Korean Constitutional Law Confronted with the Possibility of Reunification: Can German Experiences Help?

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Introduction

Issues surrounding a prospective Korean reunification are mostly discussed through political, economic, military or sociological perspectives. Yet, if reunification takes place in a constitutional state, the constitution will have to be respected, providing a legal framework for the political decisions to be taken. The exact contents of this framework however are very vague and they are seldom at the center of constitutionalists' debates. Given the very special circumstances of reunification and the fact that reunification is one of the main goals of the Constitution of the Republic of Korea (KC), it seems conceivable that its interpretation can allow a certain flexibility to adapt to the challenges of reunification.

To ascertain the constitutional parameters more precisely, it seems promising to compare Korean reunification to the German reunification process as the only reunification so far, set in the context of a constitutional state. Of course, it is today all but certain in which political circumstances Korean reunification will take place, and many observers contend that these circumstances will greatly differ from German reunification. Nonetheless, as long as reunification to one constitutional and democratic state is the goal, chances are that the legal premises of reunification will show great similarity in Korea and Germany despite economic and sociological conditions being far apart.

This paper will thus analyze constitutional problems of reunification on a comparative basis. A first part will shortly point out some constitutional problems of German reunification. In most cases, some details of legal questions in German law can be ignored, since the circumstances in Korean reunification would be different and the Constitutional texts and its interpretations will differ, too. Therefore this study will restrict itself to outline the main legal issues in reunification. For further case studies on this topic, refer to the two volumes and over 2000 pages concerning legal questions in German Reunification in the "Handbuch des Staatsrechts" tomes VIII and IX and the numerous studies referenced within.[1] In a second part this paper will try to develop a coherent approach for the constitutional parameters of Korean Reunification on the basis of the existing South Korean Constitution.

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1 See *Josef Isensee* and *Paul Kirchhof* (eds.): Handbuch des Staatsrechts, Band VIII: Die Einheit Deutschlands – Entwicklung und Grundlagen – and Band IX: Die Einheit Deutschlands – Festigung und Übergang. For a concise summary, see *Bernhard Kempen*, Wiedervereinigung, in: Werner Heun et al (eds.), Evangelisches Staatslexikon, Stuttgart 2006, p. 2712 ff.

Likely problems in constitutional law will be outlined and aspects of possible solutions presented.

A. German reunification and Constitution

German Reunification took most political leaders by surprise. No legal solutions had been elaborated beforehand and so many of the decisions taken revealed a certain trial and error character

I. Why no "new" Constitution?

The first legal question to be answered was whether a new constitution should be drafted or if the West German "Grundgesetz" should become the Constitution for the reunified German State. Both German states opted for the latter alternative. As the GDR pushed for its accession to the Grundgesetz, the FRG was unable to refuse, since article 23 GG included the binding constitutional offer to the East to accede.[2] Two reasons were particularly important for this decision. First, the population in the West identified with the Grundgesetz and the population in the East saw the Grundgesetz as the basis for Western Germany's political and economic success after World War II. Thus on both sides, the Grundgesetz was seen as a well-functioning, appropriate constitutional basis for the reunified Germany. Second, in the rapidly developing international situation most politicians were aware that reunification could be a matter of time and that any hesitation could destroy the hopes for reunification once and for all.

II. Inter-German Treaties and Constitutional Amendments

To prepare the transition of the East from a socialist society to a democratic one, three treaties were concluded between East and West Germany – the former actually preparing its own disappearance.

The first treaty – the "Staatsvertrag" – addressed questions of economic transition. Market economy was introduced in the GDR, a unitary monetary system agreed on, custom inspections abolished, labor law and social security in the East were thoroughly reformed.

The second treaty agreement, regarded as core piece of reunification, was the "Einigungsvertrag". This agreement prepared East Germany to become part of the Federal

2 See *Josef Isensee*, Abstimmen ohne zu entscheiden? in: Bernd Guggenberger and Tine Stein (eds.), Die Verfassungsdiskussion im Jahr der deutschen Einheit, München 1991, p. 214 (216 f.); *Kempen,* note 1, p. 2712.

Republic and included some amendments to the "Grundgesetz".[3] Questions of unity of law, international treaties and the organization of administration in the East were addressed.[4] Finally, the two Germanys agreed on the "Wahlvertrag", in which the procedure of the first common elections was determined.

III. Major Legal Disputes and Decisions of the Federal Constitutional Court

Reunification then raised a number of constitutional problems. For the purpose of this study only problems will be addressed which might arise during Korean reunification or which give hints for comparable problems. The judgments of the Constitutional Court will be awarded special attention, as in these judgments the conflicting interests are particularly apparent.

1. Constitutional amendments in international treaties

Many scholars considered it as particularly problematic that Constitutional amendments were adjudicated upon in the Einigungsvertrag, which was concluded as an international treaty, leaving parliament with no other option but to agree to these amendments.

Some legal scholars contended that this procedure was a serious threat to the usually preponderant role of parliament in the German process of constitutional revisions. For this reason eight conservative members of parliament went to the Federal Constitutional Court (BVerfG) in Karlsruhe to secure their rights. The Court however declared these demands as "evidently unfounded". It argued that in the case of the "historic chance to achieve the unification of Germany", the government was competent to agree upon constitutional revisions in an international treaty, as long as these revisions were absolutely necessary to reach a consensus about reunification with the GDR and with the International Powers involved.[5] The main concern behind this ruling was obvious: the Court didn't want to trouble the schedule of reunification and thus let pass, what never would have passed in other circumstances. Still it saw that the situation bore considerable difficulties and insisted that only amendments necessary for reunification were possible.

