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**KOREAN REUNIFICATION BASED ON A NEGOTIATION APPROACH
IN LINE WITH A FEDERAL REPUBLIC
WITH A CENTRAL GOVERNMENT AND TWO REGIONAL GOVERNMENTS**

*Jihoon Chun**

ABSTRACT

The two sides of Korea, the last remaining divided country in the world, have each put forward a series of unification formula but there has been no significant progress made in devising mutually acceptable plans for reunification until the June 15 Joint Declaration which acknowledged a common ground in both sides' proposals. To facilitate the process of unification, South Korea has to overhaul its legal norms that have seriously blocked legitimate efforts to build a democratic platform for dialogues and exchanges between the South and the North, all the while easing military confrontations. The most pertinent approach for a unity would be to strive for a negotiated unification in which the two parties with equal rights and duties tolerate each other, and promote co-existence and co-prosperity, without marginalizing either side. The power structure of a unified Korea should be framed in accordance with such a negotiation approach: a federal government mainly in charge of military affairs and foreign policy to overarch two autonomous regional governments in the south and north of Korea, whose governance system shall be of an assembly government coupled with a directorial system and a unicameral federal assembly of equal number of representatives from both sides. A pan-Korean organization for national unification can prepare for parliamentary elections for constitutional assembly and the final draft of the reunification constitution passed by the constitutional assembly shall be approved in two separate referendums in the north and south.

Keywords: Korean Reunification, Unification by Negotiation, Unification by Absorption, Three Principles of National Unification, Unified Federal Korea, Territory Clause, Peaceful Unification Clause, National Security Act, Korean Commonwealth, Democratic Confederal Republic of Koryo

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I. Introduction

As an evaluative proposal for a unified federal Korea, this article deals with the mode and steps of Korean reunification in a constitutional framework. Any specific suggestions for the reunification constitution itself, including the economic order or financial management of the unified republic and the organizations and procedures of federal judicial authorities, would not be presented herein. Such details are to be decided on by the entire Korean people in a truly democratic manner. The issues of coordinated development after reunification or of defending liberties and rights of the entire Korean people are also excluded from discussion.

Korean reunification is the act of bringing the two Koreas together to make and become a single state after more than six decades of division. Both Koreas have agreed not to pursue the unification by coercive means or by absorbing each other. The July 4th North-South Joint Communiqué (1972), the Agreement on Reconciliation, Nonaggression, and Exchanges and Cooperation between the North and the South (1991) (“Basic Agreement”), and the June 15 Joint Declaration (2000) are all indicative of such. The Republic of Korea (ROK) and the Democratic People’s Republic of Korea (DPRK) should jointly endeavor for national reunification through negotiations, which necessitates the establishment of a federal state with a central government under which the two regional governments exercise autonomy in managing internal affairs on an equal footing.

As Johan Galtung pointed out, a unitary state may well be a long-term goal but is hardly realistic for the short-term given the differences between the two systems while a well-working symbiosis and interdependence can be much stronger than an insincere convergence as a peace-building tie.¹ The change of generations in both Koreas would make it possible for the new generations who have not experienced the terrible war of 1950-1953 to look at the division of Korea with fresh eyes and to formulate a more reasonable process of unification.²

II. Comparison of Unification Proposals of Both Koreas

A. Proposals of North Korea

At the Sixth Congress of the Workers’ Party of Korea (WPK) in 1980, Kim Il Sung

¹ Johan Galtung, *On the Reunification of Korea*, Talk given to the Association of Korean students at the University of Hawaii, 1, 6 (Jan. 10, 1986), available at <http://www.transcend.org/galtung/papers/On%20the%20Reunification%20of%20Korea.pdf>

² *Id.* at 1–2.

unveiled a plan for establishing the Democratic Confederal Republic of Koryo (DCRK, *Koryo Minju Yonbang Konghwaguk*),³ which features the establishment of a unified national government “on condition that the North and the South recognize and tolerate each other’s ideas and social systems.”⁴ Two main organs of the DCRK would be “a Supreme National Confederal Assembly consisting of an equal number of representatives from north and south and an appropriate number of representatives of overseas nationals” and “a Confederal Standing Committee empowered to guide the regional governments in north and south and to administer all affairs of the confederal state.”⁵

In 1991 New Year’s Address, Kim Il Sung indicated that the North was willing to discuss about gradually phasing in a unified confederal state by transferring more power than had previously been intended to the two autonomous governments while increasingly strengthening the function of a central government in the future. In April 1991, the DPRK Supreme People’s Assembly (SPA) said that what Kim Il Sung meant in his New Year’s message was that the DCRK could initially give the regional governments powers over foreign policy, military affairs and domestic policy.⁶ On October 6, 2000, the Committee for the Peaceful Reunification of the Fatherland specified on the potentially provisional nature of the unified republic: the “low-level federation”⁷ formula proposed by the North in the June 15 Joint Declaration relates to coordinating the North-South relations in the interests of the whole nation by forming a unified national entity under which two regional governments in north and south retain their existing power over internal political affairs as well as military affairs and diplomacy.

