

Building a Unification Infrastructure: To Legislate a Basic Inter-Korean Law

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INTRODUCTION

Since the founding of the Republic of Korea in 1948, South Korea's relations with its northern counterpart have been dictated by its Constitution and by the National Security Law. Looking at Article 3 of the current South Korean Constitution from the standpoint of a dogmatic interpretation of law (*Rechtsdogmatik*), it claims that the entire northern region of the peninsula legally belongs to the Republic of Korea, and it denies any other sovereign entity. Under the National Security Law, not only is the North Korean government an anti-state organization but any interaction between the South and North Korea is also defined as anti-state.

However, with the democratization movement of the late 1980s, South Korean society recognized North Korea as an actual entity, and began to engage it. On August 1, 1990, the South Korean government promulgated laws regarding inter-Korean exchange and cooperation, taking steps towards building equal and cooperative inter-Korean relations.

Furthermore, with the passage of the four agreements on inter-

Korean economic cooperation in the National Assembly in June 2003, which came into force in August 2003, North Korea became a concerned party in the agreement backed by the South Korean domestic legal system. With visible progress in inter-Korean relations and the attending atmosphere of peace and reunification, momentum is growing for a Constitutional revision and abolishment of the National Security Law.

Over the years, the laws defining inter-Korean relations have either been reinterpreted based on changes in the social and political climate or revised to reflect changes in inter-Korean relations. The ever-shifting nature of inter-Korean relations is part of the inevitable, transient nature of the special relationship formed during the move towards reunification. Considering the qualitative progress in inter-Korean relations today, (for example, the increased number of programs to foster reconciliation, cooperation, and exchange) future laws prescribing inter-Korean relations should be such as to anticipate and accommodate changes on the Korean peninsula. Therefore, instead of the rigid perspective of a legal framework, future inter-Korean relations should be approached from the perspective of sociology of law, through which legal change could be facilitated in response to social changes, so as to further social progress.

CONTROVERSY OVER LAWS CONCERNING INTER-KOREAN RELATIONS

Clash between the Articles in the Constitution

The Constitution is the body of fundamental laws and regulations of a nation that govern all other laws and regulations, and also includes provisions prescribing the function and nature of the government. And it is the Constitution that shapes the South's policy on North Korea, unification and the inter-Korean relations.

Recently, however, more questions have been raised about contradictory provisions in the Constitution: Article 3 (Territory) and Article 4 (Unification and Peace).

The “Territory” article defines South Korea’s territorial rights, and the “Unification” article defines its unification policy. Article 3, which has been part of the South Korean Constitution since its establishment in July 1948, states that “[t]he territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands,” that includes North Korean territory as part of the Republic of Korea and denies any sovereign entity other than the Republic of Korea.

Article 4 of the Constitution, revised in December 1980, states that “[t]he Republic of Korea seeks formulation of a policy of peaceful unification based on the principles of freedom and democracy,” which contradicts Article 3 by acknowledging the territorial division of the peninsula.

In other words, Article 3 claims the Republic of Korea’s sovereignty over the entire peninsula, including the North, while Article 4 acknowledges North Korea’s right to govern the northern half of the peninsula. In legal terms, Article 3 denies, in principle, the division of the peninsula. At the same time, Article 4, reflected by developing social phenomena, supports unification of the peninsula as the aim of the government.¹⁾

Given the reality, strict adherence to the dogmatic approach to law regarding the Territorial article would not only restrict the overall reconciliatory mood in inter-Korean relations but would also stifle proactive measures to deal with the current situation, in which

1) According to Professor Jae Sung-ho, there is no contradiction between the two articles, since Article 3 should be understood as a disjunctive provision suggesting the proposition of reunification and Article 4 as making explicit the method of reunification. Jae Sung-ho, “Debate on the Abolition of the Constitutional Article on Unification” (in Korean), *Korean Journal of Unification Studies*, Vol. 1 (Seoul: KINU, 1992), p. 282.

there is growing support for revision or abolishment of the Territory article.