In this judgment the BVerfG stipulated what would become a central argument in its jurisprudence: the "historic chance to achieve the unification of Germany" requiring and

3 As we will see below, this procedure created serious problems with regard to the rights of parliament to decide upon constitutional amendments.

4 See *Wolfgang Loschelder*, Der Beitritt der DDR – Voraussetzungen, Realisierung, Wirkungen, in: HbStR IX, note 1, § 217, para 44.

5 BVerfGE 84, p. 90 (118).

justifying special measures.[6] This jurisprudence would become a corner stone of all constitutional jurisprudence on unification-related issues.[7]

2. Common elections

A second important judgment by the Constitutional Court related to the electoral law of the first common elections. In the political situation of 1990 it was clear that the successor of the communist party in the East, the PDS, would not be able to reach 5% nationwide, as it had no support in the West.[8] Thus to apply the 5%-clause nationwide meant to keep the Socialist party out of parliament, the main reason why all the major Western parties insisted on the upholding of this clause.[9] However if the Constitutional Court had been very generous in its judgment on the Constitutional amendments, it became relentless in the case of the 5%-clause. The Constitutional Court held the 5%-clause to be discriminatory in the context of Reunification and thus censored it.[10] Given the high importance of the principle of equality of votes, the Court ruled that it had to suffice in the 1990 elections to reach 5% of the votes in the East.

The contrast between these two judgments is striking. Concerning the question of how to reach reunification the Court renounced almost completely to review the measures judged appropriate by the government. Yet, on the issue which held great influence on party politics and which had no potential to effectively hinder reunification, the Court was a strict controller and overruled the attempt by the old West German parties to impede the emergence of new parties.

3. Rehabilitation

A further problem of German reunification was the necessity of rehabilitation for the victims of the socialist regime. An obligation to compensate was based on the principles of the social and democratic constitutional state.[11] Two major issues of rehabilitation had to be addressed. First, the legislation for the recompense of socialist injustices tried to com-

6 See the analysis of jurisprudence by *Eckart Klein*, Die verfassungsrechtliche Bewältigung der deutschen Wiedervereinigung, in: Karl Eckart (ed.), Wiedervereinigung Deutschlands, Berlin 1998, p. 417 (426).

7 See BVerfGE 85, 360 (377), 92, 277 (327), 82, 316 (321), 84, 90 (119), 94, 12 (34 f.), NJW 1997, p. 383 ff., NJW 1997, p. 1977.

8 It would receive almost no votes in the West and thus would need 23,75% of East German votes to reach 5% nationwide and enter parliament, what seemed impossible.

9 See for example the statement of the speaker of the social-democrats in the Bundestag, H.-J. Vogel, BT StenProt. 11/217 p. 17168 C/D.

10 BVerfGE 82, p. 322 (340 ff.).

11 See BVerfGE 84, 90 (126) and *Horst Dreier*, Verfassungsstaatliche Vergangenheitsbewältigung, in: Peter Badura and Horst Dreier (ed.), Festschrift 50 Jahre Bundesverfassungsgericht, Tübingen 2001, p. 159 (186).

pensate for disadvantages in professional careers, suffered by GDR citizens because of their democratic convictions. Second, victims of political persecution were granted compensation in form of nullification of penal judgments and financial compensation for unjustified imprisonment. Needless to say, such compensation was usually unequal to what had been lost.[12]

One can assert that the Federal Republic was constitutionally obliged to grant compensation to victims of the socialist dictatorship. Yet in view of the very large number of victims and the difficult financial situation in the aftermath of reunification, there was a large margin of appreciation of how money should be distributed.

These principles also applied for the demands for restitution of owners of property expropriated by the Soviet Union and later the GDR. Some of these owners were granted restitution but most of them only received financial compensation, which in many cases was far below the market price.

4. Penal prosecution

Another tangled challenge of reunification litigation was the question of penal prosecution of acts committed by GDR-officials, which were considered crimes in the West, while legal in the East. If the letter of the law in the East seemed to allow punishment, but in socialist practice the deed was considered to be legal, the German Courts agreed that principally no punishment was possible. However, the penal courts imposed one exception: If the legal situation in the East was in sharp contrast to international obligations of the GDR, Federal Germany's justice could condemn the involved criminals.[13] The solution drew very severe critiques since it seemed to be in clear contrast to the absolute non-retroactivity of penal laws prescribed for in article 103 § 2 GG[14], but the finding was finally accepted by the Constitutional Court.[15]

In contrast, the Constitutional Court put strict limits to the penal prosecution of spies of the former GDR.[16] It stated that their punishment violated the principle of a state of law, if the acts had been in compliance with the socialist law and there had been no risk of being punished. This included all spies acting from Eastern territory only, since the GDR – naturally – didn't threaten to punish its own agents.[17] However, if the spies were acting on

12 *Dreier,* note 11, p. 159 (186) quotes an example of 12,000 DM for 2 years of emprisonment.

13 The penal Courts took according decisions in BGHStE 39, p. 1; E 40, p. 218; E 41, p. 101.

14 See for example *Dreier,* note 11, p. 159 (205 ff.); *Josef Isensee*, Rechtsstaat – Vorgabe und Aufgabe der Einheit Deutschlands, in: HbStR IX, note 1, § 202, p. 99 ff.

