural formalities is ironic. The Supreme Court and

90 Chaihark Hahm & Sung Ho Kim, To Make We the People: Constitutional Founding in Postwar Japan and South Korea, 8 INT’L J. CONST. L. 800, 830 (2010).
91 Kim, supra note 89, at 605.
92 Id.
93 Id.
Constitutional Court have undertaken significant efforts to undo much of the allegedly “legal” constitutional precedent set in the 1960s and 1970s that came from strict adherence to legal formalities. For example, in 2010 and 2013, both courts each declared unconstitutional all Park-regime emergency decrees, thereby setting aside all decisions rendered between 1974 and 1979 based on those decrees. Specifically, the Courts emphasized in these contemporary decisions how they see the courts of law “as the last bastion for the protection of basic rights.” It was therefore imperative to undo precedent that would prevent the courts of law from protecting the basic rights of citizens harmed.

More ironically, “these decisions . . . [corroborate] the . . . claim that the people, the holder of pouvoir constituant, can disregard the individual constitutional laws at will.” This exposed the courts to criticism, but there is scholarship that also understands the relationship of constitution and people as one of mutual benefit, “reflexivity,” and mutual creation. That is to say, the amorphous, abstract entity of “the people” does not merely create the constitution from the norms and societal values that it holds. More so, the constitution gives the people their very identity because the “making of a constitution has the effect of calling a ‘people’ into existence.” The people, therefore, must play an active role in determining which constitutional provisions the legal and

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94 Id. at 642.
95 Id.
96 Id. at 644.
97 Id.
98 Id.
99 Hahm & Kim, supra note 90, at 807.
100 Id.
social system must disregard or demarcate. Their “political and legal identity[, being] grounded in that very constitution” must be reflected by the constitution. This provides support for the recent trend towards “constitutionalism” that South Korean courts have been undertaking. Nevertheless, the role of the courts and “how [they] fare in the post-democratization era” is still a live question and a relevant question to the continued history of development in the country.

South Korean courts have felt the difficulty in finding the delicate balance that must be struck between too much emphasis on legal formalities and the rule of law and too much emphasis on natural law and human rights. “To strike out against the tide [raises] the specter of futility; to swim with the tide [raises] that of complicity;” and thus the courts must find a middle ground between the public desire for righteousness and justice and the substantive due process of the rule of law. They are in a unique position, straddling two exceedingly divergent eras of governmental rule and social realities, and trying to find the median fertile ground on which to defend, vis-à-vis the government and civil society, the basic guarantee of protections for human rights codified in Article 10 of the 1987 Constitution: “All citizens shall be assured of human dignity and worth and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals.”

101 Id.
102 Kim, supra note 89, at 653.
103 Id. at 648-50, 651.
104 Id. at 653.
C. CONCLUSIONS ON THE CASE STUDIES

This section analyzed South African and South Korean legal systems in the context of each respective country’s historical, political, economic, and social development to supplement the quantitative findings of the previous section. Quantitatively, no correlation was found between growing economic power (trade agreements) and growing human rights protections. The qualitative analyses enlightened these results by showing the contemporary complexities in South African and South Korean society. Both countries underwent unique periods of transition in the 1980s and 1990s that would dictate progress, or lack thereof, in the following decades. In other words, both countries’ government history has proved problematic to the development of sophisticated, trusted legal systems. Nevertheless, reforms in the respective constitutions and respective Supreme and Constitutional Courts, as well as heavy international attention and academic scholarship, give promising hope for the future that human rights protections will continue to be prioritized and that repressive, oppressive past policies will plummet.

V. GENERAL CONCLUSIONS

This article was meant to study how well trade regimes and legal systems fare in the protection of human rights in South Africa compared with South Korea. The first half of the article developed a quantitatively analytical study that tracked the growth of South Africa’s and South Korea’s trade regime measured against each country’s measurement for human rights protections. The study was inconclusive; the analysis put forth an x-coefficient of 0, meaning there was no correlation between how these countries developed
economically and how their human rights outcomes changed because of the economic development.

Because of this statistical aberration, I undertook a qualitative analysis in the second half of the article to study the historical development of each country, looking at the most recent history of political reform, economic development, social change, and legal restructuring. The results of the qualitative analysis proved more enlightening: for both South Africa and South Korea, deep-seeded government mistrust, social inequalities, and historical legal ineffectiveness and inefficiency pose important contemporary challenges to the protection of human rights.

For South Africa specifically, the government and its institutions must address the ubiquitous and grave social tensions that are currently pushing civil society to the brink of a rift reminiscent of the dark days of apartheid. By remedying the social disunity currently pervading everyday life, the government will realize the same human rights protections ensured by the 1994 Constitution, those which make the Rainbow Nation famously inclusive and its constitution exemplary. In fact, constitutionalism may prove to be the “mechanism for balancing this requirement of unity with the unavoidable diversity of interests, values, and cultures [of black, Afrikaans, and white] that pervade” the South African society.106 For South Korea, the government must allow the high courts to effectively rule over precedent from its own dark era under the authoritarian dictatorship of General Park, and the courts must do so in a way that balances

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106 Chaihark Hahm & Sung Ho Kim, To Make We the People: Constitutional Founding in Postwar Japan and South Korea, 8 INT’L J. CONST. L. 800, 812 (2010).
society’s cry for substantive justice with the legal formalities of rule of law and due process: “the unity presupposed by a constitutional order is never static. It is a product of ceaseless dialogue.”\textsuperscript{107} Additionally, the academic world must continue to author studies investigating this development of legal human rights protections in South Korea; the field needs more analysis and the South Korean people’s cry for increased democracy and human rights protections needs international attention.

Further, international institutions have a role to play in ensuring that these countries, and all countries party to international treaties focusing on human rights and trade, actualize their obligations, responsibilities, and promises under the treaties. Though international organizations lack police power, the collective power of its party members is a useful tool to effect positive change in human rights obligations across the world. Such organizations and coordinated party-member action paralyzed the South African economy during apartheid in the mid-20th century and helped South Koreans push for greater democratic freedoms at the end of the 20th century. There is much unrealized international power in these bodies; and it is a power which can be easily utilized to achieve goals in the area of human rights and economic development that all countries party to them want to achieve.

Trade is a mechanism for achieving equalized social interactions if properly and constructively channeled. Trade is essential to the protection of human rights because “trade assists countries and people to meet the livelihood supplies”\textsuperscript{107} Id.
that embody economic, social, and cultural rights.\textsuperscript{108} Importantly, the growth of trade opportunities and profits must be complemented by an effective legal system which would be the ultimate champion and defender of every human’s most basic rights. The first steps towards remedying the social status quo must come from the executive; the process must be safeguarded by the judiciary; and the perpetuation of profit can be ensured by a happy, protected, productive populace. There is an “indirect but inherent linkage between [all three of] them,” and South Africa and South Korea are in a unique position to capitalize on the benefits of each.\textsuperscript{109}

\textsuperscript{109} \textit{Id.}