Legal Basis and General Consequences of the Division of Korea—From Constitutional and International Law Perspectives†

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This paper is designed for an legal analysis of (1) what decisions and agreements had led to division of Korea, in other words, what is the legal basis of the national division, (2) what efforts have been made for national unification thus far, and (3) what is required or needed for the realization of unification of Korea.

In legally analyzing the question of what had made Korea divided, power politics loom larger than law. This fact seems to pose a considerable difficulty hindering our perception of legal facts. Particularly in Korea, global strategies of world powers dictated the situation ultra vires or without legal foundation. Therefore, the question of who is responsible for Korean division is posited here. This question can be a terribly important legal concept for realization of Korean unification, true to the spirit of an old Korean proverb that one who caused a problem is responsible for its solution (結者解之). I believe those who are responsible for "unlawful" division can be charged as being responsible for correcting the "unlawful" state of the matter, i.e., for unification of Korea.

What is characteristic of Korea and Germany in common as a divided nation is the fact that everybody involved agrees that both Korea and Germany were one country and are going to be one country sooner or later and regards national division as an unnatural, temporary state of matters. Korea was one country for more than a millennium before 1910 and during the Japanese rule. No one raises a doubt to the proposition that two Koreas should become one country. And yet reunification is made extremely difficult at the moment.

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What are involved here? I believe national self-determination, majoritarian rule, and human rights and dignity ought to be the controlling principles for the future phase of Korean problems including national unification.

**What Made Korea Divided?**

Not a single decision or agreement existed that had meant to divide Korea at least when Japan surrendered unconditionally to the Allied Forces in August, 1945 at the end of the Second World War. At the hindsight, the fateful General Order No. 1 issued by the Supreme Commander for the Allied Powers on September 2, 1945\(^{(1)}\) was the most important legal instrument that had decisively contributed to the eventual division of Korea. The Order merely provided for acceptance of the surrender of Japanese forces north of the 38th parallel by the Soviet forces and south of the parallel by those of the United States and nothing more. Thus division along the 38th parallel had started purely as a temporary measure to facilitate the surrender of Japanese troops in Korea. At this stage, what concerns political scientists most is the question of who actually made the decision leading to the General Order No. 1 and how. According to their studies, the State-War-Navy Coordinating Committee of the United States Government recommended the idea of division at the 38th parallel for the military purpose of accepting Japanese surrender to President Truman, who then approved on August 13, and immediately transmitted it to the governments of Great Britain, the Soviet Union, and China. Upon their acceptance without objection, the provision of 38th parallel was sent to General MacArthur as General Order No. 1 on August 15.\(^{(2)}\)

It was in March 1943 when President Roosevelt met with British Foreign Secretary Eden that the future status of Korea was for the first time seriously considered by the Allied powers during the war period. There they agreed to the idea of placing Korea under international trusteeship with the US, the Soviet Union and China as possible trustees. It is said that the trusteeship idea was also present in Roosevelt's mind when he met Churchill and Chiang Kai-shek at Cairo on November 20, 1943, to discuss the future of Asia. In

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any case, the *Cairo Declaration* issued as the conference communique by the three heads of state on December 1, 1943,\(^{(3)}\) provided among others: "...Japan will also be expelled from all other territories which she has taken by violence and agreed. The aforesaid three great powers, mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent." It is known that the idea of the three power trusteeship concerning Korea was also discussed at the initiation of Roosevelt and agreed upon at the Teheran Conference on November, 1943 and again at the Yalta Conference in February, 1945. In the *Potsdam Declaration* made by the heads of the US, Great Britain and the Soviet Union on July 26, 1945,\(^{(4)}\) independence of Korea was once again assured by the provision that "the terms of the Cairo Declaration shall be carried out." In this way, the two guiding principles for the determination of the future status of Korea, that is, Korean independence preceded by an international trusteeship, were agreed upon by the Allied powers and nothing else made prior to the General Order No. 1.

**Perpetuation of the Division**

The intended solution of the Allied powers to the Korean question was the temporary military occupation of Korea by the US and the Soviet, superseded by the four-power trusteeship, and then by the establishment of a unified, independent Korean government. We witness, however, the intended course having proceeded in the wrong direction, that is, toward the perpetuation of the division as a political division. We may be permitted to venture a statement, at the vantage of hindsight, that definitely the power politics practiced by the world powers at the expense of small nations dictated the change of the course toward divided Korea. War-time cooperation between the United States and the Soviet now quickly came to end and everywhere their interests collided with each others in the world following the end of the Second World War. The conflicting interests of the two powers, which were amply documented in the settlement of the post-War Eastern Europe, were also manifested in Korea from the moment when the two powers began their military occupation.


of Korea.

Following the military occupation of Korea north of the 38th parallel by the Soviet Union and that of south Korea by the US, the Allied powers moved in the direction of implementing their wartime agreement on Korea, that is, first the four-power trusteeship and then establishment of a unified independent Korean government. When the Foreign Ministers of Great Britain, the Soviet Union, and the US met together at Moscow in December, 1945, to deal with the post-war world problems, thus they agreed to include “the creation of a unified administration for Korea as a prelude to the establishment of an independent Korean government” in the agenda. On December 20, 1945, they finally reached an agreement on Korea to which China later adhered. The agreement — the Moscow protocol on Korea (5) — was composed of the following four major items: (1) establishment of “a provisional Korean democratic government”; (2) establishment of a joint American-Soviet commission, representing the two commands in Korea, which was to be responsible for assisting in the formation of a provisional Korean government through consultation “with the Korean democratic parties and social organization”; (3) the proposals of the commission to be submitted for the joint consideration of the four powers for the working out of an agreement concerning a four-power trusteeship for a period up to five years following consultation with the provisional Korean government; and (4) a conference of the representatives of the US and Soviet commands in Korea to be held within two weeks to consider urgent economic and administrative matters as well as measures for permanent coordination. The Moscow agreement on Korea, however, soon encountered great difficulties: first, inability of the two powers to reach agreement on matters related to its implementation because of conflicts between them; and second, vehement Korean opposition to four-power trusteeship on Korea. From the beginning all the major international agreements on Korea by world powers were made without respect for Korean sentiment and at the expense of Korean interests. The agreement on trusteeship as well as on division were particularly so.

The news of the proposed trusteeship on Korea one morning in December, 1945 came as a complete surprise to Koreans and a terrible insult to Korean sentiment. After all the years of longing and struggling for independence, the

Korean people could not accept the idea of trusteeship. Thus all the political parties, both right and left, registered their strong opposition to trusteeship. A few days later (January 2 and 3, 1946), however, the Korean communists and their sympathizers suddenly switched their position toward the support of trusteeship probably upon the receipt of instructions from Moscow. In the meantime, the conference of the US-Soviet commands preparatory to the Joint Commission, was held on January 16, 1946 and decided for establishment of the US-Soviet Joint Commission to implement the Moscow agreement on Korea as well as for other matters on February 5, 1946. Pursuant to this decision, the Joint Commission(6) convened in Seoul on March 20, 1946. At the Commission sessions which lasted to May 6, however, both sides were not able to agree on the nature of “democratic” parties and social organizations to consult with in forming a provisional government. The Soviets insist on establishing a friendly government in Korea demanded for exclusion of organizations and individuals that had carried on anti-trusteeship activities. This demand would have eliminated practically all the nationalist and rightist leaders from participation in the provisional government.

The second conference of the Joint Commission which was open on Seoul on May 22, 1947 soon had come to a deadlock ending as a complete failure by late October, 1947, because of the incompatible proposals by both sides for the nature of democratic parties and social organizations to consult with. Adoption of Soviet proposal would have led to a communist dominated Korea.

In order to break the impasse thereupon, the US proposed for a conference in Washington of the four powers originally slated to be trustees of Korea to find a substitute for the Moscow plan. The main idea of the proposal was election in Korea under the auspice of the United Nations for the formation of a provisional legislature and government. The proposal was accepted by Great Britain and China but not by the Soviet Union. Thereupon, the US

(6) Concerning the Joint US-Soviet Commission and its activities, see Kim, Unification Policies of South and North Korea, pp. 41-51.
resolved to submit the Korean problem to the United Nations on September 17, 1947\(^{(7)}\). The General Committee by a vote of 12 to 2 recommended the inclusion of the Korean question in the General Assembly's agenda and the latter by a vote of 41 to 6 with 7 abstentions adopted the recommendation and referred the Korean question to the First Committee for consideration and report. Over the Soviet proposal for simultaneous withdrawal of the US and Soviet troops in both Koreas and for invitation of elected Korean representatives from both Koreas, which was voted down by a vote of 35 to 6 with 10 abstentions, the First Committee accepted the American proposal by a vote of 41 to 0 with 7 abstentions. Upon the First Committee's recommendation, finally, the General Assembly by a vote of 43 to 9 with 6 abstentions adopted its resolution on November 14, 1947\(^{(8)}\).