15 See *Dreier,* note 11, p. 159 (205 ff.).

16 See BVerfGE 95, 86.

17 See BVerfGE 92, p. 277 (351 f.), and *Klein,* note 6, p. 417 (427).

western soil, they could be punished after Reunification as had been the case before 1990.[18] The solution of the Constitutional Court came close to an amnesty, and was thus criticized by the dissenting opinion and some scholars as usurpation of the powers of the legislature.[19]

IV. Conclusion

The large number of decisions delivered by the Court proves that the process of Reunification was a legally challenging enterprise.[20] Throughout, the BVerfG found itself in a very difficult situation. It could neither take decisions which endangered reunification nor such which caused unbearable costs for the federal republic. Consequently many legal questions had to be decided under enormous pressure. Yet, the Court and in many cases parliament did their best to respect fundamental rights as much as possible. As to all others professions, the process of reunification caused specific difficulties for the constitutionalist that enforced solutions hardly acceptable in regular times.

One further observation might prove instructive. Almost all of the Court's decisions are related to special and distinctive problems in the transition process. That is to say that the Constitution did not prescribe the general political decisions during this transition process, like the question of whether or not to pass by a stage of confederation or what demands of the Soviet Union and the GDR had to be fulfilled. By contrast, Constitutional norms played an important role when the fundamental decisions had been taken and it came to precise decisions, directly affecting individual rights.

B. Constitutional law in Korean reunification

The following chapter will analyze constitutional problems in a prospective process of Korean reunification. Keeping in mind the legal solutions in Germany in 1990, possible advantages and disadvantages will be analyzed without however giving clear-cut solutions to the arising problems. Such solutions can only be found in the concrete economic and socio-political situation of reunification and by Korean scholars. This article only tries to make the modest contribution, German constitutional doctrine can make to this important process. The following chapter will first consider general constitutional question, then examine some particular problems and finally propose necessary constitutional amendments.

18 Articles 94 and 99 of the West German Penal Code (StGB) penalized espionage of the GDR against the FRG even from the territory of the GDR.

19 BVerfGE 92, p. 277 (351 f.).

20 Until today there have been close to 100 judgments by the Constitutional Court regarding unification-related matters.

I. The constitutional framework for reunification – General Considerations

As the German Grundgesetz did, the KC mentions reunification in some of its articles. In law, the Federal Republic of Germany after 1949 and the Republic of Korea after 1948 see themselves as the only legitimate successor of the one state prior to division. The KC allows no doubt about that, when it reads in article 3: "The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands." Yet, this legal statement stands in contrast to the "de facto" existence of two states. Of course the Constitution is aware of this fact when it stipulates in article 4: "The Republic of Korea seeks unification and formulates and carries out a policy of peaceful unification based on the principles of freedom and democracy." The apparent contradiction between these two norms has been much discussed in Korean Constitutional doctrine.[21] It shows that the relation to North Korea is as a matter of fact none of internal relations, but that from a constitutional point of view North Korea cannot be regarded as independent state.

Yet, the Constitution is unambiguous about the fact that the South Korean government is to pursue reunification actively and that in the case of reunification the existing South Korean Constitution should be the Constitution of a reunified Korea. Given the description of the German reunification process above, it seems obvious that in the context of reunification special problems will arise, which can hardly be adequately solved with the conventional interpretation of the Constitution. However, the Korean Constitution today includes numerous rules, which insist on the goal of reunification but very few provisions, which deal with constitutional issues in a reunification process. Thus, one of the core questions of this work is, if there are adequate mechanisms to design reunification within the existing constitutional framework.

Regarding these questions, it has to be kept in mind that the answers can depend on the demands of other parties in discussions about reunification. Such demands, possibly leading to constitutional amendments, would change the constitutional situation. However, they will depend on the political powers negotiating reunification and it would be purely speculative to include them in the following considerations. When appearing very likely such demands will be mentioned, but in general the following chapter will take the KC as a starting point.

1. No new Constitution

The first issue to be decided before reunification takes place and which will influence all further considerations is whether to uphold the KC or if rather a new Constitution has to be drafted. There are a certain number of reasons favoring the perpetuation of the KC. First, it hardly seems feasible that in the already very complex situation of reunification, the ambitious task of negotiations on a new constitution can be successfully carried out. In neces-

[21] See *Jang Yeong Su*, Heon Beop Chong Ron (Introduction to Constitutional Law), Seoul 2002, p. 174.

sary negotiations about a new constitution various political groups would try to constitutionalize parts of their political program and it would be extremely difficult to come to a satisfying consensus. Second, such a process would probably take up much time; time, which might be very disadvantageous to lose. Third, the KC is a generally well functioning fundamental law. Of course, there might be wishes about amendments to the Constitution, like strengthening the role of parliament. Yet, the KC has brought two decennials of peaceful democracy to South Korea including a steadily improving Human Rights situation and the guarantee that, unlike in many other newly democratized countries, the decision of voters for democratic change is respected. There are no good reasons perceivable why this should be given up in the mere hope that something better might be negotiated. Fourth, the KC intends its own maintenance after reunification. Contrary to the German Grundgesetz's article 146, it does not provide a provision for its own termination, but is obviously designed to apply to the entire peninsula, see article 3 KC. For these four reasons chances appear high that the parties in a reunification process would take the current constitution as a normative basis of the reunified Korea and under certain circumstances agree on some amendments; such an outcome is the basic assumption to the following chapter.