³ The Democratic People’s Republic of Korea (DPRK) has used the term “confederation” or “confederal” for that matter, which in fact means “federation,” i.e. a political unity of two separate states – North and South Korea – in which each constituent member holds residual powers regarding its internal affairs while recognizing the sovereignty of a central authority. Thus the term Democratic “Confederal” Republic of Koryo (DCRK) does not refer to a state union but a unified state – democratic “federal” republic named “Koryo” – albeit not necessarily of a single social system. It seems that the DPRK prefers the term “confederal” because of the need to dispel a misconception that a “federal” republic would be of a single system.

⁴ B. C. Koh, *A Comparative Study of Unification Plans: The Korean National Community Versus The Koryo Confederation*, 21-4 KOREA OBSERVER 437, 439 (1990).

⁵ *Id.*

⁶ B. C. Koh, *From Confederation to Federation: Toward Unified Korea*, in CONSTITUTIONAL HANDBOOK ON KOREAN UNIFICATION (III): LAW ISSUES 765, 777 (Sung-hee Jwa et al. eds., Korea Economic Research Institute, 2002).

⁷ The term “low-level federation,” or a loose form of federation, refers to a preparatory stage toward reunification in which two regional governments under a central government each have rights and duties in national defense and diplomatic matters as well as internal political affairs.

B. Proposals of South Korea

In 1989, the South put forward the Korean National Community Unification Formula⁸ in which exchanges and cooperations between the South and the North precede a loose union of the two states called *Nambuk Yonhap*, the Korean Commonwealth, before going onto general elections according to a reunification constitution drawn up by a joint council composed of the same number of representatives from the South and the North. The Korean Commonwealth would have a set of organs: a Council of Presidents as the supreme decision-making body, a Council of Ministers – of about 10 cabinet members from each side including prime ministers as co-chairs – to deal with the whole range of issues, a Council of Representatives – comprised of about 100 legislators from each side – to draw up a constitution for the unified Korea and to advise the Council of Ministers, a joint secretariat for providing support to both the Council of Ministers and the Council of Representatives as well as resident liaison missions.⁹

The idea of the Korean Commonwealth, however, is simply technical in nature without much indication of its goal. Moreover, conflict resolution mechanism in case of a stalemate is noticeably absent. The Korean National Community (KNC) formula is tantamount to an admission of unification by absorption for it is basically of one system with one government,¹⁰ which means de facto forced integration of the North into the South Korean capitalist system. Also noteworthy is that the KNC plan avoids using the phrase “great national unity” as one of the three principles of unification. Instead, the KNC plan adopts the word “democracy (*Minju*)” along with “independence” and “peace,” adding that a “democratic republic regime” in which participation and equal opportunity is guaranteed for each member of the Korean nation and various views and opinions are freely expressed and advocated is the only option to advance the great national unity. This may in turn imply that the South has no intention to tolerate North Korean ideas, only to cause self-contradiction.

⁸ The unification plan proposed by former ROK President Roh Tae Woo administration in September 1989. This formula suggested an interim stage in which the South and the North would form a state union called *Nambuk Yonhap*, which the Roh government translated as the “Korean Commonwealth.”

⁹ The National Community (NC) Unification Formula proposed by the Kim Young Sam administration in 1994 was not much distinguishable from the KNC formula. The NC plan is not to be discussed herein.

¹⁰ Former ROK President Roh Tae Woo announced the KNC plan in his speech to the National Assembly in September 1989, saying that the unified Korea should be a unitary state and that perpetuating two states with different ideologies and systems is not a complete reunification.

C. Differences Between the Two Formulas

1. Two Systems and Two Governments

A point apparently common to these two formulas is a construct of two systems and two governments that the North has envisioned as part of the DCRK plan and the South has posited as part of the Korean Commonwealth, respectively. In the application of this element, however, there is a grave difference between the two Koreas. The DCRK plan seems to have two systems and two autonomous regional governments under a central government as its final goal of reunification in order to ensure the continuance of North Korean socialist system after reunification. In contrast, two systems and two governments under a state union in the KNC plan might be another name for the currently existing ones beneath the veneer of a “national community” in economic, social and cultural spheres. If so, this may be a step backward from the standpoint of the 1991 Basic Agreement, which provides that the inter-Korean relationship is not one between sovereign states.

2. Interpretation of the Three Principles of Unification

Even though both formulas are said to have been centered around the three principles of unification – independence, peaceful unification, and great national unity – since the July 4th Joint Communiqué in 1972, the North and the South have contrasting interpretations of two of the three: “independence” and “great national unity.”¹¹

The WPK emphasized independence as the first tenet of the 10-point platform for the DCRK announced in 1980 that the DCRK should adhere to independence in all state activities for it is the “life and soul” of the country and the nation; only when a state exercises sovereignty with firm independence in its activities, can it uphold the nation’s dignity and honor and ensure the development and prosperity of the country in keeping with the desire of the people.¹² The DCRK should not depend on any foreign forces and oppose all forms of foreign interference. The 67-year presence of US forces on South Korean soil is therefore incompatible with the Korean reunification according to the DCRK formula.¹³ To the South Korean authority, independence just means holding onto

¹¹ Koh, *supra* note 5, at 451.