Application of the National Security Law

The National Security Law (NSL) was enacted on December 1, 1948, soon after the founding of the Republic of Korea, in order to safeguard a free democratic system by stemming the surging ideological clash between the right and the left, and to quell Communist activities. The NSL has been revised eleven times.²⁾ The current version is based on the basic framework of the May 1991 revision, revised to accommodate the shift in South Korea's North Korea policy and to strengthen human rights protection. In relation with the North, the most controversial article of the NSL is Article 2 (Definitions).

Article 2 defines anti-State organizations as "domestic or foreign associations or groups having a command structure, and arrogating government title, overthrowing the State or causing national disturbances." If the phrase "arrogating government title" stands as it is, the Democratic Peoples Republic of Korea (North Korea) would be considered an anti-State group. However, the phrasing in Article 2 is inconsistent with the content of the 1991 Basic Agreement and the June 15 Joint Declaration of 2000, in which both South and North Korea acknowledge the other as a legal entity. Therefore, there is a suggestion to revise the phrasing of the article to "any association intending to cause national disturbances."³⁾ Another argues that

2) For more detail and insight into the legislation and revision of the National Security Law see Kim Sung-nam, "Written Opinion from the Public Hearing on Abolishing the National Security Law" (in Korean), *Inkwonkwa Jongui*, Issue 162 (February 1990), p. 130; Park Won-soon, *A Study on the National Security Law, I: the History of National Security Law* (in Korean), 2nd ed. (Seoul: Yeoksa bipyong-sa, 1990), pp. 75-224.

3) Lee Dong-bok, "Reviewing the Issue of Abolishing the National Security Law," a paper presented at a seminar, Conference for Revision the National Security Law,

unless North Korea conducts Communize activities toward the South, it should be considered as an organization for reconciliation and cooperation.⁴⁾

There has been growing dissension over whether the Security Law should be abolished. In fact, polarization over the issue of abolishing NSL is a direct reflection of the ideological polarity in South Korean society. Those supporting abolishment argue that the legal origin of the NSL is itself unconstitutional, anti-unification, and anti-democratic; meanwhile, those who are against abolishment claim that is false.⁵⁾ In the end, the controversy stems from whether to recognize North Korea as a legitimate entity, and it demonstrates the need for a legal basis on which to define North Korea in order to ensure stability in the development of inter-Korean relations.

Inter-Korean Exchange and Cooperation Act

In the past, laws on the inter-Korean relations had been enacted with the view that North Korea was the arch-foe; however, the Inter-Korean Exchange and Cooperation Act, enacted on August 1, 1990, defines South Korea's relationship with the North in terms of a partnership. Enacted to liberalize inter-Korean interactions and to define the process of inter-Korean exchange and cooperation, this law takes precedence over other laws. It is the first such law since the founding of the Republic to give legal sanction to inter-Korean exchange and cooperation.

There is, however, debate over whether the Act should be considered a special law or a basic law governing inter-Korean relations. Those who assert that it is a special law refer to the clause

hosted by the National Congress for New Politics (September 29, 1999), pp. 4-5.

4) Jae Sung-ho, *Research on the Legal and Institutional Infrastructure for Unification* (Seoul: KINU, 2003), p. 268.

5) Jae Sung-ho, "The National Security Law and Domestic Discord in South Korea" (in Korean), *Joongang Buphak*, Vol. 3, Issue 3 (2002), pp. 69-111.

“as far as it is deemed just” in Article 3 of the act as overriding the National Security Law.⁶⁾ On the other hand, those who assert that it is a basic law framing inter-Korean exchange and cooperation, point out that the Act not only defines all matters of inter-Korean interaction and exchange, but also provides flexibility in defining the bilateral relationship in broad terms, such as the application of the Act in South Korean humanitarian efforts for North Korea.⁷⁾

Given the growth rate in inter-Korean relations in various fields, however, relying on the Exchange and Cooperation Act alone to define all aspects of inter-Korean relations could signal many problems ahead. Therefore, more concrete and realistic reformulation and revision of relevant laws is needed to lay the groundwork for institutionalization and advancement of inter-Korean relations.