2. *Procedure of constitutional amendments*

One of the legally most challenging problems German reunification was the fact that constitutional amendments had been agreed on in an international treaty. The same problem could arise in Korean reunification. Constitutional amendments would be necessary to change or abrogate the norms related to reunification and possibly to adapt norms relevant to some special problems.[22] If constitutional amendments were negotiated by the President of the ROK, the treaty would have to be ratified by the national assembly. In ratifying an international treaty, the national assembly cannot propose any changes, but only approve or disapprove.[23] Besides as the treaty includes amendments to the Constitution, article 130 will apply. Article 130 stipulates special requirements for the vote of the national assembly and requires the people consent to the proposed amendments in a referendum. In this situation a mélange of rules of approving international treaties and of constitutional amendments would apply. Constitutional amendments will be adjudicated upon with the enormous pressure that, if they fail, this will impede reunification. Thus, the executive can negotiate constitutional amendments, which as a matter of fact have to be accepted by parliament. Such a procedure was considered highly problematic in German constitutional law. Yet, the Constitutional Court considered it to be justified by the special circumstances of Reunification as long as only reunification-related amendments were adopted.

Similar considerations apply to the Korean case. The fact that the decisions of national assembly and popular referendum have to be taken under high pressure originates from the

22 See below B.III. and the amendments to the Grundgesetz in article 135a § 2 and 143.

23 Parliament can only consent to international treaties not amend them, see article 60 KC.

very nature of reunification. If this process requires constitutional amendments, it is impossible to decide about these amendments without the pressure of impeding reunification by a negative vote. That furthermore parliament won't be able to change the wording of the constitutional amendments, as they are included in an international treaty, resides within the inner-logic of reunification based on international negotiations. The historically unique situation of reunifications requires fast and decisive actions and is thus foremost the time of the executive. Therefore article 66 § 3 KC accords the competence in unification related matters primarily to the President. Yet, this reasoning only applies to amendments directly related to reunification. Other amendments have to be discussed after reunification.

3. Common elections

The democratic principle of article 1 KC requires holding elections a short time after reunification to make sure that the entire Korean population is duly represented by the elected representatives of the state. The case of reunification, however, entails major irregularities necessitating some adjustments.

In Korea two popular votes will be necessary: parliamentary and presidential elections. The latter should take place in an appropriate time after reunification. It is dubious whether the President holding office in the moment of reunification could be reelected or not. Article 70 KC seems to give a negative answer to that question prohibiting the reelection of the president and article 128 § 2 KC even rules out a constitutional revision allowing reelection. However, this question reveals exclusively of Korean Constitutional law, where no German experiences exist and which thus shall not be discussed in this study.

Some comparative problems exist with regard to parliamentary elections. First, it is debatable whether the entire parliament should be reelected or if only the northern part of the Unified Korea should elect new representatives to send them to the parliament already constituted in the South. This is a question of political practicability rather than of constitutional law, since there is no rule stipulating that all members of parliament have to be elected simultaneously. Yet, it certainly has to be prevented that, in the long term, elections take place on different dates in North and South. Such an outcome would be especially disadvantageous in case of a clear cut majority after the elections in the South, which couldn't be altered by elections in the North, because of the numeric superiority of the Southern population. For this reason, it seems the most convincing, if legally not mandatory, solution to hold common elections for an all-Korean parliament shortly after reunification.

Given the election procedure, it goes without saying that elections have to conform to the general KC-standards of elections, thus have to be universal, equal, direct and secret as prescribed in article 41 KC. A possible lesson from German reunification is that a fair chance of Northern political parties to succeed in these elections has to be guaranteed. That is true for newly founded as for already existing parties, as long as they accept basic democratic principles. This results from the equality of vote demanded by article 41 § 1

KC. In Korean electoral law, one third of the seats in parliament are distributed proportionally to parties which receive more than 3% of the nationwide votes and two thirds are won in local ballots with a first-past-the-post voting system. The equality of vote becomes especially relevant and poses special requirements for the seats distributed on the basis of the proportional elements of electoral law. It has to be carefully considered how to allow a ballot, which gives chances to the North Korean population to be represented with independently formed parties in the parliament. One could imagine that in the unified Republic of Korea, concurring to the judgment of the Constitutional Court in Germany, the nationwide 3%-clause for the proportional vote should only apply to the formerly divided parts of the country. If this solution wasn't applied, a party, only represented in the North of the Country, would need about 9% of the votes in the North to receive any seats.[24] This would cause serious problems with regard to the principle of equality of vote.

A possible further existence of the old Workers' party in the North or other small parties having supported the Juche-regime might raise some additional issues. These parties would have to transform their organization and objectives to conform to article 8 § 2 KC. In particular they have to accept the fundamental democratic order of the KC to evade their dissolution by a judgment of the Constitutional Court as provided for in article 8 § 4 KC. In short, such parties would have to do what most formerly communist parties in Eastern Europe did: Adapt to the new democratic order. In this case, the Workers' party could be on the ballots in the first general elections after reunification.

A major problem regarding this party would be how to handle its property. The Worker's party's property is huge and very valuable. However, it will be difficult to judge, what belongs to the state and what constitutes property of the party. In this situation, it seems justified to consider that all property belongs to the state and thus after reunification to the unified Republic of Korea. The workers' party might be left with the party's main building and some operational funds, the spare of the party property will be used to cope with the extremely difficult economic and social situation in the North. From a constitutional point of view it is not arguable why the ex-state party should be given the immense properties it acquired only because of its symbiosis with the state.[25] The right of property only guarantees property to individuals, but not to state agencies. And it seems evident that a state agency, "privatized" in the process of reunification, has no constitutional right to retain all its former goods. This "metamorphosis" enforces a fundamental change of the structure of the organization of the workers' party, which is furthermore necessary to turn it into a normal party in Korea's pluralistic politics.[26]

24 This is due to the fact that only about 23 Mio. people live in the North, while in the South is living a total of 49 Mio. people.