¹² Kim Il Sung, *On Establishing Democratic Confederal Republic of Koryo* (Oct. 10, 1980), THE PEOPLE’S KOREA (1997), http://www1.korea-np.co.jp/pk/027th_issue/98012104.htm.

¹³ Rules of the Workers’ Party of Korea urges the struggle to expel US imperialist invasion force from South Korea and to put an end to the domination and intervention of any foreign forces. Though the meaning of “solving the question of reunification independently” was not elucidated upon the agreement on the June 15 Joint Declaration, a recent statement of the Foreign Ministry of the DPRK made it clear that the withdrawal of American forces from South Korea is a common task for all the interested parties seeking permanent peace and prosperity in the Korean peninsula and the Northeast Asian region; See Statement of the Ministry of Foreign Affairs of the DPRK, *America Should Brace For An All-Out War If US Forces Continue To Stay In South Korea*, THE CHOSON SINBO (Sep. 7, 2012,

“self-determination” but this rings hollow because the South has already agreed in the July 4th Joint Communiqué on the principle that the reunification must be achieved without outside interference or reliance on external forces and yet does not provide any additional explanation thereto in the KNC plan.¹⁴

The WPK supported the second tenet of the 10-point platform for the DCRK as follows: the DCRK should effect democracy throughout the country and promote great national unity; the confederal government should guarantee the interests of the two regions, two systems, different parties, groups, and classes in the country without bias to either side; the confederal state should ensure the freedom of forming political parties and social organizations and their free activities and the freedoms of religious belief, speech, the press, assembly and demonstration as well as the rights of the people in north and south to travel freely across the country and to engage in political, economic, and cultural activities in any areas.¹⁵ On the other hand, the National Security Act of South Korea, whose stated purpose is to prevent any “anticipated”¹⁶ anti-state acts from compromising the security of the State, has long been used since December 1948 to trample legitimate oppositions by punishing all those who are considered to be a threat to the safety of the South Korean regimes for their politically dissident or pro-unification activities, critically hindering democratic consolidation necessary to prepare the South for reunification. The principle of grand national unity, as interpreted by the North, thus mandates the repeal of the National Security Act. The South has not only so far rejected this interpretation but has also deviated from the principle of grand national unity by unilaterally replacing it with “democracy” since 1989.

3. All-Korea Elections

As early as 1954 at the Geneva Conference the South Korean representative argued for all-Korea elections based on population. The KNC calls for general elections to establish a unitary government and a national assembly of bicameral legislature with a lower house that represents the north and south of Korea by population and an upper house that represents both sides equally. It is unsurprising that the KNC plan incorporates the idea of representation by population, given that the South has a two-to-one advantage in population over the North. Yet this runs counter to the rationale of not allowing one to swallow up the other. The North has advocated the principle of co-existence and co-prosperity and subordinating everything to the cause of national

10:16 PM), http://chosonsinbo.com/2012/09/kcna_120907/ (translation by author) (last visited Oct. 9, 2012).

¹⁴ The KNC plan simply employs the phrase “independently in the spirit of national self-determination.”

¹⁵ THE PEOPLE’S KOREA, *supra* note 12.

¹⁶ National Security Act, Act No. 3318, Dec. 31, 1980, Article 1(1): The purpose of this Act is to secure the security of the State and the subsistence and freedom of nationals, by regulating any anticipated activities compromising the safety of the State. (S.Kor.).

reunification. It is absurd to expect that the North would accept such a proposal.

D. Interpretation of Article 2 of the June 15 Joint Declaration

The June 15 Joint Declaration of 2000 was significant in that “the North and the South agreed to solve the question of reunification independently by the concerted efforts of the Korean nation”¹⁷ no matter what is to come. The low-level federation formula regards a federal state as reunification while the Korean Commonwealth formula requires a single system and a unitary government for reunification. The low-level federation is a unified polity while the Korean Commonwealth is an ad hoc polity existing “before” reunification. Then questions may arise: were the North and the South aware of the difference?; did both sides agree on Article 2 of the June 15 Joint Declaration¹⁸ with different agendas in mind?; or did one side fall into a trap set by the other?¹⁹

Article 2 can be interpreted, however, to mean that the North and the South seek to further their own interests through coexistence and cooperation and that the both sides search for possibilities of unification by negotiation, not by absorption or force.²⁰ With that said, the entire Korean nation should closely examine how to construct a unified republic in which two regional entities are equally represented: unless the reunification process prevents any one side from being politically marginalized by the other, such a deficiency of constitutional framework might result in a catastrophe, as evidenced by the Yemeni case in which the secession of South Yemen, whose previously ruling Yemeni Socialist Party had markedly fewer seats in the elected government following the 1993 parliamentary elections than in the transitional period between the unity accords of May 1990 and the 1993 elections, from the then unified Republic of Yemen led to a civil war in 1994.²¹

¹⁷ June 15 South-North Joint Declaration, Art 1: The South and the North have agreed to resolve the question of reunification independently and through the joint efforts of the Korean people, who are the masters of the country.

¹⁸ June 15 South-North Joint Declaration, Art 2: For the achievement of reunification, we have agreed that there is a common element in the South’s concept of a confederation and the North’s concept for a loose form of federation. The South and the North agreed to promote reunification in that direction.

