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Brief Report on the Special Relationship between South and North Korea and the Realisation of the Rule of Law

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1. Introduction

With the end of the Second World War, the troops of the Soviet Union and the United States occupied respectively the northern and the southern parts of the Korean Peninsula and so divided it into two Koreas. Its tragic division then became firmly entrenched while experiencing the Korean War from 1950 to 1953. For some decades, the South and the North, in a continued political and military confrontation, carried on an intermittent pattern of South-North dialogue. But the Basic Agreement in 1991 (the Agreement on Reconciliation, Non-Aggression and Exchanges and Cooperation between the South and the North),[1] of which the keynote was the peaceful coexistence of the South and the North, marked a new turning point in the legal relationship between the two sides.

2. The Special Relationship between South and North Korea

A. The preamble of the Basic Agreement expressed the relationship between South and North Korea as "a special relationship constituted temporarily in the process of unification, not being a relationship between states". From the legal point of view, both sides intended the term "special relationship" to mean here that the relationship between the South and the North is neither one of pure international law nor one of pure municipal law, but is a mixed form or an intermediate stage between international law and municipal law.

B. Examples of special relationships between states

Special relationships which may be compared with that between South and North Korea can be found in some examples such as the relationships between the nations of the British Commonwealth, the special forms established during the decolonisation process of the newly born nations, the special relationship between England and Ireland, and that of West and East Germany before their reunification.

(1) One may first consider the special relationships inside the British Commonwealth of Nations during the interwar period. It can properly be explained by the so-called "*inter-se* doctrine". According to this doctrine, the relationship between England and its self-governing colonies was not one of subordination but of equal status. They did not apply international law to one another. In other words, while their relationship with third countries was one of international law, the relationship amongst themselves was not.

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[1] *Signed by the Prime Ministers of both sides, on 13 December 1991, after a high-level conference held in Seoul.*

(2) Burma, Philippines, Cyprus and Algeria, which had been colonies of western countries, had already separated themselves and seceded from the municipal law of their colonial empire in a considerable measure even before they became completely free and independent. In this case, there is a phase when the relationship between the political entities was neither that of international law nor that of municipal law but a mixed relationship of international and municipal laws.

We can find a concrete example in the case of the Evian Agreement that was concluded between France and the troops of Algeria that wanted her independence. France emphasised the fact that the Algerian side could not have any status in international law and so concluded the negotiation in a form of agreement that was under the application of French domestic law, in particular the French Constitution. But the contents of the negotiation showed that the obligations of the newly-born Algeria were obviously those of international law. This Evian Agreement by domestic law was transferred into a treaty by international law after Algeria attained independence of Algeria. When we accept the doctrine admitting the existence of a middle level between international law and municipal law, we can presumably conceive the legal characteristics of this kind of negotiation and explain more smoothly the transference phenomenon.

(3) On the 18th of April in 1949, Ireland seceded from the British Commonwealth of Nations by dint of the Ireland Act of which the premise was that England was not a foreign country to Ireland. This new conception, followed by New Zealand in 1953 as well as by other British Commonwealth nations, has been discussed as a "special relationship". England, Ireland and other nations of the British Commonwealth admitted this kind of special relationship as a reciprocal one and as a result they have treated one another as domestic partners in the area of trade and have applied special procedures in the acquisition of each other's nationality. But, of course, it was made clear that these special terms would not infringe the national independence of Ireland.

(4) It is of common knowledge that the relationship between East and West Germany was apprehended as a special one. It was neither one of pure international law nor one of pure municipal law. West Germany admitted East Germany as another nation within Germany but did not recognise East Germany as a state at the international law level. In this context West Germany did not treat the people of East Germany as foreigners, while at the same time not establishing any general diplomatic relations.

C. Effect of the special relationship between the two Koreas

The same is true of the Korean case in many ways. The relationship between the South and the North is a special one of a dual character, so that they are seen as two nations internationally but one nation internally.

(1) In the matter of acquiring nationality, they admit a mutual special treatment. They have never regarded each other's people as foreigners and possibly this condition will be maintained until their reunification.

(2) Though the South and the North entered the United Nations simultaneously,[2] neither has ever recognised the other as a state and in spite of the development of their relationship they did not establish normal diplomatic ties. Indeed, far from establishing embassies, they fall short even of the level of the two Germanies, which maintained "permanent representations" (*die Ständige Vertretung*) in each other's capitals. They have merely reached an agreement to establish a South-North Liaison Office in a border village called Panmunjeom.

(3) It is admissible to give each other special legal treatment in the commercial exchange between South and North. South Korea exempts the goods of the North from tariffs. Instead domestic taxation is imposed on them, because exchanges with the North are not regarded as international trade. The North is in the same position, and this is shown very clearly in the fact that North Korea excludes South Korean enterprises from companies coming under direct application of their joint corporation law (i.e. foreign companies) and tries to apply it indirectly by analogy.