25 For a similar argument see BVerfGE 84, p. 290 (297 ff.); *Hans Meyer*, in: Badura/Dreier, note 11, p. 83 (86).

26 See for the German case *Philip Kunig*, Die Parteien und ihr Vermögen, in: HbStR IX, note 1, § 216, para 44.

4. Reunification as exception and Human Rights

One of the main concerns in any reunification scenario will be the protection of the citizens' fundamental rights. Yet, in the same time the effectiveness of measures of the state authorities has to be secured. The Constitutional Court of the Republic of Korea has developed a very demanding jurisprudence on fundamental rights over the last 20 years. In numerous cases the Court declared laws void, because they violated Human Rights. Yet, not any provision restricting Human Rights is unconstitutional, but it has to be analyzed, if the restriction conforms to article 37 § 2 KC and to the principle of proportionality. The reasons enumerated in article 37 § 2, which can justify restrictions on Human Rights, are national security, the maintenance of law and order and a necessity of public welfare. There is no special mention of reasons related to national reunification. Thus, one might think that in reunification the same level of Human Rights protection applies as in any other situation. Consequently, special difficulties of reunification could not be taken into account and from the first day citizens in the North would enjoy the same rights as citizens in the South. Yet, such an interpretation might not be adequate in the difficult situation of Reunification and in particular could cause an uncontrollable, since legally unstoppable, wave of immigration from the North to the South.[27]

To propose such an interpretation, however, falls short of the content of the KC. The Constitution stipulates the central goal of reunification in numerous of its norms, in paragraph three of the preamble, in articles 4, 66 § 3, 69, 72, 92. Given the fact that a constitution shall usually be interpreted in a systematic and interrelated way, it seems hardly convincing that these norms shouldn't have any effect on the possibility of restriction of Human Rights in reunification. Instead, these norms insinuate that the special situation of reunification has to be taken into account, when adjudicating upon the constitutionality of Human Rights restrictions. Concurringly the BVerfG stated on several occasions that the unique circumstances of reunification allowed measures, which in regular times would have been considered contrary to the Constitution.[28] Thus, article 37 § 2 KC, even though not especially mentioning the case of reunification, has to be read in the light of the numerous provisions of the Constitution making clear that reunification has to be considered as a main goal. This could be interpreted as leading to a fourth reason - unwritten in article 37 § 2 – which legitimizes restrictions on fundamental rights, i.e. the cause of national reunification. The creation of such unwritten norms is something familiar to most constitutional orders and there are many prominent judgments of Constitutional Courts.[29] Yet, such jurisprudence has always been object of fervent critiques, because judges, in developing

27 To such fears see below B.II.2.

28 See above A.III.1.

29 See for example the Volkszählungsurteil BVerfGE 65, p. 1, which develops a unwritten fundamental right and the Capital movement case by the Korean Constitutional Court 2004Hun-Ma554, which states – acknowledging that there is no written provision – that Seoul constitutionally has to be the Capital of Korea.

unwritten principles, are not saying law anymore, but are creating it. Critiques then usually argue that creating law should be the task of the legislator and Courts, in doing so, usurp this power. Even if the underlying conception of Courts as mere "bouche de la loi" seems hardly convincing today, it should be examined, if other possibilities of judicial construction exist to avoid such criticism.

The Constitutional Court could interpret the wording of article 37 § 2 KC in a broader way including the goal of reunification in the three written reasons. In some cases, measures in reunification already serve national security and the maintenance of law and order and thus could be justified by these goals. In other cases, it should be contended that the goal of public welfare in article 37 § 2 KC comprises the goal of reunification in a general way. The Constitution intends to be applied to the entire Korean peninsula, as it clearly states in article 3 KC. Thus, "public welfare" arguably should not be understood as comprising only public welfare in South Korea, but public welfare in Korea within the boundaries of article 3. And there is no doubt that reunification in a peaceful and democratic way would provide increasing welfare for the population in the North. This is even more convincing as Public Welfare guarantees to live in a pluralistic, democratic and liberal society.[30] If article 37 § 2 KC is thus read in the light of articles 3 and 4 and the preamble of the Constitution, it is contended here that the cause "public welfare" includes the mission of reunification. Not only measures, which directly concern questions of social needs in the North, can be considered to serve public welfare, but reunification itself provides public welfare.

Furthermore, given the repeatedly stated goal of reunification, it is conceivable to award it a special weight. This would allow more severe restrictions of fundamental rights in the context of Reunification than in regular times, what basically means that the powers of parliament and executive are widened in the situation of reunification. This is crucial as in the moment of reunification, important decisions may have to be taken in a very short time and the competent authorities will not have the time to wait for an constitutional analysis about the admissibility of a measure. In this way, the existing Constitution can adapt to the very complex situation of necessary restrictions to Human Rights in the context of reunification.

This argumentation can be extended to other constitutional norms. The KC insists on the goal of reunification in many of its articles. In the system of a constitution, where colliding norms often have to be restrained to reach "praktische Kohärenz", it seems clear that no provision of the Constitution should be read in a way, which obstructs one of the Constitution's main goals. That does not mean that any measure taken by the government can be justified by a mere reference to the problems caused by Reunification. It is within

30 Even though the concept of "public welfare" is controversial in Korean constitutional doctrine, most scholars contend that it has to be understood in a broad sense, see *Kim Nam Sik*, Gi Bon Gwon Ron (Treaties of fundamental rights), Seoul 2000, p. 84; *Jang Yeong Su*, Gi Bon Gwon Ron (Treaties of fundamental rights), Seoul 2002, p. 149.

the jurisdiction of the Constitutional Court to examine whether or not the problems of reunification plausibly necessitate such measures to be taken and if advantages and disadvantages of these measures are in a sound relation. Thus, reunification doesn't give a "carte blanche" to the government, but its margin of appreciation is widened and important decisions can be taken without overwhelming constraints. In reviewing the constitutionality of such measures, the Constitutional Court always has to be aware that the measure in question was taken to realize one of the Constitution's main goals.