The resolution 112 (II) provided for a Temporary Commission on Korea, consisting of the representatives of Australia, Canada, China, EL Salvador, France, India, the Philippines, Syria, and the Ukraine, to observe elections, to advise elected Korean representatives on the establishment of a national government, and to advise the national government in making those arrangements necessary to Korean independence. The resolution also provided for the elections to be held not later than March 31, 1948, by secret ballot on the basis of adult suffrage. The representatives so elected, whose number was to be proportionate to the population, were to constitute a national assembly empowered to establish a national government. In consultation with the Commission, the government in turn was to take over the functions of government from the military commands and to arrange with occupying powers for the complete withdrawal of their armed forces if possible within ninety days.

Upon encountering the blocking by the Soviet of its activities in north Korea, the UN Temporary Commission on Korea proceeded to implement the programme as outlined in the resolution II, "in such parts of Korea as are accessible to the Commission," that is, south Korea alone, by following the resolution adopted by the Interim Committee of the General Assembly on February 26, 1948\(^{(9)}\). Accordingly, the general election to elect members to the National Assembly was held in south Korea on May 10. The National

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\(^{(7)}\) UN hankukmunjae kyoluijip (Resolutions of the U.N. Principal Organs Relating to Korea, 1947~1970), (Seoul: The Republic of Korea Ministry of Foreign Affairs, 1976), pp. 39-41;


Assembly convened for the first time on May 31, 1948, and began to undertake the important steps necessary to form a national government: it adopted a constitution on July 17, 1948 and elected Syngman Rhee as the first President of the new government on July 20. The Republic of Korea was formally inaugurated in Seoul on August 15. Commanding General Hodges officially announced that the American military government in Korea would be terminated on that date. Officially there was an agreement by means of exchange of letters between the newly formed Korean government and the U.S. concerning the transfer of authority and the withdrawal of the US occupying forces\(^{(10)}\). In any case, the United States government soon accorded recognition to the new government and sent John J. Muccio as Ambassador to Korea. China and the Philippine followed the suit. And upon the consideration of the report of the UN Temporary Commission on Korea and that of the Interim Committee, the General Assembly declared, by adopting the Resolution 195 (III) on December 12, 1948, \(^{(11)}\) that “there has been established a lawful government (The Government of the Republic of Korea) having effective control and jurisdiction over that part of Korea where the Temporary Commission was able to observe and consult and in which the great majority of the people of all Korea reside; that this Government is based on elections which were a valid expression of the free will of the electorate of that part of Korea and which were observed by the Temporary Commission; and that this is the only such Government in Korea.” The resolution also provided for the establishment of a Commission on Korea composed of Australia, China, El Salvador, France, India, the Philippines, and Syria to continue the work of the Temporary Commission in order to fully accomplish the objectives set forth in the resolution of November 14, 1947.

The establishment of the Republic of Korea (ROK) backed by the United Nations invited a prompt response from the north: a constitution was adopted on September 8, 1948 and the establishment of the People’s Democratic Republic of Korea (DPRK) was announced on the next day, with the support of the Soviet Russia. The formal inauguration of the People’s Republic of

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Korea, however, ought not to obstruct us from seeing what had developed prior to that event in North Korea. The establishment of a government there dated back far earlier. When the Soviet XXV Army under the command of General Ivan M. Chistiakov entered Pyongyang on August 24, 1945, they found the Pyongannamdo Province Committee for Preparation of Korean Independence led by a prominent Christian nationalist leader Cho Man-sik already functioning as a self-governing entity. The Committee was composed of 18 nationalists and two domestic communists. The first measure that the Soviet occupation authority undertook thereupon was to transform Cho’s Committee into an organization that was at least not dominated by right-wing nationalists. On August 26, 1945, the People’s Political Committee of Pyongan-namdo Province nominally headed by Cho was by force created out of his Committee under the supervision of General Chistiakov, with its 32 members equally divided between rightists and communists. Within next few weeks, the People’s Political Committees were organized also in other provinces to take charge of all administrative functions under the direction of the Soviet occupying authorities. The obvious intention of the Soviet, albeit not announced, was to install a friendly regime in north Korea. Unlike the U.S. whose military government directly governed south Korea, the Soviet ruled north Korea through the Korean government composed of friendly Koreans set up by them. Only with the People’s Political Committee being established in each province, the Soviet authorities on September 14, 1945 issued for the first time its policy directives in north Korea, stipulating (1) the early establishment of a government representing the working people, peasants, industrial workers, and other Koreans opposed to the Japanese; (2) land distribution to the farming population; (3) placement of the Japanese-owned industry under the control of a workers’ committee; (4) immediate purge of all pro-Japanese Koreans; and (5) public control of all educational and cultural institutions.

The directives were only an indication of what would evolve and how it would proceed. In short, the Soviet policies were to have the communists

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(12) Pak Dong-un, Pukhantongch’ibikuron (The Government Structure in North Korea), (Seoul: Korea University Press, 1964); Pang In-hun, Pukhan ch’oson nodongdangui hyongongkwa balsan (The Formation and Development of the Workers’ Party of Korea), (Seoul: Korea University Press, 1967), pp. 237-278 (Ch. 3); Kim Ch’ang-sun, Pukhan sibonyosa (Fifteen Years History of North Korea), (Seoul: Jimunkak, 1961), pp. 43-82; Robert A. Scalapino and Chung-sik Lee, Communism in Korea (Berkeley: University of California Press, 1972), Vol. 1, pp. 313ff.
headed by Kim Il-song whom they installed be in control and to transform the north Korea into a friendly communist controlled society at whatever costs it might take. The establishment of the People's Political Committees were one of the earliest manifestations of their policies. At a secret meeting of the Korean Communist Party leaders from the five provinces, Kim Il-song revealed the policy line of building the north Korea as “the democratic base” on October 10, 1945. Now, the Five-Province Administration Bureau of North Korea, a better organized government, was created from the People’s Political Committees as early as on October 28, 1945. The Five-Province Administration Bureau was replaced by North Korean Provisional People's Committee headed by Kim Il-song on February 8, 1946, with nationalist leaders like Cho and others already eliminated. The North Korean Provisional People’s Committee immediately launched a number of major revolutionary measures, as part of which Kim’s so-called 20 Point Platform was laid down as the guiding policy lines on March 23, 1946. Land Reform Law based on the principle of no compensation for taking and no payment for distribution was proclaimed on March 5; Election Law for North Korean Provisional Committee on June 5; Labor Law was announced on June 24; Law on the Equality of the Sexes on July 30; Law on Tax in Kind on June 27; Law on Nationalization of Major Industries on August 10; and Decision for Enhancement of Individual Creativity on October 4. With those laws implemented, society in north underwent an unprecedented Communist controlled revolutionary change under the auspice of the Communist party and the Soviet authorities. The Workers Party of North Korea was officially founded on August 28, 1946, by incorporating both North Korean Communist Party and Korean New Democratic Party into its fold.

Now the first local elections in Korea were held on November 3, 1946, to choose the members of province, city, county, and district People’s Committees.

(16) Ibid., pp. 729-730.
(17) Ibid., pp. 211-212.
(18) Ibid., p. 103.
(19) Ibid., pp. 104-105.
On February 17, 1947, the North Korean People's Assembly of 327 elected by the members of province, city, county, and district People’s Committees, was inaugurated as the highest legislative body. The North Korean People’s Committee (not any more provisional), headed by Kim Il-song, consisting of various ministries and bureaus, was created by the Assembly as the highest executive organ of north Korea on February 22, 1947. In fact, the inauguration of the People’s Democratic Republic of Korea with the Supreme People’s Assembly and Cabinet was the re-dressing of the North Korean People’s Assembly and the North Korean People’s Committee with new names. In the meantime millions of north Koreans chose to come south at the risk of life at the crossing border (38th paralleled) as a kind of referendum by foot. There is no statistics of how many came south, but all together five millions of people are estimated to have escaped north by the end of the Korean War (1950-53). (20)

The Constitution of the ROK and That of the DPRK

The Constitution of the Republic of Korea of 1948 Article 4 provided as follows: “The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands.” This article is still retained unchanged even in the present Constitution of 1980 (in its Article 3) despite of a number of major constitutional changes through amendments. The territory provision has been interpreted as the unmistakable indication of the constitutional declaration that the constitutional law of the ROK is valid throughout the entire Korea, north as well as south. (21) Therefore the sovereign power of the