SIGNIFICANCE OF THE BASIC ACT FOR PROMOTION OF INTER-KOREAN RELATIONS

The Development of a Legal System in Inter-Korean Relations

South Korea's typical slogans on North Korea between 1948 and 1972 were to “establish one nation through an UN-supervised general election,” to “make anti-Communism the national policy,” and to “build a dominant national power over the North.” However, the adoption of the July 4 Joint Communiqué in 1972, based on the principles of autonomous, peaceful unification, and national unity, led to rapid progress in the inter-Korean relations towards mutual

6) Park Yoon-heun, “Supplementing the Inter-Korean Exchange and Cooperation Act Based on the Basic Agreement between South and North Korea and Direction for Development” (in Korean), *Journal of Law*, Vol. 34, No. 2, Seoul National University (1993), p. 6.

7) Jae Sung-ho, “A Proposal for Reforming Legal System to Promote Inter-Korean Exchange and Cooperation” *Research Report*, 96-13 (Seoul: KINU, December 1996), p. 6.

recognition and equality, and negotiation of differences through political means. The two sides, at least nominally, began to consider each other not as enemies but as partners in their common goal of peaceful unification.

Such changes led to constitutional amendments to include the phrase “peaceful unification of the nation.” The same acknowledgements were made applicable to the *Yushin* Constitution, especially Article 35 (*Tongiljuche Gookminhoeui*, National Congress of Unification), Clause 3 of Article 43 (Duties of the President), and Article 46 (President’s Inauguration Oath), legally acknowledging the division of the peninsula and stating peaceful unification as a national goal. By clearly stating the goal of “peaceful unification of the nation” in the Constitution, Seoul’s North Korea policy took a more open and active turn, culminating to the recognition of Pyongyang as a *de facto* government in the Diplomatic Policy Proclamation for Peaceful Unification of June 23, 1973.⁸⁾

To reflect the changes in Seoul’s North Korea policy, the Constitution was revised, giving indirect recognition of the division of the Korean peninsula. However, nothing was mentioned of the contradiction in the “Territory” article in the 1970s. Moreover, even though Pyongyang was recognized as a *de facto* government, the National Security Law was only revised to consolidate anti-Communist laws under the new military government that came into power in 1980, and no revisions were made to reflect the overall social changes.⁹⁾

Inter-Korean relations made notable progress in the late 1980s, and, on July 7, 1988, the South Korean government issued a declaration reaffirming the principles of the July 4 Joint Communiqué of 1974 (autonomy, peaceful unification, and national

8) Bae Jae-sik, “Legal Relationship between South and North Korea” (in Korean), *Korean Journal of International Law*, Vol. 21, No. 1/2 (1976), pp. 241-242.

9) The National Security Law and Anti-Communist Act were consolidated by the sixth revision of the National Security Law on December 31, 1980.

unity) and called for a creation of a single “national commonwealth” between South and North Korea. In December of the same year, the Constitution was once again revised so that the full text of the Constitution recognized the national division and affirmed peaceful unification of the nation as the goal of the Korean people, also adding the “Peaceful Unification” clause in Article 4.

Breaking away from the past government-led unilateral unification policy and embracing the unification movement and the democratization spirit of 1980s, the 1988 revision of the Constitution not only propelled the government to pursue a more active North Korea policy but also provided a legal framework for the government to assume such a role. Along with the revision of the Constitution, the National Security Law underwent a significant change in the interpretation of the Law, adding a clause in Article 1 (Purpose) that prohibits any arbitrary or expanded interpretation of the law that would infringe on the basic human rights guaranteed by the Constitution.¹⁰⁾

Since the beginning of the 1990s, there has been a growing need to step up measures to realize the goals of the July 7 Declaration and to institute a legal system necessary to carry out such goals while keeping the spirit of partnership alive. Amidst enormous support to expand inter-Korean exchange and cooperation efforts, the Inter-Korean Exchange and Cooperation Act was established and promulgated on August 1, 1990. The enactment signified the South Korean government’s commitment to pursue a unification policy based on law.