5. Liability of a unified Korea for North Korean acts

A further general question to be analyzed is whether or not the unified Republic of Korea will be liable for acts committed by North Korean officials, during the North's existence. There are two possible legal bases for demands of individuals for reparation: Fundamental rights or the principles of a social and constitutional state and its concretizations.

Fundamental rights do not only ban violations of these rights, but in case of afflicted violations give a right to compensation of the individual against the state. At first glance one might think that as the Unified Korea in some ways will be the successor of the North Korean state, the citizens in the North could claim restitution or compensation from the unified Korea for the uncountable violations of Human Rights committed by the North Korean state. Yet, this argumentation falls short of the factual Korean situation. It ignores the division of the country and misinterprets the Constitution in one decisive point: the fundamental rights only bind the organs and agencies of the Republic of Korea. For these reasons the violations of Human Rights by the North Korean government cannot be attributed to the unified Korea. Consequently the unified Republic of Korea is not obliged to confer compensation to all citizens violated in their rights by the North. It is not the obligation of a Constitutional state and the guarantee of Human Rights to secure retroactive historical justice, but to allow to its citizens to live in freedom and dignity today.[31] In the process of reunification this task is already very demanding and should not be further complicated by demands to compensate all injustices occurred during the last century. In a technical wording: In the case of claims for public liability, North Korean officials, who committed the act, were not public officials in the sense of article 29 KC and the Human Rights guaranteed in the KC did not apply. Similarly, political prisoners in the North are not entitled to damages against the ROK out of article 28 KC.

Yet, there is a strong moral and political need to grant some kind of compensation to the victims of a totalitarian regime. In German Reunification the constitutional norms, which contained guidelines for this problem, were the principles of a social and democratic constitutional state enshrined in article 20, 28 GG. In Korea one might take another normative basis. Article 30 KC prescribes that those, who suffered bodily injury or death from the deeds of others, may receive aid from the state under the conditions prescribed by law.

[31] See *Fritz Ossenbühl,* Eigentumsfragen, in: HbStR IX (note 1), § 209, para 54.

"Deeds of others" can be interpreted as including acts of North Korea and thus a law could be passed on the basis of article 30, which entitles the victims in North Korea to just compensation. It is debatable whether there exists a constitutional obligation of the legislator to pass such a law or not.[32] Given the assumed cruelties in North Korean prisons or labor camps, it seems like a moral obligation to give some a kind of compensation to the victims of those deeds. The existence of such an obligation seems even more evident as the North Korean victims have been denied justice since 1945. Still, to constitutionally determine an obligation to give financial aid to the victims of totalitarian oppression or even its exact amount is just not feasible. It is the duty of the legislature to cope with the situation after reunification and parliament and executive have to determine to what extent help should be given to the victims. In these considerations, the suffering of victims of the totalitarian regime in the North shall be duly weighted. But still many other burdens will have to be assumed by the unified Korea causing very high costs. Even though compensation for victims of the North Korean state is very important, the same is true for measures aiming at making the North Korean economy recover and to ensure sufficient food supplies for the North. The Constitution cannot respond to the question, to which aspects priority should be given in these deliberations. For this reasons a constitutional obligation to provide financial recompense to the victims does not exist. The only constitutional prerequisite is that these suffering have to be taken into account, thus the government cannot just ignore what happened and that if compensation is to be given, this compensation has to comply with the principle of equality.[33] Thus compensation for the victims of the North Korean regime is a question of politics rather than of constitutional law. This of course does not obstruct the government form granting compensation, but the Constitution does not oblige the government to spend more money for this purpose than what it deems feasible.

6. Conclusion

The Constitution gives a wide margin of appreciation to the competent authorities in addressing issues in reunification. As long as the KC is not abrogated, it does not lose its normative power, but allows a flexible interpretation, which in general does not restrain the competent authorities from taking necessary steps. These general considerations shall be applied and discussed for some concrete problems in the following chapter.

II. Human Rights especially relevant in transition

In German Reunification protection and compensation for violations of fundamental rights gave place to the most heated discussions. Since the concept of fundamental rights is similar in Germany and Korea, but questions of constitutional law with regard to the organiza-

[32] Most Korean scholars believe that article 30 does not contain such a general obligation of the state, see *Jang* (note 30), p. 672.

[33] See below B.II.4.

tion of the state are very different, this chapter will concentrate on issues of fundamental rights.

1. Right to property

An issue of huge economic importance in any transition process is the (re)-distribution of land property in North Korea. It is without the scope of this article to give an exhaustive analysis of the problems which might arise.[34] Considering questions of restitution of properties expropriated by the DPRK it seems convincing to apply the same rules outlined for compensations of victims of the Communist regime in general. Thus some kind of compensation should be granted but the legislature has a broad margin of appreciation when adjudicating upon this issue. In the contrary, North Koreans possessing land in the moment of reunification couldn't be expropriated without granting them compensation.

2. Freedom of movement

The freedom of movement will also require special attention in reunification. One of South Korea's main concerns in reunification is to prevent a wave of immigration of desperate North Koreans to the South. The attention to the freedom of movement in this case will be in strong contrast to the generally low importance of this freedom in constitutional, market-economy states, where citizens are usually allowed to travel freely and to move their residence at their discretion.