See also a number of the court decisions that were handed out explicitly or implicitly on the basis of the proposition that the sovereign power of the ROK reaches north Korea: The Supreme Court Decision of March 24, 1984 (Daepan 4281 hyongsang 10); the Supreme Court Decision of September 27, 1955 (Daepan 4288 hyongsang 246); the Supreme Court Decision
ROK *de jure* reaches the Korean-Chinese and Russian border to the north but only its exercise in north Korea has been interpreted as *de facto* thwarted initially by the Soviet Union and then by the presence of the north Korean regime. As a corollary of the constitutional proposition, the north Korean regime had been interpreted only as a rebellious or at best belligerent band occupying unlawfully the northern half of Korea and exercising an unlawful, *de facto* governmental power there at least until the announcement of the South-North Agreement of July 4, 1972. With this agreement, the status of the North Korean regime has been interpreted as a degree upgraded to that of a *de facto* local government.\(^{223}\)

In the same spirit as in the territory clause, the constitution had no other provision either on national unification or on temporal or spatial limitation arising from national division such as in the Preamble of the *Grundrecht* than the territory clause, because it is based on the proposition that it applies to the entire Korea as we have seen. Likewise, no one raised any doubt to the position that the Korean government established in accordance with the provisions of the constitution has authority to represent all the Korean people whether they reside in south or north and that the voice of the government is only *de facto* hampered by the presence of the north Korean regime. From the constitution of 1972 on, however, the terms “national unification” and “national unification of the fatherland” are introduced in the Preamble and provisions of the Korean constitution (the present Constitution of 1980 Articles of September 28, 1961 (Daepan 4292 haengsong 48): Seoul High Court Decision of December 7, 1972 (Seoul kobop jae 2 hyongsapu 71 no 998). Especially interesting is the Supreme Court of September 27, 1955, in which the Court held that acts of arresting, imprisoning or interrogating committed against victims by a member of the north Korean police organization constituted punishable acts under the Criminal Law of the ROK to which Hague Regulations on Land Warfare did not apply. See Chusok hankukpannyejip (Annotated Court Reports), Criminal Law Part II (1951~1965), (Seoul: Seoul National University Law Research Institute, 1968), pp. 44–45.

\(^{223}\) See Song-Ihwa Hong, “Nambukhan jopch’ok ijouui bopjok kwankye” (Legal Relations between South and North Korea before South-North Contacts), *Korean Journal of International Law*, vol. 26, No. 2, pp. 41–75, esp. 55–56 (1982). See also South Korean Prime Minister Kim’s statement of June 27, 1973 in the National Assembly’s question and answer session that the ROK stands for one nation, one state, and two governments unlike West Germany’s one nation and two states position. *Chungang ilbo*, June 27, 1973 issue, p. 1.

38 Section 3, 44, and 47). And yet the terms are provided as part of the obligations imposed on the government and as part of the rights and duties of the President. The characterization of the Korean constitution as applying to the entire Korea is regarded as still valid. And the introduction of the terms of national unification and national unification of the fatherland into the constitutional provisions did not affect at all the characterization of the constitution as stated above.

The position that the Korean constitution is valid throughout the entire Korea and that the Korean government formed in accordance with the constitution possesses the authority to represent all the Koreans are naturally derived from a number of the United Nations resolutions to assure the national independence of Korea with the establishment of a Korean government representing the Korean people. As we have seen, the United Nations efforts were prompted by the inability to reach an agreement between the United States and the Soviet Union concerning the Korean problem. And the activities of the United Nations Temporary Commission on Korea authorized to observe elections to form the Korean government was only thwarted in North Korea by the blocking of the Soviet occupying authorities. In any case the constitution was duly adopted by the Korean representatives validly elected by Koreans with the UN sponsored free election in accordance with the UN General Assembly resolutions of November 14, 1947 (112-II) and of February 26, 1948 (583-A). The government of the Republic of Korea formed in accordance with the constitution is none other than "a lawful government" sponsored by the world organization. To this government, the U.S. government yielded the governing authority, which it temporarily wielded for a time, by the Agreement between the Government of the Republic of Korea and the Government of America Concerning the Transfer of Authority to the Government of the Republic of Korea and the withdrawal of the United States Occupation Forces effected by exchange of Letters signed at Seoul on August 9 and 11, 1948 and entered into force on August 11, 1948. And the United Nations provided its recognition to the government of the Republic of Korea

by adopting a General Assembly Resolution 195 (III) of December 12, 1948: it "declares that there has been established a lawful Government (The Government of the Republic of Korea)... that this government is based on elections which were a valid expression of the free will of the electorate... and that this is the only such Government in Korea." On November 22, 1949, the UN General Assembly passed Resolution 296 (IV) (G)\(^{24}\) determining that "the Republic of Korea is in its judgment, a peace-loving State within the meaning of Article 4 of the Charter, is able and willing to carry out the obligations of the Charter, and should therefore be admitted to membership in the United Nations," and thus requesting the Security Council to reconsider the application of the ROK for the membership. And there had followed recognition of the government of the Republic of Korea by many governments.

Now with the establishment of the government of the Republic of Korea, the sovereignty of Korea is restored to its full extent. During the Japanese rule (1910~1945) and the military occupation by the Allied Forces, the sovereignty of Korea is deemed as having remained only dormant. In Korea, the treaty of 1905 (for protectorate status of Korea) and that of 1910 (for annexation) between Korea and Japan is unanimously regarded as null and void from the beginning because they were made under duress exerted on the representatives of Korean government at that time by the Japanese.\(^{25}\) It is a well established historical fact that those treaties were entered and signed in the Korean palace which was completely surrounded by the Japanese troops following the Russo-Japanese war (1904~5) and that they were not even signed by the Korean emperor himself. Consequently, the sovereignty of Korea was never lost to Japan; it became only latent by the forceful unilateral action of Japan over Korea. Thus Korea was unlawfully occupied and denied exercise of its sovereign power by the Japanese. Now Korea recovered its sovereign power with the establishment of the government of the Republic of Korea. In a fair mind, this state of matters is behind the Treaty on Basic Relations between the Republic of Korea and Japan. The Treaty Article 2

\(^{24}\) UN kankuwmunjae kyoluijip, pp.73-74; Korean Unification, p.117.
declares: "it is confirmed that all treaties or agreements concluded between the Empire of Korea and the Empire of Japan on or before August 22, 1910 are already null and void," and Article 3 "it is confirmed that the Government of the Republic of Korea is the only lawful government in Korea as provided in the Resolution 195 (III) of the United Nations General Assembly."(26) Prior to the treaty the San Francisco Treaty of Peace with Japan on September 8, 1951(27) is interpreted as also having confirmed the same state of matters concerning Korea (particularly by its Article 2 (a)). I believe further that the Cairo and Potsdam Declarations also can be relied on to support the theme that the Republic of Korea succeeded the Empire of Korea.

The position that the Republic of Korea is the successor of the Empire of Korea and that the Government of the Republic of Korea is the only lawful government in Korea, a position known as the claim of legitimacy in south Korea, has been augmented by another symbolically important claims that the government in south Korea inherited the authority of the Korean government in exile and that two-thirds of the Koreans, the absolute majority of Koreans, joined by a large number of north Koreans who came south on their free volition, participated in the formation of the government of the Republic of Korea. The Preamble of the Korean constitution of 1948 made it clear that the Republic of Korea was founded on the authority of the Korean government in exile. The policies of the Soviet in north was to build a socialist state with their protege-communists in control so that they rendered support only to the communist group which was not representative of the majority of all Koreans even in north Korea. The Unites States in south maintained policies of playing neutral to political leaders of all colors and pushing through implementation of trusteeship agreement to the last minute when they decided to take the Korean problem to the United Nations. They even refused to give a recognition to the Korean government in exile. Many Koreans resented this fact. In any case, all those that led the government in exile came to Seoul, not to the north. The Korean government-in-exile was formed by independence movement leaders abroad immediately after the nationwide uprising against the Japanese rulers for independence in March 1919 and had

lasted until 1945. This government in exile even declared war against the 
Japanese(28) and engaged in active military campaigns along with the Chinese 
and the U.S. during the Pacific War. The claims of south Koreans having 
handed the tradition of national liberation struggle and that based on the 
principle of majoritarian rule are believed to provide sufficient legitimacy to 
the Republic of Korea. Undoubtedly, the north Korean claims of legitimacy 
are based, not on any past of Korea or the majoritarian rule, but on the claim 
of the Marxist-Leninist lines, the sovereign right of the working people, 
proletarian dictatorship, and recently on a nationalist theme (chuch’e) coined 
by Kim Il-song.

The proposition that the sovereign power of the Republic of Korea reaches 
north Korea and that the north Korean regime is no more than rebellious 
group had been endorsed by the Supreme Court in its decisions.(29) The 
provisions of the National Security Law in Korea are based on the same 
proposition. Under the law, a collaboration with any member of north Korean 
regime constitutes a punishable crime; so does an act siding with a policy line 
or claim made by the north Korean regime. The Western plural democratic 
features of the constitution, particularly human rights and dignity and “demo-
ocratic basic order” provisions for political parties can be also relied on to 
lend support to the validity of the statute; communism would be repugnant 
to the democratic nature of the constitution. It is in this context that such 
catch-phrases as “march north” were once popularly accepted and “recovery 
of the lost land” are advocated by some people even today.