Upon joint membership in the UN in 1991, the Korean peninsula was divided into two separate nations diplomatically, while internally, a single nation still existed. In order to repeal the “one-state only” policy of the past, South and North Korea concluded the

10) South Korean government and the National Assembly carried out the eighth revision on May 31, 1991 with the purpose of assuming a more active role in promoting its North Korea policy and to strengthen human rights protection.

1992 Basic Agreement, which redefined the bilateral relations to reflect the reality. Composed of 25 provisions, the Basic Agreement states, in both Preamble and Article 1, that the relationship between South and North Korea is “not one between countries but a special one constituted temporarily in the process of reunification,” reaffirming that while two nations existed diplomatically, there was a special circumstance in which internally there were two systems under one nation.

After the adoption of the Exchange and Cooperation Act and the Basic Agreement, bilateral relations showed visible progress, and along with the agreement on eight follow-up protocols, there have been frequent talks between Seoul and Pyongyang in order to effect the relevant measures. In the end, the Inter-Korean Exchange and Cooperation Act and the Basic Agreement were synergistic in advancing the inter-Korean relations significantly forward by institutionalizing the system of peaceful coexistence between South and North Korea in their common efforts towards reunification.

With the prevailing mood of reconciliation and progress in inter-Korean relations, Seoul and Pyongyang took steps to solidify their newly affirmed relationship based on the recognition of each other as fellow countrymen. With the June 15 Joint Declaration of 2000, both sides recognized common elements in their respective unification formula and agreed to work towards peaceful reunification. Since the Joint Declaration, inter-Korean relations have made impressive headway, not only in economic areas, but also in all areas of exchange and cooperation, culminating in over 20 agreements in various fields.

In particular, four agreements on inter-Korean economic cooperation enacted in August 2003, having the same force as internal law, represents a landmark development in the inter-Korean relations, a touchstone in changing the characteristic of the bilateral relations from backward-looking to forward-looking. It is generally recognized that the Cold War era regulations still remaining in the Constitution and the National Security Law are impediments to the

advancement of inter-Korean relations, and need to be repealed for effective execution of inter-Korean exchange and cooperation projects.

Significance of a Basic Law for Inter-Korean Relations

In response to the national debate calling for an institutional legal framework to promote inter-Korean relations and to pursue North Korea policy more objectively and transparently, 125 members of the ruling Uri party submitted a joint initiative for a bill, the Basic Act for Promotion of Inter-Korean Relations (Basic Relations Bill), at the ordinary session of the National Assembly on September 3, 2004. According to the stated purpose of the initiative, the bill was introduced to meet the need for transparency under the basic legal framework for pursuing North Korea policy, to bring stability and consistency to inter-Korean relations, and to promote progress in bilateral relations by defining the relations within a legal framework. Recognizing that inter-Korean relations have been shaped solely by the will of the President or the ruling party in the past, producing many negative side effects that in turn led to national division, the initiative seems to have been aimed at creating a national consensus on inter-Korean relations by clarifying the scope and the content of Presidential powers in the matter.

In the past, the laws governing inter-Korean relations often skirted the existing legal system if that was necessary to improve inter-Korean relations. The Basic Relations Bill, on the other hand, will lay the legal groundwork and system for exchange and cooperation between South and North Korea. Moreover, in contrast to previous inter-Korean exchange and cooperation laws, which may have been too focused on fast results rather than substance, the new bill will provide legal stability and also complement previous laws on inter-Korean exchange and cooperation.

Consisting of four chapters and twenty-three provisions, the Basic Relations Bill lays out specific guidelines and stipulations.

