

Reunification, Integration and Unification of Law

Germany and Korea

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Abstract

The meetings of US President Donald Trump and North Korean leader Kim Jong-un, on 12 June 2018 in Singapore, as well as of South Korean President Moon Jae-in and Kim Jong-un, on 18 and 19 September 2018 in Pyongyang, intensified hopes of a step-by-step process aimed at the reunification of Korea. This development may follow the patterns of (West) German Chancellor Willy Brandt's 'East Policy' with the Soviet Union and the (East) German Democratic Republic in 1970-71, which led to the reunification of Germany under Chancellor Helmut Kohl, in 1990. This article deals with similarities and differences in regard to Germany's and Korea's recent histories. It analyses the political, economic and legal aspects of a possible way to achieve Korean unity.

Keywords: reunification, Korean nation, integration, Constitution, human rights, social market economy.

A A New Approach to Peace on the Korean Peninsula

"No nuclear weapons test any more! No intercontinental missiles tests! Instead, full concentration on economic growth!" With these messages North Korean's ruler Kim Jong-un surprised the world on 21 April 2018, a few days before his meeting with South Korean President Moon Jae-in in Panmunjom. These talks have been in the nature of a 'political test' for a conference between President Kim and President Trump that took place on 12 June in Singapore, where an agreement on denuclearization of North Korea was signed, and is expected to be worked out in the coming months or even years. These events evoked thoughts in Seoul and Berlin of a step-by-step process of Korean reunification following the 'patterns' of German Chancellors Willy Brandt's 'East Policy' with the Soviet Union and the German Democratic Republic in 1970-71 as well as reunification of Germany that Chancellor Helmut Kohl reached in 1990.

The political situation in the Korean peninsula seems to be more favourable than it was five years ago. In 2014 the President of South Korea, Ms. Park Geun-hye,

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paid a state visit to Germany, which was reciprocated by German President Joachim Gauck. In their speeches both presidents made far-reaching reflections on the reunification of Germany in 1990 and a possible reunification of Korea – on 28 March 2014 in Dresden and 12 October 2014 in the Korean National Assembly.

Against this background, this article deals with four questions:

- What does the Korean peninsula want to achieve by the reunification?
- How can the territorial reunification be achieved as a prerequisite for the integration of the Korean people?
- What can and must be the role of the law as an instrument and result of the unification process?
- And, as a final, comparative question, how did the creation of a unified legal system in Germany succeed, and could it succeed similarly in Korea too?

B Reunification

Reunification was an essential policy goal and Constitution-based mandate of Germany after World War II and the division of the country in 1949 (West Germany and East Germany). The preamble to the Constitution of the Federal Republic of Germany (of 1949) states that

the German people in the Länder Baden, Bayern...[and then adds all the 11 Länder of the free democratic part of West Germany] by its constituent power adopted this Basic Law in order to give government for a transitional period a new order. It also acted for those German people to whom participation was denied. The entire German people are called upon to achieve in free self-determination the unity and freedom of Germany.

This happened, as is historically well known, in 1990. The Federal Constitutional Court has integrated the phrasing of the preamble as a constitutionally binding duty on all state organs. Although the first Constitution of the German Democratic Republic from 1949 contained no such instruction, it acknowledged that there 'was only one German nationality'. This reference to the 'whole of Germany' is omitted in later amendments.

C The German Constitution

Similarly to the German Constitution, the preamble of the Constitution of the Republic of Korea states that the Korean people have taken over the task of democratic reform and peaceful unification of the homeland. It had decided to bring about national unity with humanity and brotherly love. Rather than underestimating the actual situation and the internal conditions of North Korea, one should note that Kim Il Sung, on 14 August 1960, proposed a 'Confederation of the South and the North'. The core content of this proposal, 'a federal republic of Koryo', was reaffirmed at the Congress on 10 October 1980 and is still valid today

for the official reunification conception of the North Korean government. The term ‘confederation’ refers to an association of independent units that, notwithstanding common activities, retain their sovereignty. The confederation may be a transitional stage before a federation or even a unitarian state is attained. The options of cooperation and possible development of the structure of the two Koreas may become clearer from a reading of the preamble of the European Union after the Lisbon Treaty of 9 March 2010 and the Treaty on the Functioning of the European Union of the same date. It reads thus:

Thereafter, the Contracting Member States have agreed to better cooperate

- in determining to lay the foundations for creating an inner union of people;
- in determining to start the process by the establishment of the European Communities of the European integration process to a new level;
- mindful of the historic importance of the ending of the division of the European Continent and the need to create firm bases for the design of the future Europe;
- in determining to achieve the strengthening and the convergence of their economies and to establish an economic and monetary union.

D Integration

The real unity of a state – in whatever form – can arise only when the process of integration of the people succeeds. The integrated nation sees itself not merely as a legal community, but as one of values, history and common destiny and of living and working as an economic community. It has a common identity, supported by the institutions and the Constitution. Often there is strong national feeling, a sense of patriotism, as in Korea, owing to its long history as one nation. An illustration of the most important factors of integration is afforded by the preamble to the Treaty on the European Union:

Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law have developed the universal values.

It goes back to the very practical requirements that apply to the integration of asylum seekers, civil war refugees and economic migrants in European countries. Sufficient language skills, commitment to the free democratic basic order, and a good knowledge of the legal and social order and living conditions are instruments as well as a result of integration. Integration does not require full cultural integration, which includes religion, literature and art. Indeed the opposite is true: pluralism prevails and makes the living together colourful and enriching for everybody. Each country has its own factors of integration. Those of the Federal Republic of Germany after World War II have been and more or less are after 70 years

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- jointly addressing the past, especially the two world wars;
- the social market economy and participation of trade unions and employer organizations in its success;
- the Constitution, including the highly respected Constitutional Court;
- the strong party system;
- good governance and management, especially on the community level.

Again, every country has its own factors of integration. It is possible to transfer ideas and structures, for example of economic or social or educational systems, to another country or, more appropriately, to find them developed there in a similar way. Confrontation with war and struggle for peace after the Korean war, the enormous economic growth and the intended orientation to the USA and Europe in economic and cultural matters may be strong pillars of the South Korean identity, on the one hand, while a special form of communist theory and a turn to Russia and China may support the integration of North Korea. It remains to be seen whether a remaining ‘common Korean identity’ is strong enough to be a solid support for a possible reunified Korea. Ultimately, the identity of a people is retained through difficult historical periods or breaks; it remains anchored in the hearts of the people.

E Law as an Instrument of Integration, Comparative Law and Legal Harmonization

Law is one of the instruments of integration, and an acceptance of and an understanding of the law of the land are a result of the integration. The state produces law through its institutions. In order to understand the state, you have to understand the law. If you tell me what the law of a country is and whether it is effectively implemented – fundamental rights such as freedom of expression, freedom of assembly, state organization, fair and transparent procedures, etc. – I will tell you in what kind of state you live, a state bound by the rule of law, an authoritarian or even a dictatorial system. Law is a cultural phenomenon, a regulatory system, that characterizes the social reality of a country. Society and law evolve over time. Law is an important factor of integration; it creates identification of citizens with the state. Law should not be ‘law in the books’. It must be accepted, understood and implemented as ‘law in action’ (Roscoe Pound).

To unite states requires adjustment and standardization of their legal systems. This has happened, for example, with 28 member states of the European Union over years. Adoption of legal systems starts with comparison of the legal material. Exact knowledge of the legal standards and the meaning of legal terms is required. Furthermore, it is important to examine to what extent and how the law is applied and anchored in society. Sociology of law, even history of law, provide information on topics such as the following: How does law control human behaviour? How does law respond to political, cultural, psychological and demographic changes? How does law find the proper balance of political power, organized interests, economic system, ethical ideas, the units of economic structure,

the organization of companies and associations. It is vital to compare legal institutions and their functions. What is the function of parliament in the constitutional system? 'Ownership' is an institution of our legal systems. But how is the line drawn between 'individual property' and 'public property'? How can you secure a loan through a piece of land, through a mortgage? How are lawyers trained? By micro- and macro comparisons of terminology, institutions, procedures of legal systems under the layer of differences, one would mostly discover common ideas, goals and instruments of legal regulation.