On the other hand, the north Korean Constitution of 1948 did declare Seoul 
as the capital city of the DPRK (Article 103; The constitution of 1972 
designates Pyongyang as the capital city of the DPRK). Probably this provision 
can properly be interpreted as an indirect constitutional indication of the 
DPRK’s claim over the entire Korea. Otherwise, the constitution on its surface

(28) The Declaration of War against Japan of the Republic of Korea in Exile made on December 
(29) See the Supreme Court Decisions of September 27, 1955 and September 28, 1961, and Seoul 
High Court Decision of December 7, 1972 quoted in the Footnote (21) above. There are an 
innumerable number of the court decisions that were made on the basis of the proposition that 
the North Korean governmental organization was no more than a rebellious band: for example, 
the Supreme Court Decision of January 26, 1971 (70 do 2357); February 23, 1971, (70 do 
2629); the Supreme Court Decision of February 23, 1971 (71 do 36); the Supreme Court 
Decision of February 25, 1971 (70 do 2417); the Supreme Court Decision of February 23, 
1971 (71 do 45).
was silent or even innocent either about the state of national division or unification and about the characteristics of the DPRK. Its Article 2 provided: "The sovereignty of the DPRK resides in the people." And its Article 13 provided not only for the right of citizens to free speech and publication but also for the freedom of citizens to organize and to join democratic parties, trade unions, etc. These provisions, however, cannot fool us about their true nature. Who are the people that can exercise the sovereign right? Who has what kind of freedom of speech and publication and what kind of organizations and democratic parties free to organize and free to join? The constitution did not contain any single provision indicating the presence of the Communist party (the KWP) or its role.

In comparison, the north Korean constitution of 1972 is much more straightforward. Its Article 1 proclaims the DPRK as "an independent socialist state" representing "the interests of all the Korean people" (underline is mine). The Article 2 provides: "The DPRK relies on the politico-ideological unity of the entire people who is based on the worker-peasant alliance led by the working class as well as on the socialist production relations and the foundation of an independent national economy" (underline is mine). Even with these two provisions it is rather clear who are the people that have the sovereign power: "The sovereignty of the DPRK rests with the workers, peasants, soldiers, and working intellectuals" (Article 7). The constitution further proclaims outright that the DPRK stands for the "dictatorship of the proletariat" (Article 10). In the same spirit, the predominant presence of the Communist party as the vanguard party of the workers is now announced in its Article 4: "The DPRK is guided in its activities by the chuch'e idea of the Workers' Party of Korea (KWP) which is a creative application of Marxism-Leninism to the specific conditions of the DPRK." Accordingly, the state is to defend and protect "the interests of the workers, peasants, soldiers, and working intellectuals freed from exploitation and oppression" (Article 6).

I believe it is important to note that the north Korean constitution through its Articles 1 and 2 made clear the claim of the DPRK to represent the entire Korean people, that is, the entire working Korean people, whether living in north or in south, with whom the sovereignty of the DPRK rests (Article 7). As a matter of fact this claim of the DPRK over the entire working Korean people and consequently over the entire Korea is not based on the continuity
of the statehood from the Empire of Korea, nor on the endorsement of a wold organization. Its legitimacy resides in the revolutionary justification that the working people claim to inherently possess. I believe this claim constitutes one of the conditions that the DPRK requires for national unification. The other condition is that the KWP leads the working people even in their efforts for national unification. The Article 5 "The DPRK strives to achieve the complete victory of socialism in the northern half, drive out foreign forces on a nationwide scale, reunify the country peacefully on a democratic basis, and attain complete national independence" is in fact no more than a manifestation of those conditions for national unification. I believe the emphasis is placed less on the recognition of the fact of national division or on national unification by a peaceful means than on the obligation imposed on the DPRK to achieve national unification under the DPRK's terms, that is, the unity of the entire working people in south and north under the leadership of the KWP, when the Article 5 is interpreted in association with the Articles 1, 2, 3, 4, 6, and 7 mentioned above.

We do not want to go into details in analyzing of those constitutional provisions as if they have significant legal implications, first of all, because such a legalistic analysis would not carry much weight. In such a typical Stalinist polity as the DPRK, the real engine of the regime is the Communist party, the KWP led by Kim-Ii-song, and the state apparatus is seen only as an important instrument of realizing the goals set by the Communist party leadership. What are provided in those constitutional provisions are rather declarations, guidelines and principles whose priority and application are determined by the Communist party as a particular situation dictates more than legal organs such as courts and public procurators; the Communist do not believe in the rule of law in a Western sense (but socialist legality). The fact that public announcements can be quite different from the actual conducts is indeed characteristic of such a regime; they are only a matter of strategies and tactics for achievement of the goals the Communists set.

As early as on October 10, 1945, as we have seen, the policy line of building north Korea as "the democratic base" to liberate south Korea was announced by Kim Il-song at a secret meeting of the Korean Communist Party leaders from five provinces and royal members, and later reaffirmed at the third expanded congress of the North Korean Branch of the Communist
Party on December 17, 1945, despite all the democratic pretensions and
pronouncement to the contrary. Building a communist country on the entire
Korea through “liberation of south Korea,” that is, unification under the
Communist rule, has been the consistent goal of the north Korean regime led
by Kim Il-song. In order to achieve this goal, they wanted to build a strong
socialist country as the base from which south Korean revolution would be
launched. This is what the policy line of building north Korea as the demo-
cratic (now revolutionary) base is about. There never was any refutation of
the goal; there have been only different colorations and alterations of strategies
and tactics for the achievement of the goal as time passes. The Korean War
(1950～53) was an attempt on their part to achieve the goal which ended
with failure. The north Korean constitution Article 5, mentioned above, was
in its essence a manifestation of the goal. The Rules of the KWP (30) describes
the goal more clearly in its Preamble: “The immediate aim of the KWP lies
in guaranteeing the victory of socialism in the northern half of the Republic,
carrying out the revolutionary tasks of national liberation and people’s demo-
cracy on a nation-wide scale; its ultimate aim is that of building a communist
society.” “The KWP pushes through the policy line of self-reliant, peaceful
unification of the fatherland, provides active assistance and supports to the
anti-American, anti-puppet struggles of the south Korean people who try to
drive out the American imperialists, the bitter enemy of the Korean people,
from south Korea, to oppose the Japanese militarism, and to bring down the
puppet regime of landlords, mercenary capitalists and reactionary bureaucrats
for the unification of the fatherland, and struggles for the realization of south
Korean revolution.” In this way, revolution of south Korea is inseparably
integrated into the goal of national unification. Formally a peaceful unification
is alluded to, but use of force when deemed necessary has never been refuted
as a means to unification. Incidentally, Kim Il-song announced at the 4th
Congress of the KWP in 1961 that socialist reconstruction had practically been
accomplished by 1958, indicating the north Korea having moved to the stage
of socialism following democratic stage. During the 1954～58 period a forceful
farming collectivization was undertaken. Now the north Korean constitution
of 1972 is called the Socialist Constitution of the DPRK replacing the Con-

(30) The Rules of the KWP, as amended at the Party Congress of November, 1970 are quoted from
Pukhan Kyoyo (North Korea: An Outline). (Seoul: the Republic of Korea Board of National
stitution of the DPRK of 1948.

**Korean War and Unification Efforts**

The north Korean regime started its “liberation war” on totally unprepared south Korea with far more superior forces in number and equipments early in the morning on June 25, 1950\(^{31}\). Immediately thereupon the UN Security Council whose meeting the Soviet Union had been boycotting swiftly determined the armed attack upon the Republic of Korea by forces as constituting “a breach of the peace” on the same day in New York time (S/1501)\(^{32}\). It also called for the immediate cessation of hostilities and called upon the north Korean regime to withdraw forthwith their troops to the 38th Parallel. With these requests not met, it resolved to recommend the UN member nations to “furnish such assistance to the ROK as may be necessary to repel the armed attack and to restore international peace and security in the area” (S/1511) on June 27, 1950\(^{33}\). Accordingly 16 member nations including the U.S. provided such military forces and other assistance. Thereupon the Security Council further recommended all members providing military forces and other assistance pursuant to those resolutions to make such forces and other assistance available to a unified command under the United States, requested the U.S. to designate the command of such forces, and authorized the unified command to use the UN flag (S/1588)\(^{34}\). And the south Korean government decided to assign command authority over its forces to Supreme Commander of the United Nations Forces thus formed by sending a President Rhee’s letter to General MacArthur on July 15, 1950\(^{35}\).

As the UN forces was closing on Korean-Chinese and -Russian border following a successful counterattack and crossing of 38th parallel, the hope for and expectation of an immediate unification ran high among Koreans. The hope and expectation, however, had soon dissipated when Chinese army entered the war on the north Korean part in November, 1950. And the UN reacted to the new situation by adopting the General Assembly Resolution 384 (V) that requested its president to constitute a group of three persons to determine

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\(^{31}\) As for the Korean War, see Hakjoon Kim, *Unification Policies of South and North Korea*, pp. 87–160.