Chapter 1 defines the legal status of South and North Korea and the legal nature of inter-Korean trade; Chapter 2 talks about follow-up projects and the organizations in charge of promoting progress in the inter-Korean relations; Chapter 3 is concerned with appointment of representatives and special envoys to the inter-Korean talks; and Chapter 4 deals with the legal force of bilateral agreements and it stipulates presidential powers in suspending the legal force of the bilateral agreements. Notably, Chapter 1 of the Basic Relations Bill, stating the relationship between South and North Korea as “not one between countries but a special one formed temporarily in the process of advancing towards reunification,” defines the inter-Korean trade as national, rather than international trade, thus providing a clear legal definition of North Korea’s status.

Moreover, Chapter 2 of the Bill lists concrete guidelines in six areas of improvement (“promoting peace on the Korean peninsula,” “inter-Korean economic cooperation,” “reinstating national unity,” “resolution of humanitarian issues,” “aid to North Korea,” and “promoting cooperation with the international community”), and specifies improvement in the six areas as government responsibilities that supplement the president’s constitutional duty of “peaceful reunification of the nation.”

According to Chapter 3, the Minister of Unification will appoint the representatives and special delegates to North Korea, and the appointment will then be passed on to the President, via the Prime Minister, for final approval. Representatives at working-level talks will be appointed by the Minister of Unification, and if necessary, government officials may be dispatched to North Korea for a certain period.

With the provisions in Chapter 4, the President can conclude and ratify an agreement with North Korea after deliberations by the Cabinet. Also, by making it possible for representatives at the inter-Korean talks and special delegates to North Korea to attend to any details regarding the execution of the content or simple administrative measures specified in the inter-Korean agreements,

the Act gives flexibility in executing over 100 bilateral agreements that had been impaired by the complexity of Constitutional procedural requirements.

The chapter also gives the National Assembly the right to consent to the conclusion and ratification of any part of inter-Korean agreement to which the Article 60, Clause 1 of the Constitution is applicable—such as when the agreement burdens the people with financial obligations or when it is related to legislative matters. In short, the President, according to Chapter 4, not only has the power to conclude and ratify an agreement with North Korea but also has the power to suspend, in parts or in its entirety, an agreement with North Korea if the President deems it necessary to guarantee national security, to maintain order, and/or to protect public welfare.

FUTURE TASKS FOR PROMOTION OF INTER-KOREAN RELATIONS

As shown, inter-Korean relations are no longer in the abstract stage but have advanced to the working-level in various fields. Therefore, a new legal framework should be established to reflect the changes. To this end, reinterpretation of Article 3 (“Territory”) of the Constitution, prevention of rigid application of the National Security Law regarding North Korea, and systematizing of other inter-Korean acts after the passage of the Basic Relations Bill are now inevitable.

Before making revisions, however, it is important to first conduct an analysis of the legal concepts and characteristics of interchange between the two Koreas to determine possible problems that could arise. Appropriate steps could then be taken to form a concrete and practical, legal and cooperative bilateral relationship, and to prevent potential problems. Efforts to improve legislation for promoting inter-Korean relations require more practical and specific legislation in line with the social phenomenon, i.e., promoting inter-Korean

exchange and cooperation in the name of national unity. To this end, parties must reorient their perspectives in order to enact laws that would shape and guide future inter-Korean relations.

The Legal Nature of Inter-Korea Trade

Considering inter-Korean trade as the basic task in furthering inter-Korean relations, it is first necessary to decide whether a bilateral agreement related to trade should be considered a treaty or a contract. If it is considered a treaty, it would be subject to international law, while a contract is subject to internal law.¹¹⁾ Generally, an agreement between two sovereign states is called a treaty, while a contract is an agreement between two parties under the jurisdiction of the same internal law. Moreover, agreements between sovereign states constitute a legal relationship based on public law, while the agreements between parties under common internal law form a relationship based on private law.