¹⁹ Taik-young Hamm et al., *The Korean Peace Regime and Political Education for Reunification*, 9-4 NATIONAL STRATEGY 33, 35 (2003) (S.Kor.).

²⁰ *Id.* at 36.

²¹ Michael Geistlinger, *Nation-Building for Korean Unification*, in CONSTITUTIONAL HANDBOOK ON KOREAN UNIFICATION (III): LAW ISSUES 679, 700-03 (Sung-hee Jwa et al. eds., Korea Economic Research Institute, 2002).

III. Points at Issue Concerning the Federal Constitution of a Unified Korea

A. Basic Guideline for the Korean Reunification

1. *The Three Principles of Independence, Peaceful Unification, Great National Unity*

The United Nations General Assembly have unanimously adopted two resolutions in welcoming and supporting the June 15 Joint Declaration of 2000 and the Declaration on the Advancement of North-South Korean Relations,²² which are inclusive of all the previous inter-Korean agreements such as the joint statement of July 4, 1972 which clarifies the three principles of independence, peaceful reunification and great national unity.²³ Clear is the meaning of the three pillars: the north and south of Korea should realize independent reunification without foreign interference, by peaceful means without recourse to armed force, achieving great national unity by transcending differences in ideology and social systems.

2. *By the Entire Korean People, for the Entire Korean People*

The people, not the ruling elites in south and north, should be the master of the whole process of Korean reunification. The representatives of the unified government are not just elected by but directly responsible for the people.²⁴ The reunification constitution shall be guided and created by collective wisdom of the people. One of the rationales for the reunification is the commitment to constant enhancement of lives of the entire Korean people: the unified republic must aim at guaranteeing the basis of a decent life – housing, education, health care and a stable livelihood – to every member of the Korean nation.

3. *Unification by Negotiation Between Equal Partners*

Dispute over which system is to be adopted is one of the greatest harms to grand national unity. This is not a matter of capitalism or socialism but of the entire Korean people living worthy of human beings. Considering that there have been widely disparate developments in many important areas of life in north and south, a federal formula on the basis of one nation, one state, two systems and two governments is

²² See G.A. Res. 55/11, U.N. Doc. A/RES/55/11 (Nov. 16, 2000); G.A. Res. 62/5, U.N. Doc A/RES/62/5 (Nov. 16, 2007).

²³ Park Kil Yon, Vice-Minister of Foreign Affairs, Chairman of the Delegation of the Democratic People's Republic of Korea, Statement at the General Debate of the 63th session of the UN General Assembly (Sept. 27, 2008), available at http://www.un.org/en/ga/63/generaldebate/pdf/dprkorea_en.pdf.

²⁴ Elected representatives should be recalled if they fail to represent the needs of the people or fulfill their duties.

deemed the most viable option. It presupposes a negotiation approach in which both sides with equal status promote reconciliation and mutual prosperity, never allowing any one side to control the other.²⁵

B. Legal Norms of South Korea That Need To Be Overhauled

1. Contradictions of Article 3 and 4 of the South Korean Constitution

Article 3 of the South Korean Constitution, usually dubbed as “Territory Clause,” provides that, “The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands.”²⁶ Accordingly, rulings of the Supreme Court and the Constitutional Court of Korea have hitherto maintained the position that the North falls within the territory of the Republic of Korea.²⁷ However, such an interpretation is that which labels North Korea as “enemy” or “anti-state organization” and does not acknowledge the North as a sovereign state and as exercising that sovereignty in the northern part of the Korean peninsula, practically negating the prospect of a negotiated unification. It does not make much difference to the dead end if the wording of “shall consist of” – instead of “consists of” – is construed as a political will or determination of the ROK.

Article 4, which was inserted in the ninth amendment of the Constitution in 1987, stipulates that, “The Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the basic free and democratic order.” This so-called “Peaceful Unification Clause” takes the “basic free and democratic order”²⁸ based on capitalist market economy for granted.²⁹ The Constitutional Court of

²⁵ Aside from the Yemeni case in which a unification in haste, albeit by agreement, with insufficient attention to the integration after unification gave rise to an armed conflict, neither the German case of unification by absorption nor the Vietnam case of unification by force can be a proper reference for the Korean question.

²⁶ The Territory Clause has been around for 64 years since the first Constitution of the ROK in 1948 up until now. The argument that the ROK is the only lawful government in the whole Korean peninsula seems to lend some credence to the claim of the Territory Clause but such an argument is groundless at least in terms of international legal standards because the UN General Assembly Resolution 195 (III) in December 1948 declares that the effective control and jurisdiction of the ROK government is limited to “that part of Korea” where the elections, on which the ROK government is based, “were observed by the [UN] Temporary Commission [on Korea]”, not to mention that the DPRK is a sovereign state and a member state of the UN. In contrast, the former Article 23 of the Basic Law for the Federal Republic of Germany stipulated that the authority of the Basic Law was confined to the territory of 11 states of West Germany though it was later used to allow the accession of East Germany to West Germany.