\(^{32}\) *UN hankukmunjae kyoluijip*, pp. 122–133; *Korean Unification*, pp. 122–123.

\(^{33}\) *UN hankukmunjae kyoluijip*, p. 134; *Korean Unification*, pp. 127–128.

\(^{34}\) *UN hankukmunjae kyoluijip*, pp. 135–136; *Korean Unification*, p. 128.

\(^{35}\) *Korean Unification*, pp. 128–129.
the basis on which a satisfactory cease-fire in Korea could be arranged and to make recommendations to the General Assembly on December 14, 1950\(^{(36)}\) and also by adopting the General Assembly Resolution 498 (V) condemning the Chinese government as having "itself engaged in aggression in Korea" on February 1, 1951\(^{(37)}\). We cannot go into details at this point, but we might be tempted to suggest that the intervention of the Chinese troops changed the whole matters considerably so that now the UN forces retreated to south Korea and many countries involved in the Korean war began to seek for a way out by means of cease-fire around the 38 parallel where the war had initially started. Finally, through a long hard, nerve-breaking negotiation (which started on July 10, 1951) during which a fierce fighting was fought in order to gain a better position at the negotiation table, the war ended on July 27, 1953 when the Armistice Agreement signed by the Commander-in-Chief, United Nations Command, on the one party, and by the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, on the other party earlier on the same day, entered into force\(^{(38)}\). It is to be noted that the south Korean government opposed to any negotiated cease-fire other than unification throughout and was accordingly not a party to the Armistice Agreement\(^{(39)}\). The fact immediately makes us to raise a question of whether the cease-fire agreement legally binding south Korea.

Before we go into this kind of legal problems it might be helpful to venture a few evaluational statements concerning the Korean War and its impacts on the prospect on national unification. From the Korean perspectives, sadly the Korean War brought nothing after all the blood-shedding and devastation of the entire country. Antagonism and mutual distrust because of the war became

\(^{(36)}\) Kukbangjojakji, vol. 1, p. 604; Korean Unification, p. 139.

\(^{(37)}\) UN hankukmunjae kyoluijip, pp. 121-122; Korean Unification, p. 145.


\(^{(39)}\) The ROK government announced its statement of opposing negotiation for armistice on June 27, 1951. See Kyonghyang sinmun June 28, 1951. See Kyonghyang sinmun, June 28, 1951 issue.

As a more drastic measure opposing armistice agreement that was about to come to a conclusion, the ROK government made an announcement of its unilateral decision to release non-Communist Korean POWs pursuant to the spirits of the Geneva Convention and human rights and indeed set free about 27 thousand non-Communist POWs on June 18, 1963.
deeper between south and north and between the non-Communists and the Communists so that a negotiated unification, for example, taking an Austrian style neutral road, is made practically impossible. Incidentally, the idea of unification through taking an Austrian style neutral position has been popular among some Korean intellectuals in south and abroad, but it is predicated on unification between two groups of Koreans before the world powers concerned approve it or acquiesces in it. And I believe the war made it rather clear that a unification by force is practically impossible because of the world powers which have diverse interests in Korean problems, and yet the north Korean regime has not thus far given up the hope of forceful unification under its own terms, that is, liberation of south Korea, either by a military means or instigating and helping various subversive activities in south.

In any case, an interesting question is that of the legal nature of the Korean War. This question became quite complicated by the very fact that one party of the de facto war fought as a UN forces and equally by the fact that it ended with an cease-fire agreement between the two warring parties, the UN forces and the North Korean and the Chinese armies. We cannot dwell on this problem long, but, in short, this de facto war was not a war in the conventional international law of warfare,\(^{(40)}\) nor a civil war, nor a collective measure originally envisioned in the Chapter 7 of the UN Charter. Neither side of the de facto war manifested its intention of war (animus belligerendi) explicitly or impliedly by way of declaration of war or otherwise. Observation of the Geneva conventions of 1949 by both sides alone would not make it a war in the conventional international law sense. Moreover, the UN Security Council defined the action of the north Korean regime on the Republic of Korea, a lawful government established under the UN sponsorship, merely as “armed attack” and further defined the armed attack as constituting “a breach of peace” in its resolutions mentioned above. Such resolutions adopted by the UN Security Council seems to have definitely deprived it of its status as a war in the conventional international law sense and, at the same time, its status as a civil war. Particularly according to the Security Council’s resolution of June 27, 1950, the Korean War is defined as

\(^{(40)}\) See Han-Key Lee, “Hankuk hyujonhyopjongui jaemunjae,” Korean Journal of International Law, vol. 3, pp. 56, 63 and 79. He defines the Korean War as a war in the conventional international law sense.
“military measures” required to repel “the armed attack” and thus to “restore international peace” and security breached by the armed attack, I believe that the Korean War could have been a civil war between two governments within a state, particularly when the legal and political position taken by both south and north Korean governments claiming itself as the de jure government toward each other as a belligerent group at best is considered, if the UN did not enter the conflict under its terms as mentioned above. I also believe, however, that the international character of the Korean conflict as military measures undertaken by the UN against the aggressor was considerably diminished by the fact that it ended with an armistice agreement concluded between the two sides.

The military measures taken by the 16 UN member nations was by no means the military measures envisioned under the Article 42 of the UN Charter, because the latter measures are predicated upon special agreements entered pursuant to the Article 43. Such special agreements never have been concluded between the Security Council and a member nation. The military measures taken by the UN in the Korean conflict could be a collective self-defense measures by the Korean government and 16 friendly nations (Article 51). I believe, however, that the Security Council whose primary responsibility is for the maintenance of international peace and security is authorized to recommend measures, even military measures, required to restore the international peace and security when it finds that there is a threat to or a breach of, international peace, or an aggressive act. Therefore, I believe that the UN Security Council had taken just that kind of measures under the Article 39, that is, it recommended member nations to provide necessary assistance, urgent military measures required to restore international peace and security, to the Republic of Korea. (41) And the 16 member nations responded to its recommendation by voluntarily sending military forces and other assistance to be available to a unified command under the United States which was authorized to use the UN flag. I also believe that the interpretation that the Security Council is under Article 39 authorized to recommend military measures is in fact reinforced by the General Assembly’s Uniting for Peace Resolution 377 (V) of November 3, 1950. (42) The General Assembly is empo-

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(42) Now since the Soviet was back to its seat the Security Council was not able to take any action
wered by the resolution to recommend member nations to take collective measures, even the use of armed forces in case of a breach of international peace or act of aggression, to maintain or restore the peace and security, if the Security Council fails, because of lack of unanimity of the permanent members, to exercise its responsibility for the maintenance of international peace and security. The resolution was necessitated by the inability of the Security Council to take an action because of lack of the unanimity of the permanent members since the Soviet returned to its seat. The resolution was designed to have the General Assembly in the place of the Security Council perform the functions of the UN maintaining international peace and security when the Security Council is unable to act because of lack of the unanimity of the permanent members. In any case, then the Security Council on which primary responsibility is conferred for maintenance of international peace and security is no doubt authorized to make recommendations to members for collective measures including military ones. These measures are no doubt predicated upon the duties of members to provide assistance in support of an action taken by the UN under its Charter and to refrain from assisting a nation against which preventive or enforcement action is taken by the UN (Article 5 Section 5).

In the Korean war, hostilities came to stop with an armistice agreement entered between the Commander-in-Chief of the UN Forces on the one hand and the Supreme Commander of the DPRK Army and the Commander of the Chinese People's Volunteers on the other hand, as we have seen. The de facto war did not end by a unilateral act of the UN Forces executing those resolutions of the Security Council and the General Assembly mentioned above. The armistice agreement has not been terminated by an agreement for a peaceful political settlement between two sides as envisioned in its provision Article IV, paragraph 60, nor replaced by a peace treaty. Technically, therefore, the

on the Korean question because of the Soviet's exercise of veto power there. Thus, the General Assembly came to take over the functions of the UN in the Korean War, which the Security Council undertook in the early phase of the war, by adopting the Uniting for Peace resolution.