Legislative alignment is 'applied comparative law'. If two countries (Federal Republic of Germany and German Democratic Republic; South and North Korea) or more are merged (European Union), there is pressure of harmonization of national bodies of law. Certainly, one is looking for 'the best solution'. Which legal regulation is the fairest and most plausible for all under the prevailing social and economic conditions of the partners? Unification of law happens at the international (WTO), supranational or regional (European Union) or even national level. In a peaceful unification process no partner's body of law completely takes over the regime of the other partner's or partners' legal territory. Unification of the law is not to be expected in the form of new law grabbed from the clouds of ideal law. Often there will be three types of laws:

- If there are similar regulations in the partners' laws, there will be common standards.
- If regulations are different, the best option will prevail. Another alternative would be to establish new standards according to 'best practices', as found in comparative law.
- Finally, a part of the body of law of a partner for its territory may continue to apply, and vice versa.

In Germany unification was processed in two treaties: the 'Treaty establishing a Monetary, Economic and Social Union', of 18 May 1990, and the 'Unification Treaty', of 31 August 1990. Again, a prerequisite of such a contract agreement is the precise knowledge of both legal orders, their conditions, their application and its social consequences. This includes the involvement of lawyers from all participating countries.

F German and Korean Unification

There are five reasons why the German reunification has worked relatively well, although the task is still incomplete:

- The moment was just right. The Soviet Union collapsed under Gorbachev, and the reunification request was alive in both parts of Germany.
- The Federal Republic's government operated well under Chancellor Kohl's leadership.
- The treaties were drafted properly, and a well-trained management coped with the huge task of a then unexpected historical event.

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- Some concerns that reunited Germany could be ‘too powerful’, became less important, because the state was embedded in the European Union.
- The US and other occupying powers in the ‘2 + 4 talks’ (US, England, France, Russia and Germany (West and East)) returned sovereignty to united Germany.

On 9 November 1989 the Berlin Wall fell. On November 28, Chancellor Kohl proposed his ‘10 points’ for a merger of both parts of Germany. At its core was a contractual community of both countries, that is, a confederation with the aim of a federation and the restoration of German unity. Kohl thought in longer time dimensions and renounced a ‘road map’. Then the development set off at a trot. “If the DM (West Germany’s currency, the Deutsche Mark) does not come to us, we come to you!” was the emergency call of Germans in Socialist Germany. On 7 February 1990 Kohl made an offer of an economic and monetary union that culminated in the first Unification Treaty on 19 May 1990. In the German Democratic Republic, the economy was converted into a free market system, and the DM was introduced as the new currency. Kohl euphorically promised the citizens in the East ‘flourishing landscapes’. This forecast was not utopian, because the German Democratic Republic was the tenth largest economy in the world. On March 18 1990, the first free general election was conducted in the GDR. Kohl’s party won. Negotiations over the Unification Treaty began, and it entered into force on 29 September 1990. 3 October was set as the reunification date. The 2 + 4 Treaty, which finalized the last remaining statutes and treaties of the Allied Government on 12 September 1990 in Moscow, entered into force on 15 March 1991. Thus was the sovereignty of Germany restored and the reunification of the country finalized.