²⁷ Supreme Court, 97Do2021, Nov. 20, 1997 (S.Kor.); Seoul District Court, 2003KoHab580, Sept. 26, 2003 (S.Kor.); This ruling argues that since the ROK Constitution is effective in the whole Korean peninsula, the north region of Korea, which has been unlawfully occupied by the North Korean regime, is part of the ROK territory that has not been reclaimed; Constitutional Court, 2003HunBa114, June 30, 2005 (S.Kor.).

²⁸ The term “basic free and democratic order” also appears in the preamble of the Constitution. The original Korean term, *jayuminjujeok gibonjilseo*, is translated in Article 4 of the Constitution as

Korea even says that “the deep faith in and the strict principle of the basic order of the liberal democracy and market economy is the dominating idea that flows through the Constitution not only at the present but in the past and future as well, serving as a criterion for all laws and regulations.”³⁰ Yet an economic order based on private property and market economy, no matter what it is called, is never indispensable to democracy while democracy is and must be capable of embracing diverse economic orders or systems. The Peaceful Unification Clause admits of no compromise and is itself antithetical to a true democracy, thus being incongruous with the pillar of grand national unity, which requires both the North and the South to recognize and respect each other’s ideology and social systems, as well as with the pillar of peaceful unification, under which both sides should not use force against each other.³¹

Article 9 of the North Korean Constitution provides that the DPRK shall struggle to accomplish the complete victory of socialism “in the northern half of Korea” and to achieve the fatherland’s reunification on the principles of independence, peaceful reunification and grand national unity. The North Korean Constitution, therefore, does not intend to impose socialism on the southern half of Korea.³² The Rules of the Workers’ Party of Korea, however, mentions that the immediate purpose of the WPK includes carrying out democracy revolution in the whole country and that the ultimate purpose thereof lies in completely realizing the independence of the popular masses by molding the whole society ideologically to be of “Juche” idea. This has to be revised so that such a campaign of the WPK does not hinder at all the unification process or interfere with the autonomy of the regional government in the south of Korea after

“principles of freedom and democracy” according to the webpage of the National Assembly of the Republic of Korea, available at http://korea.assembly.go.kr/res/low_01_read.jsp?boardid=1000000035.

²⁹ Constitutional Court, 2000HunMa238, Sept. 27, 2001 (S.Kor.). In this decision, the constitutional Court of Korea gives a description on the term “*jayuminjujeok gibonjilseo*”: “The Constitution regards liberal democracy, a combined concept of liberalism, which excludes state intervention, respects the freedom and creative initiative of individuals and embraces pluralism, and democracy, with rule by the people in which all state authority emanates from the people, as its utmost value and declares the fundamental value which underlies such a constitutional order as a ‘basic order’”(translation by author); “The basic order means the rule of law which, rejecting any violent and arbitrary rule, i.e. one-man or one-party dictatorship of anti-state organization, adopts the principles of freedom and equality and the autonomy of the people based on majority opinion”(translation by author); “In particular, it includes the respect of fundamental human rights, separation of powers, parliamentary politics, multi-party system, election system, economic order based on private property and market economy and independence of the judiciary”(translation by author).

³⁰ *Id.*

³¹ South Korea and the United States have been holding annual joint military exercises against North Korea since back in 1976, in utter violation of the agreed principle of peaceful unification between the South and the North.

³² On top of this, there is not any reference similar to that of the Territory Clause of the South Korean Constitution. Although Article 103 of the DPRK Constitution adopted in 1948 stipulates that the capital of the DPRK is Seoul, there has been a new corresponding provision in the DPRK Socialist Constitution, adopted in 1972 and amended subsequently in 1992, 1998, 2009, 2010 and 2012, which says that “the capital of the DPRK is Pyongyang.”

reunification.³³ In order for the South Korean Constitution to be compatible with the federal formula based on the three pillars, Article 3 and 4 of the Constitution should be deleted unless revised to conform to the recognition of North Korea as a sovereign entity and an equal partner, not an enemy or an anti-state organization, for peaceful reunification.

2. *Anti-unification, Anti-democracy National Security Act*

Article 2 of the National Security Act describes the central element of the offense of anti-state acts, saying that the term “anti-state organization” refers to a domestic or foreign organization or group which claims the title of the government or aims at a rebellion against the State. However, the overt vagueness of Article 2 leads to a direct conflict with the principle of *nulla poena sine lege*.³⁴ Another element of offense in Article 5 through Article 8, “with the knowledge that it may endanger the existence and security of the State or the basic order of liberal democracy,” is also too broad to be consistent with the principle of clarity of law. Furthermore, the National Security Act, especially Article 7 of the Act,³⁵ places excessive restrictions on a set of constitutional rights such as the right to freedom of opinion and expression. The subjective element of the offense of Article 7 paragraph (5) is the presence of the intention of committing the acts as referred to in paragraph (1), (3) or (4) of Article 7. However, the objective element of the offense of Article 7 paragraph (5) – such as manufacturing, reproducing, carrying, distributing or acquiring any documents, drawings or other expressions of ideas – pertains to mere acts of forming or expressing opinions, all of which are not illegitimate. Paragraph (5) is therefore equivalent to punishing “inner thought,” which is in itself an essential freedom that cannot be restricted by Article 37(2) of the South

³³ Article 4 of the 1991 Basic Agreement stipulates that North and South Korea shall refrain from any acts of sabotage or insurrection against each other.