Korean Constitutional doctrine generally accepts that the freedom of movement protects the movement of citizens inside Korea.[35] After reunification, it is unambiguous that traveling from the North to the South – or vice versa – falls within the scope of protection of article 14 KC. This freedom could prove very problematic as reunification and the opening of borders could trigger a wave of immigration from North, suffering from malnutrition and poor living conditions, to the "promised land" in the South.[36] The government might consider it necessary, to restrict the freedom of movement from the North to the South relying on the possibility of restrictions in article 37 KC. Such restrictions can be justified by two main reasons: First, the Southern Part of the country would be overburdened by the task to take care of an assumedly very high number of refugees. Second and even more important, it would be disastrous to the Northern economy, if most of the

34 For an analysis, see *Kolja Naumann*, Distribution of land property in North Korea after Reunification: A Constitutional Point of View, North Korean Review 2009 (forthcoming).

35 See *Kim* (note 30), p. 232.

36 There are some observers who contend that these fears are exaggerated, *Philip Bowring*, International Herald Tribune, September 27, 2005, or that a high cross-border mobility is one of the keys to successful economic development, see *Marcus Noland and Sherman Robinson and Liu Li Gang*, The costs and benefits of Korean Unification, Working Paper Peterson Institute 98-1. These questions however lie within the competence to assess of legislator and government and will largely depend on the socio-economic situation on reunification.

citizens, who are able to travel and who thus constitute the major part of the Northern work force, would escape to the South, letting behind a Northern population, which will depend on transfers from the South for incalculable time. Restriction of the freedom of movement could prevent such an outcome. These restrictions would fulfill the requirement of a necessity of "public welfare" in the sense of article 37 § 2 KC. However, restrictions of fundamental rights are only admissible, if, additionally to the pursuit of a legitimate goal, they do respect the principle of proportionality and do not violate an essential aspect of this right.[37] Proportionality means that the intensity of restriction of human right has to be in a sound relationship to the goal that shall be secured.[38] The proportionality of travel restrictions to North Koreans depends on the restrictiveness of these rules. The goals pursued by measures to prevent an exodus from the North to South are high-ranking goals and in general could easily justify restrictions of Human Rights. However, the restrictions could also be very intense. For example, a general prohibition of traveling from the North to the South would leave little or even no room for the freedom of movement for citizens in the North. It could be contended that such restrictions violate the essential aspect of this freedom and are thus prohibited by article 37 § 2 KC. Less intense measures, like the necessity of administrative approval of any traveling to the South would be less problematic, even though this depends on the conditions under which this permission is granted.

If highly intense measures like a general prohibition of traveling were considered indispensable by the government, it would be necessary to allow exceptions from these rules to secure the proportionality of restrictions. There should be an exhaustive codification of exceptions, which should be adjudicated upon by the competent authorities and courts. Furthermore, far going restrictions would require a regular and critical examination in the following years, if the situation in the North has improved to such an extent that no mass exodus has to be expected anymore. If this is denied, the government has to adapt the measures to the improved situation. This means that although very restrictive measures could be admissible and proportional in the beginning of the reunification process, they would remain highly problematic throughout this process and in case of improvements of the economic situation in the North could be considered as disproportional in very short time. To prevent judicial insecurity and to allow to the state to found its freedom of movement policy in the Reunification process on firm ground, the Constitution could be amended to explicitly allow stronger restrictions of this freedom in transition.[39]

37 See *Jang* (note 30), p. 150; *Kim* (note 30), p. 89.

38 To German influences on the Korean doctrine of proportionality see *Chan Jin Kim*, Constitutional Review in Korea, KJICL vol. 34 (2006), p. 29 (86 f.); *Jang* (note 30), p. 150.

39 For proposals for such amendments, see below B.III.

3. "nulla poena sine lege", Article 13 KC

Korean reunification, as the overcoming of totalitarian states in general, raises several problems in penal law. On the one hand, victims of state acts, which were in contradiction to principles of humanity, will claim prosecution of those, who committed these deeds.[40] Many of these deeds violated Human Rights recognized by international treaties or customary law or even "ius cogens". On the other hand in most cases, these deeds have been conforming to the legal situation in the totalitarian state or at least have not been persecuted by the competent state agencies. To analyze to what extent the persons responsible for these acts can be persecuted in a reunified Korea, it is necessary to analyze three distinct groups of "crimes": first, criminal acts, which were usually prosecuted as such in North Korea; second, acts, which where not considered illegal acts in the North, but which can be considered crimes against humanity and third, formally illegal acts, which however were silently accepted by the state. The legal situation would change considerably, if in negotiations about reunification special rules were agreed upon for penal prosecution. For example, it seems possible that a general amnesty would be passed or a procedure comparable to the Truth and Reconciliation commission in South Africa would be introduced. Even though such a solution might be considered problematic, because it prevents judicial justice, it is conceivable that if the old communist cadres would be the negotiators on the North Korean side, they would insist on a general amnesty. The following chapter however does takes as a starting point that no such amnesty or other mechanisms of dealing with the past are agreed on and instead the general penal and constitutional rules apply.

a) Criminal offenses

Fewest constitutional problems exist with regard to crimes, which where labeled and handled as such by the North Korean regime. If they haven't been tried by the courts back then and if they aren't prescribed in law, there exist no legal barriers to prosecution. In this case, the Northern Law has to be applied except in the case that the South Korean law provides less severe penalties. However there exists no obligation to prosecute such crimes, especially if punishment doesn't seem necessary anymore.