Accordingly, a relationship based on public law refers to legal actions between legal entities such as nations, international organizations, and belligerents, while a relationship based on private law refers to legal actions between judicial subjects of municipal law, such as public corporations, including state and public organizations acting as private economic entities, and individual judicial subjects. However, the state can enter into a treaty as a sovereign entity with a private economic entity. In such a case, the treaty is called a quasi-treaty, and the quasi-treaty is treated as a contract under the jurisdiction of municipal law.¹²⁾

11) Not only the state, but also warring communities and international organizations have the power to conclude a treaty; therefore, depending on the nature of the legal entity defined for inter-Korean trade, the agreement could be considered as either treaty or contract.

12) Georges van Hecke, "Contracts between States and Foreign Private Law Persons," in Rudolf Bernhardt, ed., *Encyclopedia of Public International Law*, Vol. 7 (Amsterdam: North-Holland, 1984), pp. 54-58.

To specify further, the agreements concluded between South and North Korea would have the legal characteristic of treaties if both parties entered the agreement as separate sovereign entities under the jurisdiction of international law, and they would be like contracts if the signatories are both independent judicial subjects under the jurisdiction of internal law. However, if one party is a legal entity of international law while the other party is a judicial subject of internal law, then the agreement between the parties is considered a quasi-treaty.

Given the nature of inter-Korean economic exchange and cooperation as inter-Korean trade, whatever the content of the agreement (whether investment, sales, or lease), the legal nature of the agreement is generally deemed as a contract since generally, the South Korean signatory of the agreement is either a private enterprise or a public corporation and that of North Korea, a public corporation or public organ acting as a private economic entity.¹³⁾ Even when it involves government-led investment or commerce, South Korea is considered a state while North Korea is considered a public corporation, or organ, acting as a private economic entity, and vice versa. Therefore, the agreement in this case is not a treaty but a quasi-treaty, or contract.

Regardless of the nature of the inter-Korean trade, whether it is investment, trade, property, etc., legal relationships do not belong exclusively to South Korea or to North Korea. Therefore, the relationship cannot be considered an internal legal relationship of a

13) According to North Korean Civil Law, there is (a) a contract based on a plan and (b) a contract not based on a plan. The former is a contract with the purpose of executing the economic plans for the people whose legal entity may be a government organ, an enterprise, or an organization (Article 90), while the latter is a contract with the purpose of having the people's economic plan benefit the citizens whose legal entity includes private citizens (Article 135). Therefore, given the special nature of inter-Korean trade, it may be considered a contract-based plan and its legal entity generally a public law subject or public organ.

single unified nation. Nor is it possible to view it as an international legal relationship between two countries.¹⁴⁾ In summary, inter-Korean trade is generally contract-based, while the relationship is a legal one. Since this relationship is neither South Korea alone nor North Korea alone, but is composed of both parties, the components of the legal relationship can be said to have the characteristics of a private international relationship.

Applying Laws in Inter-Korea Trade

Given the legal characteristics of inter-Korean trade, the inevitable question arises: What law would be applicable to the relationship? If *dominium* and *imperium* over the Korean peninsula belonged to both South and North Korea, the law of either South or North Korea would apply to the inter-Korean trade.¹⁵⁾ However, since South and North Korea have the *imperium* over their respective sides exclusively, South Korean law is applied to South while North Korean law is applied to North. Consequently, if a legal dispute arose, it is unclear which of the two states' laws would apply. For example, in the legal relationship between private individuals in inter-Korean trade, it is uncertain whether to apply South Korea's or North Korea's private international law, or whether the provisions of the four economic cooperation Agreements would apply in the case of private contract between the two Koreas.

14) This is because the legal relationship in judicial law that governs legal action between private individuals is mutually related to the legal status of South and North Korea in their legal relationship in public law.

15) Generally the concepts "*dominium*" and "*imperium*" are legal principles commonly used in territorial claim by a foreign nation over another nation or in asserting legitimacy and territorial right over a divided nation. *Dominium* refers to possession of land while *imperium* is the right to rule. A more detailed explanation will come later.