³⁴ Interpreting the meaning of “aiming at a rebellion against the State” and its application to actual cases is up to the executive authorities and the courts while just a dissent from or defiance toward an authority or established convention without the intention of claiming the title of the government or overthrowing the government may easily be presumed to satisfy the elements of the offense.

³⁵ National Security Act, Article 7(1): Any person who praises, incites or propagates the activities of an anti-state organization, a member thereof or of the person who has received an order from it, or who acts in concert with it, or propagates or instigates a rebellion against the State, with the knowledge that it may endanger the existence and security of the State or democratic fundamental order, shall be punished by imprisonment for not more than seven years. (S.Kor.); National Security Act, Article 7(3): Any person who constitutes or joins an organization aiming at the act as referred to in paragraph (1) shall be punished by imprisonment for a definite term of one or more years. (S.Kor.); National Security Act, Article 7(4): Any person who is a member of the organization as referred to in paragraph (3), and fabricates or circulates any false fact as to the matters which threaten to provoke any confusion of social order, shall be punished by imprisonment for a definite term of two or more years. (S.Kor.); National Security Act, Article 7(5): Any person who manufactures, imports, reproduces, holds, carries, distributes, sells or acquires any documents, drawings or other expressions of ideas, with the intention of committing the act as referred to in paragraph (1), (3) or (4), shall be punished by the penalty as referred to in the respective paragraph. (S.Kor.)

Korean Constitution.³⁶ Thus Article 7 of the Act does infringe on the freedom of inner thought, thereby overly violating the freedom of thought and conscience, freedom of expression and freedom of learning and the arts. Despite all this, the Constitutional Court's decisions have been in favor of defending the Act by either affirming "the existence and security of the State or the basic free and democratic order" or averting judgment on the law's unconstitutionality.³⁷ The National Security Act should have been repealed long ago for the sake of a truly democratic South Korea as well as facilitating peaceful reunification.³⁸ The self-contradictory mix of cooperation³⁹ and confrontation⁴⁰ with regard to inter-Korean relationship cannot be a legitimate norm for behavior any more.⁴¹

C. Power Structure of the Unified Republic

North and South Korea both have the status of a sovereign state in international

³⁶ Constitution of the Republic of Korea, Article 37(2): The freedoms and rights of citizens may be restricted by law only when necessary for national security, the maintenance of law and order, or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated. (S.Kor.)

³⁷ Constitutional Court, 2003HunBa85, Aug. 26, 2004 (S.Kor.); Constitutional Court, 2004HunBa28, July 31, 2008 (S.Kor.).

³⁸ See Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Report on the mission to the Republic of Korea, submitted pursuant to Commission on Human Rights resolution 1993/45*, U.N. Commission on Human Rights, U.N. Doc. E/CN.4/1996/39/Add.1 (Nov. 21, 1995) (by Abid Hussain). Mr. Abid Hussain, former Special Rapporteur on the right to freedom of opinion and expression, concluded in the report that "the wording and implementation of the National Security Law of the Republic of Korea fail to offer adequate protection of the right to freedom of opinion and expression as provided for by applicable international human rights law" and recommended the repeal of the Law and to consider other means. Current Special Rapporteur, Mr. Frank La Rue, again recommended in his report in March 2011 that the ROK government abolish Article 7 of the National Security Act "as it is vague, inhibits legitimate discussions on matters of public interest, and has a long history of seriously infringing on human rights, in particular the right to freedom of opinion and expression." See Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Mission to the Republic of Korea*, U.N. Human Rights Council, U.N. Doc. A/HRC/17/27/Add.2 (Mar. 21, 2011) (by Frank La Rue).

³⁹ Development of Inter-Korean Relations Act, Article 1: The purpose of this Act is to provide for necessary matters concerning basic relations between South Korea and North Korea and the development of inter-Korean relations, so as to achieve peaceful unification prescribed in the Constitution of the Republic of Korea. (S.Kor.)

⁴⁰ National Security Act, Article 1(1): The purpose of this Act is to secure the security of the State and the subsistence and freedom of nationals, by regulating any anticipated activities compromising the safety of the State. (S.Kor.)

⁴¹ Supreme Court, 2010Do1189, July 23, 2010 (S.Kor.). The South Korean Supreme Court held in this ruling that while North Korea is a partner for dialogue and cooperation for peaceful unification, it is, at the same time, an "anti-state organization" which conspires to overthrow "our free democratic system" and that the National Security Act shall continue to be enforced. This stance in effect denies North Korea as a partner for peaceful unification since the National Security Act, even in conflict with Article 4 of the Constitution, actually penalizes any act or intention that may lead to mutual understanding or cooperation between the south and north of Korea.

relations while, at the same time, the 1991 Basic Agreement provides that the inter-Korean relationship is not one as between states but a special one formed temporarily in the process of unification. Resolving this discrepancy is a primary task to overcome. South-North union, *Nambuk Yonhap*, however, is of two sovereigns and unstable peace or division may persist under the union.⁴² Two countries that have been grossly divergent in their developments for over 60 years cannot reasonably be expected to constitute a unitary state without one prevailing over the other.