The authority of the General Assembly to recommend member nations to take collective measures in case of a breach of international peace or act of aggression to maintain or restore the peace and security, if the Security Council fails to exercise its primary responsibility for maintenance of international peace and security because of lack of unanimity of the permanent members can be justified under the UN Charter Articles 10 and 11 Section 1. Jae-Shick Pae, "Kangjejeoch'i iae kwanhan ch'onghoeui kwonnung" (The Competence of the General Assembly with Respect to Enforcement Measures), *Korean Journal of International Law*, vol. 8, No. 2, pp. 319-350 (1963).
war, if it was a war, has not ended yet; only cease-fire has taken place. We do not have peace here in Korea accordingly. As we have mentioned, the ROK is not a party to the Armistice Agreement. No doubt, however, the armistice agreement is binding the ROK because it consented to assign command authority of the Korean army to the commander of the UN Forces, who signed the Armistice Agreement. Technically a party to an armistice agreement is entitled not only to terminate the agreement but also to resume hostility immediately in case of urgency in which the other party commits a grave violation of the agreement, according to the Hague Regulations on Land Warfare of 1907 Article 40. In any case, the Communist side has committed an innumerable, grave violation of the armistice agreement provisions by continuously reinforcing military forces, supplies, and equipment, to such an extent that it practically terminated the agreement, particularly those provisions against their reinforcement (Paragraph 13). Thereupon, the UN command announced on June 21, 1957 that it was exempted from its obligations under the provisions until a military parity was restored.\(^{(43)}\) And yet no hostilities were resumed. The armistice agreement contains practically no provision for its termination: it remains in effect “until expressly superseded either by mutually acceptable amendments and additions or by provision in an appropriate agreement for a peaceful settlement at a political level between both sides” (Art. V, Paragraph 62). And yet a political settlement or a peace treaty does not look near in sight as things stand now.

A preparatory meeting was held for a political conference of higher level for a peaceful settlement of the Korean problems pursuant to the Agreement Article IV, Paragraph 62 at the urge of the UN General Assembly (Resolution of August 28, 1953),\(^{(44)}\) but it soon went into adjournment sine die even without an agreement on procedural matters. There was Geneva political conference for a peaceful settlement of the Korean problems from April 27 to June 15, 1954, in which the 16 nations and the ROK on the one hand and the DPRK,


China, and the Soviet on the other hand participated, in accordance with an agreement of Foreign Ministers of the U.S., Great Britian, France, and the Soviet Union who met in Berlin from January 15 to February 18, 1954. Because of a sharp conflict between non-Communist and Communist sides, the Geneva conference came to nothing for a peaceful settlement of the Korean problems; it only reaffirmed their basic differences toward the authority and competence of the UN in Korea, and method and election procedures for a unified, independent and democratic Korea. The Communists not only repudiated and rejected the authority and competence of the UN in Korea but also labelled it as the tool of aggression. They demanded for elections prepared and conducted by an All-Korean Commission in which South and North would have equal representation under the supervision of neutral nations supervisory commission while non-Communists stood for free elections held under UN supervision for representatives in the National Assembly in which representation should be in direct proportion to the population in Korea(45).

We have a Supreme Court decision which announced that Korea was still in the state of war for the purpose of determining the competence of court-martial since only a cease-fire came into effect(46). As far as North Korea is concerned, I do not see that there is any difference between war and peace in their legal system, especially because they have been in a continuous state of war “for liberation of south.” Their system is from the beginning a kind of dictatorial system by definition. Their constitution does not particularly provide for emergency measures or for court martial as such. Such features are built in the fabric of the constitution in a sense.

South-North Agreement of July 4 1972 and Thereafter

The national unification policy which the ROK government upheld during the 1950’s and 1960’s following the Geneva Conference of 1954 that ended with failure to produce any agreement on the Korean problems was almost invariably establishment of “a unified, independent and democratic Korea” through “genuinely free elections” held “under United Nations supervision


for representatives in a National Assembly, in which representation shall be in direct proportion to the indigenous population in all parts of Korea.” This formula was one of the two principles pronounced in the Report to the United Nations on the Korean Political Conference at Geneva made by the participant nations except South Africa in the Korean War as the UN Forces on November 11, 1954 (47) and reaffirmed by the UN General Assembly (Resolution 811-IX of December 11, 1954) (48) as the objectives of the UN for the Korean problems. The other principle reaffirmed in the same resolution was “The United Nations, under its Charter, is fully and rightly empowered to take collective action to repel aggression, to restore peace and security, and to extend its good offices to seeking a peaceful settlement in Korea.” During that period, these principles were reaffirmed again and again by the UN General Assembly over the objection of the Communist side following debates on Korean problems in which the ROK government was invariably invited to attend and the DPRK government was invited under the condition that it accept the the authority and competence of the UN from 1961 (49).

The formula for unification of general free elections under the UN supervision for representatives in a national assembly in direct proportion to the indigenous population can, however, be in theory termed as repugnant to the position that the sovereign power of the ROK reaches the entire Korea and that the government of the ROK is the lawful government unless such elections are held under the national election law of the ROK. Under the position of the ROK, such elections should be held in north alone in accordance with the national election law of the ROK albeit under the UN supervision, not throughout the entire Korea (50). Therefore, even a minister of the government is committing a treasonous act against the sovereignty of the ROK and against the lawfully established government of which he is a member if he advocates the formula. This particular issue, however, did not produce any serious practical problem in the national politics of south Korea.

The counterproposal of the Communists at the Geneva Conference was elections in Korea prepared and conducted by an All-Korean Commission in which

North and South have equal representation and under the supervision of neutral nations supervisory commission, as we have seen. The North Korean proposals for unification during the 1950’s following the General Conference was in short “a peaceful unification” composed of the proposals: an international conference for the talk on withdrawal of foreign troops and reduction of armed forces; a South-North Korean conference for the talk on economic and cultural exchange and travel and exchange of correspondence; free elections. They were in fact a peace campaign to have a respite needed for recovery from war damages. In the early 1960’s, however, the North Korea switched its position to a confederation proposal for unification.\(^{(51)}\) In the late 1960’s they were busy in engaging in provocation and subversive activities toward south without proposal campaigns for a peaceful settlement.

The 1970’s would mark a new era for south-north relations beyond the armed provocations and tension resulted thereby in the later part of the 1960’s. To the reunion proposal for separated family members of the South Korean Red Cross, the North Korean counterpart responded to meet at Panmunjom in 1971, followed by a series of meetings and exchange of visits of South-North Korean Red Crosses continuing into 1972 and on\(^{(52)}\). In the meantime, the historic South-North Joint Communiqué that had surprised everybody was announced respectively in Seoul and in Pyongyang on July 4, 1972, following an exchange of secretly arranged visits by high ranking delegates in previous May as revealed at the time of its announcement.\(^{(53)}\) The communiqué signed by the delegates “upholding the desires of their respective superiors” contains an agreement by South and North on the three principles for unification of the fatherland and further agreements on practical matters to deal with better South-North relations. The three principles are: (1) unification shall be achiev-

\(^{(51)}\) See Kim Il-sung’s speech of August 14, 1960 in commemoration of the 15th anniversary of liberation from Japan in which Kim’s proposal for economic cooperation and confederation as a provisional step to unification was included, as carried in *Korean Unification*, pp. 252-254. Following the speech, the idea of confederation became more elaborated in Kim’s speech made at the 8th Congress of the North Korean 2nd Supreme People’s Assembly in November, 1960. *Choson jungang nyonkam* (North Korean Central Yearbook) 1961. pp. 27-42. And the confederation proposal was reiterated in his speech made at the 1st Congress of the 3rd Supreme People’s Assembly held on October 23, 1962. In the confederation proposal cooperation between two Koreas were added as a precondition. *Choson jungang nyonkam* 1963. pp. 32-34.


ed through *independent* efforts without being subject to external imposition or interference; (2) unification shall be achieved through *peaceful* means, and not through use of force against one another; (3) a *great national unity*, as a homogenous people, shall be sought first, transcending differences in ideas, ideologies and systems (underlines are mine). The further agreements in the communique include those not to defame and slander one another, not to undertake armed provocations, and to take positive measures to prevent inadvertent military incidents, to carry out various exchanges in many areas, to cooperate positively with one another to seek an early success of the South-North Red Cross Conference, to install and operate a direct telephone line between Seoul and Pyongyang, and to create and operate a South-North Coordinating Committee, jointly chaired by Director Lee Hu Rak and Director Kim Young Joo, who signed the communique. This communique, particularly its three principles, was taken over by the UN General Assembly as part of its consensus statement adopted on November 28, 1973, which also dissolved the UN Commission for the Unification and Rehabilitation of Korea\(^{(54)}\).