D. It seems that the legal analysis of the internal relationship between divided countries is a field that has been somewhat overlooked in international law circles. And because we feel a lack of theoretical basis, we need to analyse its legal characteristics very cautiously. But in this field, it may not be proper to provide a uniform and monolithic legal explanation, and therefore one should also take into consideration the political, social, cultural and legal situations of each divided country. One should also examine the contents of the special relationship according to the evolving aspects between divided countries.[3]

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[2] *On 17 September 1991, both sides entered the UN.*

[3] *The following remarks of Clement Richard Attlee, the ex-Prime Minister of England, give an impressive idea that is also helpful to explain the relationship of South and North Korea. "I am aware that hitherto there has been division on international law-it has come down from the Past-in which one has recognised people as either belonging or foreign, but international law is made for men, not men for international law. We are moving into a time when various other relationships are being created.", Georg Ress, Die Rechtslage Deutschlands nach dem Grundlagenvertrag vom 21. 12. 1972, 1987, p. 178.*

3. Realisation of the Rule of Law in the relationship between South and North Korea

(1) The reform and democratisation since the middle of the 1980s in the Soviet Union as well as in the East European bloc provided divided countries with a chance to overcome their situations. Germany and Yemen were such cases. Now, in the midst of these worldwide developments, that is, the breakaway from cold war practices and ideology, efforts to establish a new order of harmony and cooperation are going on all over the world.

Viewed in a political light, this change throughout the world, with the 21st century ahead, is a transition of regimes from totalitarianism to liberal democracy. On the other hand, in the light of law, it is an unfolding and expanding process of constitutionalisation in places where until now the rule of law has not been thoroughly achieved.

(2) In this respect, the elimination of totalitarianism in the Korean Peninsula, which is located in the far east of the Eurasian continent, will provide an important impetus for the expansion and reinforcement of the rule of law, which, if I may make so bold, is a value common to all the world. With a correct understanding of the special relationship involved, South Korea has made various endeavours to realise the rule of law in North Korea. The basic premise of these efforts is the gradual change of the whole social system in North Korea by peaceful means, such as the opening up of the system and democratic reform.

From this point of view, South Koreans give a hearty welcome to the North, which intends to create a special zone in the Rajin-Sunbong Area near the border with Russia and China for the purpose of inducing foreign investment, and we are working in a spirit of cooperation to support efforts for the gradual opening of North Korea, especially through economic cooperation and investment. Many of the existing North Korean statutes concerning the economy, have not been known outside the country and in many cases, the statutes that have emerged are obscure and ambiguous in their meaning.

The western countries that intend to invest in North Korea will require clear economic statutes and transparent economic policy as matters of the highest priority, and if North Korea accepts this position, there is little doubt that this could be estimated as a step forward in her realisation of the rule of law. In this context it is understandable that in spite of the current economic crisis and financial difficulties South Korea actively participates in the construction project of Light Water Reactors in North Korea. In fact, the European Union has also supported this LWR project by entering the Executive Board of the KEDO,[4] and contributing some 20 million

[4] *The Korean Peninsula Energy Development Organisation, whose main aim is to finance and*

dollars towards its financing.[5]

(3) Next, there are important matters concerned with human rights that should attract broad attention of jurists in international society. One issue of the utmost importance is the establishment of the principle of the prohibition of punishment without proper legal base in the field of criminal judicature in North Korea, where criminal trials are held in camera. The present conditions of the North Korean legal system contradict the principle of *nullum crimen sine lege* that has been the fundamental rule of criminal judicature in modern civilised countries since Beccaria and Feuerbach. We are planning, through meetings between jurists of South and North Korea, to make efforts to persuade the North to establish this principle in the area of her criminal judicature.

(4) The problem of how to treat clandestine immigrants from the North should be also a matter of great concern in the legal field for the purpose of settling the rule of law in the Korean peninsula. Those who have been staying in the adjacent country after escaping from the North where broad famine prevails amount to thousands of people. If they were detected by the police either of the country where they are staying or of North Korea, most of them would be repatriated to North Korea against their will. Even though there is little doubt that they have the legal status of "refugees" who are to be regulated by international treaties,[6] in reality, few of them can have chances to be protected either by the nation they are staying in or by international organisations. Thus, most of them are under a menace to the basic human right for life.

South Korea is making various diplomatic efforts to settle the problem of clandestine immigrants under the principle of respecting their free will. But actually, considering the diplomatic relationships between these adjacent countries, we cannot take sufficient legal measures for their positive protection. That is the reason why we should evoke an international legal concern about this problem.

(5) Historically South and North Korea is one country composed of one people. The Korean people, South and North, do wish for reunification. This means reunion of dispersed family members, free movement throughout the whole country and reconstruction of the national community. But, above all, it should mean the establishment of a true liberal democracy in the

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supply LWR project to North Korea, is established by South Korea, Japan and the USA as an international organisation in 1991.

[5] *The EU financed 3,800,000 dollars in july 1996, 2,470,000 dollars in December 1996, and supplied heavy fuel oil amounting to 10 million ECU in October 1997.*

[6] *For example, the Protocol relating to the status of Refugees, which has been in effect since 4 October 1967.*

northern part of the Korean peninsula, where the rule of law has not yet permeated, and the safeguard of human rights for all Koreans, South and North.