A federal government with sole sovereignty under which two autonomous governments in south and north of Korea administer their own internal affairs as well as military and diplomatic affairs in a limited scope may be reasonable for the unified republic. The federal government and the two regional governments should support each other in fulfilling their duties prescribed in the federal constitution and closely cooperate among each other in the legislation and execution of federal laws and regulations. The federation shall undertake tasks that the two constituent states are not capable of or which involve uniform implementation thereof. Rights and duties that are not enumerated in the federal constitution shall be attributed to the constituent states.⁴³

The process of power transfer from the regional governments to the federal government could be arranged as follows: in the first phase, the two governments in north and south enjoy full autonomy except for matters of national defense in cases of emergency, national tax and customs administration and issuing federal currency, as shall be authorized in the federal constitution; during the initial phase, the regional governments may exercise powers over the military of their own unless the state of emergency⁴⁴ is declared by the federal legislative body and may also conclude treaties with foreign countries and international organizations as long as such treaties do not conflict with the federal laws or the interests of the federation;⁴⁵ in the next phase, the regional governments, while implementing independent policies which are not inconsistent with the fundamental interests and demands of the whole nation, strive to gradually narrow down differences between the north and south of Korea by expanding exchanges and cooperation and working through standing committees of military, political, economic, social and cultural affairs; in the final phase, the federation is in

⁴² Switzerland was a confederation of cantons before a civil war broke out in 1847, after which a federal constitution was drawn up to provide a central authority while giving the cantons the right to self-government. It was not until the American Civil War which was fought over the secession of the Confederate States that the powers of the federal government of the United States have expanded greatly.

⁴³ The delegation of powers – legislative, executive and judicial – from a central government to regional governments could further be applied to build a decentralized federal republic composed of “several” truly autonomous constituent states after reunification.

⁴⁴ An imminent secession of either side from the republic is a state of emergency. Deep military integration is vital to the federation. In the Yemeni case, the incomplete integration of the armed forces of North and South Yemen was a tripwire for the commencement of hostilities.

⁴⁵ The federation should be able to object to treaties between regional states and foreign countries.

charge of national defense whether in emergencies or not and exercises full power over diplomatic relations.

D. System of Governance of the Unified Republic

1. Assembly Government

Because of decades of the division of Korea as well as the consequent need to maintain balance in the decision-making process and to prevent concentration of power in the federal government, there should be a system that is conducive to rapprochement and consensus between the north and south of Korea and that fits well with any level of integration in the unified federal republic. Systems of governance that are incapable of meeting such requirement – for example, presidential system, semi-presidential system and parliamentary system – do not have much relevance even for a highly integrated federal Korea. The presence of a president, whether in presidential or semi-presidential system, would entail an inevitable risk of favoring one side – probably the south of Korea because of the population advantage the south has over the north – that supports the president. Parliamentary system is also not feasible because of “the unstable, under-institutionalized and fluid South Korean party system” and “the well-rootedness of the WPK in the social and political system of North Korea”,⁴⁶ among other problems, let alone the disadvantage that the north would have to take due to the population size.

A form of assembly government,⁴⁷ coupled with a directorial system that “is characterized by a collegial executive which (as in a parliamentary system) is elected by parliament but which, once elected (as in a presidential system), is no longer responsible to the parliament until the following general elections”,⁴⁸ would be more proper for the federal government after reunification. Under this type of government, the representatives of equal number from each of the north and south of Korea elected for a term of five years shall constitute the federal legislative body of the unified republic and this legislative body, the National Federal Assembly, shall be the supreme authority of the republic. The National Federal Assembly shall enact federal laws and ordinances and supervise both the executive and judiciary branches of the federal government. In

⁴⁶ Wolfgang Merkel & Aurel Croissant, *Parties and Party Systems and Their Impact on Reunification and Democracy: Should Korea Copy the German Way?*, in CONSTITUTIONAL HANDBOOK ON KOREAN UNIFICATION (II): POLITICAL AND SOCIAL ISSUES 295, 357–360 (Sung-hee Jwa et al. eds., Korea Economic Research Institute, 2002).

⁴⁷ The term “assembly government,” which seems not to be widely used, refers here to a government in which one national legislative body is legally superior to the executive branch of the government and all other state organs including the courts.

⁴⁸ Hanspeter Kriesi, *The Federal Parliament: The Limits of Institutional Reform*, in THE SWISS LABYRINTH 59, 60 (Jan-Erik Lane ed., 2001). Kriesi says that, according to Philippe Lauvaux and Thomas Fleiner-Gerster, the Swiss system constitutes a genuine third type, distinct from both the presidential and the parliamentary systems – a type which they call the “directorial system” and which follows the model of the Directoire of the French Revolution.

particular, though the collegial executive would not be recalled during its term by the National Federal Assembly, the latter has control over and may assign functions to the former.

2. Unicameral Federal Assembly Composed of Equal Number of Representatives from Each Side

Of foremost importance in constituting the supreme federal authority is to guarantee fairness and equal opportunity without being skewed toward either side. Neither a bicameral legislature whose lower house is represented by population nor a unicameral legislature in which both sides are not equally represented satisfies such condition. A unicameral legislature with equal number of representatives from each of the north and south of Korea is the most sustainable solution for the both sides. The unicameral National Federal Assembly shall consist of 500 members, of whom 250 members shall be chosen in the northern half, with one deputy representing about 100,000 people, and another 250 members in the southern half, with one representing about 200,000.