The implementation of an economic and monetary union, the change from a planned economy to a market economy, was a shock therapy. The exchange rate of the currencies was 1 DM (West) to 4.4 DM (East). For wages and pensions, that is, the money of the ‘people’, it was 1:1, otherwise 1:2. That was the death knell for the GDR economy, whose technology was outdated and whose processes were inefficient but politically inevitable. A ‘Faithful Institution’ (Treuhandanstalt) took over 8,000 socialist enterprises and sold them on the market at a loss of DM 830 billion. The social union secured pensions, health, etc. The economic situation led to mass unemployment. The question of expropriated and socialized property ownership – return rather than compensation – as well as the land reform brings lawsuits until today. The constitutional form of unification was simple. The German Democratic Republic, a federation of five states to begin with, was, in her first few years of existence, remodelled into a centralized unified state. In the unification process these states were restored and merged with the existing federation of 11 West German States. They ‘slipped under the covers’ of the West German state. The Unification Treaty includes over 1000 pages, devoted to a review of the whole law of the ‘new’ Federal Republic. It is divided into three groups: first, the old law of the West German state now extended to the whole of Germany; second, major changes required by the unit; and, third, East German law, which continues to apply in former East German territories. The costs of

reunification were and still are high; they were underestimated. The best estimation is €2 trillion, as compared with the GNP of Germany at €3,2 trillion in 2017. The Soviet Union demanded compensation of DM 16 billion for the withdrawal of troops and equipment. Germany took over the debts of the GDR. Huge sums were and still are necessary for transfers from West to East, mainly for pensions and benefits but also for major expenses on infrastructure. Funding has been and will be made from three sources: first, from the budgets of the federal and state governments, and, second, from tax increases and, finally, loans. The debt of the Federal Republic has more than doubled from 1989 to 1996. But it must be remembered that the reconstruction of the East meant a huge employment programme for the former West German part of the country.

Finally, a few comments on the possible reunification of South and North Korea. The following are significant differences between the situation concerning Germany and Korea:

- Germany is a young nation, since 1871, while the Korean nation has a centuries-old tradition. The feeling 'we are one people' is deeply rooted in the people.
- The Germans have accepted the division as a just punishment after the Nazi era. Korea was a Japanese colony, which was liberated in 1945 and considers the division unjust.
- In Germany there were always contacts between citizens of the East and of the West. The information by the media was intense both ways. People knew what happened on 'the other side' of the country.
- Although Germany and South Korea both enjoyed an economic boom, the economic differences between North and South Korea are much larger.
- East Germany never suffered from dictatorial one-party rule, as did North Korea.
- North Korea is politically isolated, while South Korea is well connected.
- On the other side, North Korea could modernize economically with the help of South Korean aid. The first attempts were those in Kaesong and other special economic zones. Economic pluralism could develop as in China.
- President Park described, in 2014, a possible unification of North and South Korea as the 'jackpot'. In fact, the mineral resources – coal, zinc, rare earths – are the wealth of the North Korean part of the peninsula, and South Korea has the modern equipment to process it.
- Considering that China is one of the most dynamic regions in the world, who knows what the activities of the Asian Pacific Economic Corporation (APEC) can potentially add to that?
- Until now, many observers believe that a possible reunification of the two Koreas would happen by a collapse of North Korea. This need not be so, especially in the light of the talks now beginning between North Korea and the USA. And it must not be a 'policy of one lap'. German Chancellor Kohl proposed for Germany the way through a confederation: 'one country – two systems'.
- In any case, the unification of two legal systems is essential. And the path in Korea will be as long and stony as in Germany.

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G The Road to Unification of Korea

Both President Park and German President Joachim Gauck emphasized that it might be a long way to go. “Politics is drilling through thick boards, with patience and a sense of proportion,” the celebrated German social scientist Max Weber once said. In Dresden, President Park said that just as the German economic miracle on the Rhine found a successor in the Miracle of the Han, so will be repeated the German Reunification on the Korean peninsula. This is, she said, “a historical inevitability”. When can this happen? The German politician Otto von Bismarck, who in 1871 formed the German Empire, had this to say:

The statesman can never create something by himself; he can only wait and listen to the steps of the Lord through the historical events; then he should skip forward and grab the tip of his coat: that’s all.