The communique, however, raised a few legal questions in south Korean politics: First, what is its legal nature; is it a treaty? Although it is not a treaty between two states regulating their particular rights and duties, it is nonetheless an agreement between two international entities concerning certain matters, legal effects of which we cannot deny all together\(^{(55)}\). Second, is it


amounted to an implied recognition of North Korean state.\footnote{All the studies cited in Footnote (55) above maintain that the communique did not amount to the ROK’s recognition of North Korea as a state. But all agree that it constitutes an implied recognition of North Korea as a \textit{de facto} local government at the least.} It is to be noted that the use of the formal titles of South Korea and North Korea is avoided and that names of both heads of South and North Korea who are competent to conclude a treaty are also conspicuously absent on the surface of the communique. Instead, Lee, Director of CIA of South Korea, and Kim, Director of Organization and Guidance of the KWP and real brother of Kim Il-song, of North Korea signed the paper, “upholding the desires of their respective superiors”. I believe this is a deliberate scheme to avoid their fear of its being interpreted as a mutual implied recognition of statehood toward each other. And both the governments made it clear through a number of public statements that the agreement did not amount to a recognition of each other as a state and that their previously held positions and policies on unification and toward each other would remain unchanged by the agreement.\footnote{See Lee Hu Rak’s statements made at the press conference held immediately following the announcement of the communique as reported in the daily newspapers, \textit{Donga Ilbo}, July 4, 1972 issue; \textit{A White Paper on South-North Dialogue in Korea}, pp.93-94; Prime Minister Kim’s answers at the ROK National Assembly session, \textit{Chosun Ilbo}, July 30, 1972.} As for south Korea, the agreement would not be in violation of the proposition that the sovereign power of the ROK reach the entire Korea. At a National Assembly question and answer session in June 26, 1973, Prime Minister Kim announced that the ROK stood for one-nation-one-state-two-governments position unlike West Germany’s one-nation-two-states.\footnote{See \textit{Chungang Ilbo}, June 27, 1973, and \textit{Kyonghyang sinmun}, June 27, 1973.} Therefore, thirdly, the question is whether the agreement is not made in violation of the National Security Law, under which a collaboration or agreement with persons from north Korean authorities would constitute a punishable crime.\footnote{See also Ki-bung Chang, “Hwanhae jongeh’ae kwa nambukhanui bopjok kwankyo,” pp.82-83, 85-87, and 89-90; Dui-Kwon Choi, “Han’guk tongil bangane kwanhan kuknaebopjok koch’al,” pp.37-40.} Although there was of course no

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criminal charge lodged against the officials who had contacts with north Koreans to strike the agreement, it raised that question seriously to many lawyers and opposition politicians. This concern eventually led to a proliferation of legal studies on the agreement and other related matters (60).

Finally, the question raised was that of whether the parties to the agreement would willingly adhere to what they appeared to have agreed and would find eventually a peaceful means to achieve the most desired unification or to straightsen out their differences to come to an equitable settlement of the Korean problems. This question is posed less as a legal one of whether it is binding the parties than as a political one. What were they going to achieve by the agreement? The agreement and its follow-up South-North Coordinating Committee meetings along with South-North Red Cross sessions aroused an unusually high hope of early unification among Koreans of all walks of life. At the advantage of hindsight, it seems that both the leaders of South and North Korea used the euphoria thus aroused to consolidate their internal power more than anything else. For that purpose of strengthening their grip of power, both undertook their overhauling constitutional amendment road respectively in South and North (both on December 27, 1973).

In consideration of North Korea’s belligerent past history, a peace offensive is rather suspicious. For several months prior to launch the Korean War, North Korea had conducted an active peace offensive with innocent looking proposals and suggestions. This time it was later revealed clear that they were engaging in digging a number of infiltration tunnels apparently for military use under the Demilitarized Zone while they were meeting South Koreans for Red Cross, the Joint Communique, and Coordinating Committee talks (The first discovery of one of the tunnels was made on November 15, 1974). In any case, North Korea has never repudiated their goal of liberating southern Half (south Korean revolution) in the first place. At the time of announcing the communique, Vice Premier Park of Norea Korea added to the effect that Kim Il song sugg-

ested the three principles (contained in the communique) and the South Korean side gave an unconditional support and that the American imperialists have no business in the internal matter of our country so that they should immediately pull out their forces of aggression.\(^{61}\) On the other hand, Lee who signed the document for South Korea reiterated that the three principles for unification in the Joint Communique would not give rise to any change in the principal goal of the ROK for unification through general elections conducted under the UN supervision in direct proportion to the indigenous population in Korea.\(^{62}\) And Prime Minister Kim of the ROK spoke at a National Assembly session on September 29, 1972 that the contents of what were agreed upon would have a meaning only when they were observed and otherwise they would be no more than a waste paper and that we would wait and see what North Korean attitudes would be like in coming days.\(^{63}\)

A hot-line between Seoul and Pyongyang was installed and the South-North Coordinating Committee was formed pursuant to the provision of the Joint Communique. And there were more meetings and exchanges of visits of various level for the Coordinating Committee, along with contacts for Red Cross conference. In the meantime, President Park of the ROK announced his peaceful unification foreign policy on June 23, 1973, in which he would not object admission to membership in the UN of both Koreas as a provisional measure before realization of unification.\(^{64}\) On the same day, however, Kim Il-song in a speech made his five articles proposal for unification, the main feature of which is establishment of “Confederal Republic of Koryo.”\(^ {65}\)

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\(^{63}\) *Choson Ilbo*, July 30, 1972.


\(^{65}\) North Korea has been making a series of confederacy proposal the legal and political meanings
of which are far from clear cut; they have been more a propagandist and tactical deploy to have an upper hand over the Korean problem between South and North. The Korean term yonbang meaning federalism has been used in those proposals. When judged from its contents, however, those proposals appear to indicate more a confederacy proposal than federalism despite the use of the term yonbang. Kim Il-song’s proposal of June 23, 1973 which was made several hours later than President Park’s proposal made on the same day was intended to refuse the latter’s proposal for a simultaneous admission to the UN membership more than anything else. Kim Il-song made the proposal in his speech this time at a mass meeting welcoming the visit of Gustav Husse, general secretary of the Czechoslovak Communist Party, The People’s Korea, June 27, 1973. Even after the proposal of June 23, 1973, the unflinching North Korea has kept proposing a more or less same idea of confederacy for national unification on July 24, 1973, September 5, 1973, May 31, 1975, October 6, 1975, June 20, 1977, April 24, 1978, September 6, 1978, October 10, 1980, January 19, 1981, September 9, 1983, and again October 18, 1985. A White Paper on South-North Dialogue in Korea, pp. 240-260. See also Footnote (51) above.

In any case, the North Korean proposal of yonbang has occasioned a great many studies on federation and confederacy ideas and other integration schemes such as the EC: Chong-kyun Kim, “Kukkai bokhap hyonggsik” (Forms for Union of States), Bopjong, vol. 19, No. 8, pp. 69-74 (1964); Chong-kyun Kim, “Bokhapjaeuk kukjejokin bopjaeyok” (Composite International person), Korean Journal of International Law, vol. 10, No. 1, pp. 5-29 (1965); Kyong-Jo Kim, “Kuju kyongjae gongdongs'aeui bokjae kujeje kwanhan koch'al” (L’Etude juridique sur l’Organisation de la Communauté Économique Européenne), Korean Journal of International Law, vol. 16, No. 2, pp. 23 50 (1971); Chong-kyun Kim, “Kukjaebopjaeui punhw model kwa pundan model ui biko ryuhyongjok koch'al” (A Study on the Legal Status and Unification of the Divided States), Korean Journal of International Law, vol. 20, No. 1~2, pp. 95-174 (1975); Byong-ik Yun, “pundankukkai tonghappironaeo bon dakakjokin nambuk kyuruk jeui pyongka” (An Evaluation of Proposals for Various Exchanges between South and North Seen from Theories on Unification of Divided States), Tongil jongch'ae, vol. 2, No. 2, pp. 63-72 (1976); Ha-il Pak, “Nampuk yonbangjaeronui jindan” (A Diagnosis of the Proposal of the South-North Federation of Korea), Tongil jongch'ae, vol. 2, No. 2, pp. 102 114 (1976); Sok-yol Yu, Pukkai “Nampuk yonbangjae” punhw koch'al (An Analysis of North Korea’s South-North Federation), a Ministry of Foreign Affairs Foreign Relations and Security Research Center sponsored study, (Seoul: Cemupu oekyoonbo yonkuwon, 1980); Sok-yol Yu, Pukkai “Nampuk yonbangjae” jajangjae daehan dae-tongch'ae-jongch'ae konui (Policy Proposals for the North Korean Idea of South-North Federation), a Ministry of Foreign Affairs Foreign Relations and Security Research Center sponsored study, (Seoul: Cemupu oekyoonbo yonkuwon, 1980); Yong-dae Song, “Nampuk yonbangjaeron bipan” (A Criticism on the South-North Federation Proposal), Tongil jongch'ae, vol. 6, No. 2, pp. 169-199 (1980); Jae-Shick Paek, “Nampukkai bokjae kujejoma tongilbangamui biko koch'al” (Legal Relations between South and North Korea and a Comparative Study of Unification Proposals), in Hyondae honghupui riron in commemoration of Dr. Do-Chang Kim’s 60th Birth Day, (Seoul: Hakyonsa, 1982), pp. 12-39; Dae-Kwon Choi and Hi-yol Kae, Saecke koyonbangkukka honghupui songrip packyong mit ryuhyongglyol biko yonku (A Comparative Study of the Origins and Patterns of the Constitutions of Federal States of the World), a ROK National Unification Board sponsored study, (Seoul: the ROK National Unification Board, 1982); Yong-sol Kwon, Jayakwon mit hongshkoon yonbanghosob biko yonku (A Comparative Study of the Federal Constitutions of the Free and Communist Worlds), a ROK National Unification Board sponsored study, (Seoul: the ROK National Unification Board, 1982); Yong-song Kwon Yonbang tongil kukka gajongsi honghupjilso mit tongch'ikjaeje kwzanhan yonku (A Study of the Constitutional Order and Governmental Structure When a United States is assumed through Federalism), a ROK National Unification Board sponsored study, (Seoul: the ROK National Unification Board, 1982); Chong-kyun Kim, “pundankukui tongil hyongtae-
Proposed on January 18, 1974 for a non-aggression agreement.\(^{(66)}\) In response, Vice Premier Ho of the DPRK proposed for a peace treaty to replace the armistice agreement toward the US on March 25, 1974.\(^{(67)}\) In any case, Kim, Co-Chairman for North of the Coordinating Committee made on August 28, 1973 an abrupt announcement that he would not sit with his South Korean counterpart. And by the middle of 1975 the Coordinating Committee talks came to a complete stop.\(^{(68)}\) Now the question is whether the agreement of July 4, 1972 was totally lost by the North Korean announcement of August 28, 1973 and subsequent unilateral acts of stopping the Coordinating Committee talks all together. In South Korea, the agreement of July 4, 1972 is taken as still legally standing with its Coordinating Committee part alone being repudiated.