A. The Applicability of Private International Law

Private international law comprises provisions of national law regarding contracts and lawsuits involving foreign laws or jurisdictions to be applied to the private international relationships. The private international relationship refers to the private relationship in which the elements composing the relationship have a foreign judicial relationship. For example, if A with X citizenship were to enter into a real estate lease contract with B with Y citizenship, the judicial relationship formed can be called a private international relationship.¹⁶⁾

South and North Korea have their own private international laws. Article 1 of South Korea's Private International Law states that the purpose of the law is "to designate the principles and the law regarding the jurisdiction of international trial for the judicial relationship with a foreign element." In Article 2 of North Korea's External Private Relations Law, it states, "this law determines jurisdiction to be applied to [property and familial relationships] between a corporation or a citizen of DPRK and that of a foreign country and proposes appropriate procedures in private disputes."

To establish stability in the inter-Korean judicial relations and to make South and North Korea's private international laws applicable to inter-Korean trade, South Korea first needs a new Constitutional interpretation of inter-Korean relations. Moreover, there should be revision of current legislation, or new legislation of relevant laws after consultation with Pyongyang.¹⁷⁾

With the enactment of the Inter-Korean Exchange and Cooperation Act in 1990, a special law applicable to both South and

16) Kim Myung-gi, *Introduction to Private International Law* (in Korean), (Seoul: Beopji-sa, 2002), p. 4-5.

17) Considering the acknowledgement of North Korean government and the special inter-Korean relations, it would be inappropriate to apply South Korea's private international law, which is applied in legal relationships with elements of external private law.

Korea to further inter-Korean exchange and cooperation, the provisions of the Act take precedence over other laws regarding any inter-Korean exchange and cooperation activities, and thus preclude the applicability of private international law that is normally used in relations between countries. Furthermore, the Act provides only procedural guidelines for licenses and other procedures for inter-Korean exchange, contact, trade, and cooperative projects and therefore, lacks the characteristic of substantive law that stipulates the rights and responsibilities of each party in case of dispute.

On the other hand, with Article 10 of the North Korean Civil Law stating, “the civil law of DPRK applies to all civil judicial relations within the DPRK territory unless otherwise specified by an international treaty or agreement,” North Korean civil law applies to all civil judicial relations within North Korean territory. The problem is that any worker whose work falls under the category of civil judicial relations in inter-Korean trade, and any part takes place in North Korean territory, is subject to North Korean civil law.

B. Limits of Application for the “Agreement on the Procedures to Resolve Inter-Korean Commercial Disputes”

Lacking a treaty that mutually recognizes the other as a sovereign state, the commercial relationship between South and North Korea is currently defined under the concept of economic exchange and cooperation. The relationship is recognized as “not between countries,” but as “inter-Korean trade.” In order to resolve any dispute that may arise from the inter-Korean trade relations, the “Agreement on the Procedures to Resolve Inter-Korean Commercial Disputes” came into force in August 2003. According to this Agreement, any commercial dispute that may arise in the process of inter-Korean economic exchange and cooperation will be settled first through consultation between the parties concerned, and any unresolved disputes should then go to arbitration.

Accordingly, an inter-Korean commercial arbitration committee will be organized, and both South and North have given the

committee the power to adjudicate in possible commercial disputes between the following groups: A) between South and North Korean personnel, B) between personnel of one side and the relevant authority of the other side, and C) between the investor of one side and the relevant authority of the other side.

As for the laws governing arbitration, South and North Korea have reached an agreement on those: A) the laws agreed upon by the concerned parties, B) in the case when no law has been previously agreed upon, the relevant laws of either South or North Korea, and C) the basic principles of international law, and conventional laws of international trade and commerce.

The laws “agreed upon by the concerned parties” designated to be the laws governing the arbitration ruling can be interpreted as referring not to the trade contract signed by concerned parties of inter-Korean trade but to an agreement previously made on whether to follow South or North Korean law; therefore, legal stability cannot be guaranteed in dispute settlement. Furthermore, without such an agreement, it is unclear whether the relevant laws refer to South Korea’s private international laws or North Korea’s. Therefore, whatever the nature of the inter-Korean trade, it is important to establish a law agreed up on by both South and North Korea to be applied in case of a dispute.