3. Federal Standing Council as the Supreme Executive Authority of the Unified Republic

The supreme executive authority, the Federal Standing Council, presides over the federal administration. The members of the Federal Standing Council shall be elected by the National Federal Assembly for a five-year term of office, and they shall jointly exercise the powers of head of state and make collegial decisions on governmental duties and powers. The Federal Council may submit drafts of federal legislation to the National Federal Assembly and shall decide on government policies and ensure the implementation of the federal laws.

E. Gradual Reduction of the Military Accompanied by the Establishment of a Combined National Army

Both North and South Korea must commit themselves to reduce the military before reunification and a gradual reduction program should continue to be implemented after reunification in keeping with the power transfer from the regional governments to the federal government. At the first stage of the power transfer in which the federal government has power over the military of both sides in cases of emergency or war, there should also be a “combined national army” established and commanded by the federal government for the purpose of ensuring security of the unified republic. The north and south of Korea should equally contribute to the standing national army. During the second stage, both sides should keep cutting the armed forces of their own to meet a common goal within mutually agreed timelines. The standing national army shall accordingly be strengthened gradually in a reverse proportion to the level of armed

forces of each side being downsized. At the final stage, the two regional governments, with significantly reduced armed forces, shall transfer their peacetime command over the military to the federal government.

IV. Possible Drafting Process of the Federal Constitution of a Unified Korea

A. Signing of Unity Accord

The unification process could be initiated by a unity accord signed between the leaders of two Koreas. Under the accord, the north and south of Korea will form a pan-Korean organization for national unification in which government and civilian delegates from both sides and from overseas participate to prepare for parliamentary elections for a constitutional assembly and to manage the details of the process of reunification. Before and after the agreement, there shall be a series of measures to eliminate military confrontation including the conclusion of a peace treaty between the two Koreas and the United States along with the mutual reduction of military forces and the withdrawal of US forces from the south of Korea.

B. Establishment of Constitution Drafting Committee

The agreement will establish a constitution committee to hammer out the blueprint for the reunification constitution. The delegates at the committee appointed by the pan-Korean organization would sit until members of the constitutional assembly are elected by regional parliamentary elections.

C. Drafting Interim Constitution

This committee shall produce the preliminary draft of the constitution which includes the procedure of elections for the constitutional assembly. Though the preliminary draft shall be complemented and enhanced before the definite text of the constitution is adopted, it could serve as a platform in which various views and opinions are debated and challenged until they develop into solutions for constitutional nation-building.

D. Regional Elections for the Constitutional Assembly according to the Interim Constitution

Elections to set up the constitutional assembly should be held separately in the north and south of Korea in order for each side to send an equal number of representatives to the National Federal Assembly, the supreme authority of a unified Korea. The constitutional assembly may turn into the first federal legislative body of the unified republic if the reunification constitution so mandates. Otherwise there shall be a new round of parliamentary elections after reunification. In either case, the Supreme People's Assembly of the north and the National Assembly of the south should each be dismissed and transformed into an assembly of a regional government upon ratification of the reunification constitution.

E. Constitution of a Unified Korea

It is imperative that the entire Korean people collectively participate in and lead the process of unification and do not let self-seeking politicians or those with vested interests who prefer the status quo of a divided Korea pursue their agendas pulling the north and south apart any more. The constitutional assembly should widely accept all the proposals and solutions for national reunification submitted by the people, political parties and social organizations in both the north and south and bring them together into a cohesive whole. The final draft of the constitution must be passed by the representatives of the both sides in the constitutional assembly⁴⁹ before it is put to the vote of the people.

F. Ratification of the Reunification Constitution

The decision on ratification of the reunification constitution is subject to two separate referendums in each of which more than a half of all votes cast in the north and south of Korea is needed for approval. It does not depend on the consent of the legislature of the two Koreas since the authority of the already elected constitutional assembly overrides those of the two legislatures.

⁴⁹ It may need to be backed by two-thirds of the members: Article 97 of the DPRK Constitution provides that "the Constitution can be revised or supplemented with the approval of more than two-thirds of the total number of deputies to the SPA"; Article 130(1) of the ROK Constitution says that "passage [of the proposed amendments to the Constitution] by the National Assembly requires the concurrent vote of two-thirds or more of the total members of the National Assembly."

V. Concluding Remarks

Ever since the fratricidal Korean War, there has been a near-complete division between North and South Korea, unlike East and West Germany, for over 60 years amid the unflagging tension of military confrontation with the DPRK on one side and the ROK and the US forces on the other while there have only been tacit agreements on the actual process of unification. The two Koreas nevertheless are not without hope if both sides commit to the three basic principles of unification. The North has made clear that it is willing to tolerate the South Korean system but the South has so far regarded the North as the main threat to its existence, unduly penalizing legitimate pro-unification movements for so long, in stark contradiction to the pillar of grand national unity. Now is the time for the South to step up to the plate and recognize the North as an equal partner with whom to combine efforts to achieve independent, peaceful unification through dialogue and negotiation wherever possible.