Certainly we cannot go in indefinite details of South-North contacts and proposal-counterproposals in the later part of 1970’s and in the 1980’s. It might be sufficient, however, to mention chronologically just a few things for our present purpose. It 1979, there was a “Three Authorities Meeting” proposal by the ROK and the U.S. which was immediately rejected by the DPRK.\(^{(69)}\) In 1980, there were a number of working level meetings for the preparation of South-North Prime Ministers’ talks but the working level meeting was suspended by the DPRK.\(^{(70)}\) In 1981, the ROK proposed for exchange of visits by, and for talks of, highest authorities, which were rejected by the DPRK.\(^{(71)}\) And North Korean proposal for a “conference for acceleration of unification” between the representatives of political parties and social organizations of the

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\(^{(67)}\) Rodong sinmun, Mar. 26, 1974.


\(^{(70)}\) South-North Dialogue in Korea, No. 23 (July, 1980); South-North Dialogue in Korea, No. 24, pp. 15–35 (November, 1980).

two zones of Korea again reiterated the idea of confederation.\(^{(72)}\) In 1982, President Chun announced his comprehensive, realistic “Formula for National Reconciliation and Democratic Unification,” in which a proposal for conclusion of a provisional agreement on basic relations between South and North was included.\(^{(73)}\) In response, the DPRK announced their call for “Joint Meeting between South and North Korean Politicians.”\(^{(74)}\) In 1983, there was President Chun’s renewed call for “Meeting between Top Leaders of South and North Korea.”\(^{(75)}\) In 1984, there was North Korea’s proposal for a “Tripartite Meeting.”\(^{(76)}\) On the other hand, there were several different contacts for sports meeting and for delivery of materials for flood victims in South.\(^{(77)}\) In 1985, there were South-North economic talks, talks for a full-dress Red Cross meeting and contacts for parliamentarians’ conference, which were unilaterally suspended by North early in 1986.\(^{(78)}\) In 1985, however, there were exchanges of hometown visitors and art troupes realized.\(^{(79)}\) And from 1986 there have been IOC sponsored South-North contacts for Olympic sports events to be held in 1988.

**Concluding Remarks**

The division of Korea at the 38th parallel had started initially as a temporary measure to facilitate the surrender of the Japanese troops in Korea as agreed by the US and the USSR. The Allied Powers at the end of the Second World War had agreed that Korea should become free and independent in due course. There was no agreement that had entitled a nation, even either the US or the USSR, to perpetuate Korean division; there was no agreement either that had entitled a nation to impose on Korea its will to install a friendly government whose political-legal system was modelled after its own particularly by way of using a few hand-picked Korean runners like Kim Il-song in the front in disregard of the desires and aspirations of the majority of Koreans. Here


\(^{(74)}\) *South-North Dialogue in Korea*, No. 29, pp. 31-50 (October, 1982).

\(^{(75)}\) *South-North Dialogue in Korea*, No. 31, pp. 7-28 (April, 1983).

\(^{(76)}\) *South-North Dialogue in Korea*, No. 34, pp. 25-31 (May, 1984).

\(^{(77)}\) *South-North Dialogue in Korea*, No. 35, pp. 10ff. (August, 1984); No. 36 (December, 1984).

\(^{(78)}\) *South-North Dialogue in Korea*, No. 37 (March, 1985); No. 38 (August, 1985); No. 39 (November, 1985); No. 40 (April, 1986).

the controlling principle ought to be that of national self-determination. Then
either perpetuation of the division by a nation or imposition on Koreans against
their will of its will to make Korea be forcefully modelled after its system and
under its wing beyond an agreement or outright without an authorizing agree-
ment should be termed *ultra vires* and thus unlawful. Further, the general
principle of law dictates that one who is responsible for an unlawful state of
matters is responsible for redressing such an unlawful state of matters. Both
the USSR and the US have no right to perpetuate national division of Korea.
I believe they are responsible for correcting the *unlawful* division and for
realizing national unification of Korea pursuant to the Cairo and Potsdam
Declarations.

Under the principle of national self-determination, (80) Koreans have inherent
right to determine their own destiny without a foreign intervention. I believe,
moreover, a majoritarian rule ought to be the controlling procedural principle for
national self-determination. At this stage of our analysis, we have to note that
Kim Il-song and his government had started as an extremely unpopular regime
even among north Koreans and moreover as an imposed one by the Soviet
Russia and that now he has built his kingdom there in North Korea under
the name of constructing a socialist state. He has been trying to place South
Korea under his regal rule by using various means. Realistically speaking, this
is how North Korean leaders perceive Korean national unification.

Although Koreans had no part at all in the initial national division of Korea,
it is Koreans themselves that are first of all responsible for initiating a step for
national unification of Korea, for one who suffered an unlawful state of matters
(such as *ultra vires*, damages, and injustice) naturally wants to have such an
unlawful state of matters corrected and is above of all responsible for initiating
redressing procedure.

A realistic evaluation of the situation in Korea shows, however, that unfortu-
nately attainment of Korean national aspiration for unification does not look
promising in the near future; neither side of Korea is willing to give up its
system to join the other side. A settled co-existence of two Koreas in the form

(80) See International Covenant on Economic, Social and Cultural Rights (A) Article 1 and
International Covenant on Civil and Political Rights (B) Article 1. See also Hyo Sang Chang,
"Right of Self-Determination in Divided Countries: Its Applicability to the Korean Uni-
fication," *Österreichische Zeitschrift Für Öffentliches Recht und Völkerrecht* 35, pp.177-196
(1984): Ki-hwan Nam, "Pundan hankukui kukjaebopjok songkyok kwa hanminjokui
tongilmunjae."
of non-aggression agreement, agreement on the basic relations, admission to
the UN membership of two Koreas, the USSR and China recognizing the ROK
and the US and Japan recognizing the DPRK, and the like, despite the ROK’s
position of its sovereignty reaching the entire Korea and the DPRK’s policy of
liberation of South, might be practically the second best choice. At this point,
there is a strong resistance to this kind of second best choice of North Korea
with support of the USSR and China in the name that it would perpetuate
national division.

Here we have several lines of dualism: two Koreas still live under Armistice
Agreement of 1953, that is, in a no-war-no-peace situation not only in legal
but also actual terms: armed confrontation and tensions along the demilitarized
zone and otherwise along with some dialogues; each of both Koreas maintains
its avowed claim of de jure status over the entire Korea and the other side
being only a de facto local government at best; and yet both Koreas retain
certain direct contacts and limited agreements between them while engaging
in all kinds of confrontations on every world scenes like those around the UN,
the third or non-aligned nations politics, cultural and sports events, world
markets, and building of armed forces. To the extent that such dualisms exist,
we have quite a unstable legal foundation either for national division, for
national unification, or for peaceful co-existence of two Koreas at the moment.

Finally, whichever direction future development of relations between two
Koreas may lead to and whatever course Korean national unification may take,
our conviction dictates that human rights and dignity ought to be another
controlling principle for the entire matters. Any decision or agreement that
will determine the future course of relations between two Koreas and for uni-
fication cannot be sustained unless it is made on the basis of respect for the
basic human rights and dignity. This is because, at this juncture of civilization,
we have a profound doubt about what values a solution of the Korean problem
will have to the people involved, the Korean people, if it is in complete
disregard of the basic human rights and dignity,