Establishing a Condoperium Relationship between the two Koreas

Territorial right generally refers to a state’s exclusive dominion, as long as the exercise of sovereignty does not conflict with international law, over its territory. The phrase “exclusive dominion” refers to the right of absolute rule over the physical territory as well as persons and objects within the territory. A state’s territorial right is comprised of the territory, all the waterways, and the airspace, each with different legal status, and among the three domains, territorial right has the greatest claim over the territory.¹⁸⁾

The concept of territorial right combines the concept of *dominium*

and of *imperium*

The right to use and dispose of the territory *per se* and the objects belonging to the territory is called *dominium* in international law, and the right to govern persons belonging to the territory is *imperium*. In other words, the conceptual distinctions function to set spatial boundaries within which to exercise the rights of state.¹⁹⁾

According to these distinctions, the *dominium* and the *imperium* over the Korean peninsula do not belong exclusively to either South Korea or North Korea. Specifically, the *dominium* over the entire Korean peninsula belongs to South Korea from the South Korean perspective and to North Korea from the North Korea perspective. Only the *imperium* over the territory is limited to either side; however, a new legal perspective needed for furthering inter-Korean relations that would see the *dominium* and the *imperium* over the Korean peninsula being jointly exercised by South and North Korea.

Both South and North Korea presume a single unified nation, while each exercising partial *imperium* over the peninsula. This perspective connotes that unification is realized when the *imperium* over the entire peninsula is unilaterally exercised. If such a definition of unification is accepted, it would mean that each side is inclined to unification by means of unilateral absorption, and this, in turn, goes against the current perception of the bilateral relationship as a system of peaceful coexistence towards reunification. It also contradicts the June 15 Joint Declaration in which both sides agreed to solve the question of the country's reunification by concerted efforts.

Therefore, in terms of inter-Korean relations, South and North

18) Kim Myung-gi, *Introduction to International Law, I* (in Korean), (Seoul: Pakyoung-sa, 1996), p. 436.

19) Lee Jang-hee, "International Legal Issues That May Arise in Peaceful Usage of the DMZ" (in Korean), a paper presented at the International Forum at the DMZ in 2000, hosted by Hankyora Unification Cultural Foundation [<http://www.koreahana.net>].

Korea need to adopt the new perspective: viewing bilateral relations as a *condoperium* relationship, which is a combination of joint *dominium* and joint *imperium*. For example, if South and North Korea jointly decided to use the DMZ and other territories peacefully, the meaning of joint usage here is equal to the concept of joint exercise of *dominium* and *imperium* over the same territory.

If such a relationship based on *condoperium* is realized, it could provide the basic legal framework with the capacity to prescribe special stipulations and other special characteristics of current inter-Korean relations into a legal apparatus, for presenting the basic direction for making laws for North Korea. Moreover, it could have the effect of synergy in furthering the inter-Korean relations according to the social changes by institutionalizing the bilateral relationship as a system of peaceful existence with reunification as a common goal.

CONCLUSION

Viewing this issue from a sociological perspective of law is more effective in providing the basic direction for future development of inter-Korea relations than approaching the issue from *Rechtsdogmatik*. The law governing inter-Korean relations must possess the flexibility to adopt the changes in society and the capacity to reflect changes in the legal sphere. Only with such a law can the goal of furthering inter-Korean relations be achieved.

Legal disputes in inter-Korean trade may jeopardize continued progress in inter-Korean relations. To prevent this, a legal framework that assumes a unified Korea and considers South and North Korea as jointly exercising the *dominium* and *imperium* over the Korean peninsula should be adopted. That is, inter-Korean relations need to move towards building a bilateral relationship of *condoperium* in order to produce the legislation or amendments necessary to promote inter-Korean relations. Today, the national goal of both

South and North Korea is peace and reunification. Here peace represents a reality and reunification, an ideal. To attain both the reality and ideal of the national goal, a new legal perspective that could embrace both is necessary.