This solution applies also to deeds, which were illegal but due to the breakdown of the North Korean judiciary system were in all or almost all cases not judged. As long as in a possible trial a criminal would have been found guilty under by North Korean Courts, he can be tried after reunification. The trust in the non-functioning of the legal system is not protected by the "nulla poena sine lege"-principle in article 13 KC. However, given the desperate situation of the population in the North, it seems possible to pass an amnesty for everyday criminal offenses, so that the newly installed tribunals in the North won't be overburdened with cases concerning the past and the population in the North could restart

40 For a comprehensive overview of Human Rights violations in North Korea, see White Paper on North Korean Human Rights statistics 2007, Seoul.

their new lives without having to fear penal prosecution for deeds committed in absolute misery.

b) Formally legal acts violating Human Rights

Very problematic is the penal prosecution of acts considered legal in North Korea, but in clear contrast to fundamental Human Rights, international Human Rights treaties or metaphysical norms. In this case two principles of law collide: judicial justice and judicial security.

Article 13 KC is relevant in this context, as it provides that "No citizen may be prosecuted for an act which does not constitute a crime under the law in force at the time it was committed …". This seems to be exactly the case discussed here, as in the time the act was committed, this act did not constitute a crime under the applicable North Korean law and thus article 13 seems to rule out punishment. The problem could be solved if the possibility of restriction of fundamental rights in article 37 would apply to article 13 as to other fundamental rights. However, it is generally accepted today that not all the Human Rights guaranteed in the Korean Constitution can be restricted. For example the ban of torture is mostly believed to be absolute, meaning that even if the goals enumerated in article 37 KC can't be achieved in any other way than by using torture, torture remains illegal. The same is traditionally true for the procedural rights of citizens in criminal cases.[41] These rights cannot be legally restricted, since they protect the belief of citizens in judicial security. In other words any restriction of such a right constitutes a violation. If one subscribes to this view in the context of reunification, North Koreans, who committed acts like murder, torture etc., justified under North Korean law, cannot be prosecuted after reunification.

As we have seen above the BVerfG principally agreed with this solution, however it insisted that exceptions were admissible in cases of severe violations of Human Rights. The Court contended that the absolute trustworthiness of the "nulla poena sine lege"-principle only applied for laws passed by a democratic legislator. Thus in the case of grave violations of Human Rights, restrictions of this principle were possible. These decisions were heavily criticized by the German doctrine, which convincingly contended that the "nulla poena"-principle dates back to times, when there was no democratic legislator but an authoritarian monarchy.[42] The principle thus draws its legitimacy not from the democratic act of law-making but from the trust of citizens not to be retroactively punished. It is not convincing that only citizens, who are lucky enough to live in a democracy, shall enjoy this right, while those in a dictatorship have to fear prosecution after the dictatorship's collapse. If one subscribes to this view, northern officials cannot be judged for acts like torture or executions of political prisoners without trial, as long as their acts were conforming to North

41 See to the problem of application of article 37, *Jang* (note 30), p. 151-153.

42 See *Dreier* (note 11), p. 159 (206 f.).

Korean law.[43] Such a position might be refuted with the argument that these acts violated international "ius cogens" and thus were already illegal, in the time they were committed. Regarding deeds which doubtlessly disrespect fundamental values of the international society, it is argued that there can be no trustworthy belief of individuals in the legality of their deeds.[44] However such an argumentation isn't convincing for two reasons. First, "ius cogens" might prescribe that torture is always illegal. But this in itself is not a penal norm, but a norm which obliges the state to pass such a penal norm. Thus the international "ius cogens"-norm which prohibits certain acts, is not the penal code necessitated by "nulla poena"-principle. Second, already in democratic states it seems very difficult to determine which acts doubtlessly disrespect fundamental values.[45] To argue that such judgments could be made without any problems in a totalitarian state, completely shut off from the rest of the world, by individuals, indoctrinated during all their lives, seems utterly unrealistic.[46] Thus, it is contended here that the "nulla poena"- principle withstands the prosecution of acts, which were not punishable in the DPRK.

Such an outcome might be very unsatisfying to the victims of crimes against humanity in the DPRK, but this is what article 13 KC prescribes. Furthermore, studies on transitional justice put forward that it is all but certain that (severely) punishing officials of an overcome dictatorship is an effective way to achieve reconciliation.[47] However, without such reconciliation the future of a unified Korea is very uncertain. Nevertheless, if one wants to punish the responsible person, a constitutional amendment must be passed in reunification to allow exceptions from the "nulla poena"-principle.[48]

c) Criminal offenses accepted by the government

Some other acts were punishable under North Korean law, but were accepted in North Korean judicial practice. In these cases the question arises: What does "law in force" mean in article 13 KC? Does it mean the legal text only or the law as applied by the competent authorities?

The allegation that North Korean officials are actively pursuing drug-traffic or counterfeiting of currencies as a mean to provide foreign currencies to the North Korean state, can

43 Another example might be the legally authorized "in-flagranti"-executions of thieves of food during the great famines in North Korea, White Paper on Human Rights in North Korea, 2006, p. 24 ff. Of course, such executions violated Human Rights in multiple ways and left the relatives of the victim in great pain, but still the "nulla poena"-principle would withstand the punishment of the acting persons.

44 See *Klein* (note 6), p. 417 (425).

45 A good example is the actual dispute whether or not the so called "waterbording" practiced by American officials in the "War against Terror" constitutes torture.

46 For similar critiques in Germany see *Dreier* (note 11), p. 159 (206 f.).

47 See for example *Ruti Teitel*, Transitional Justice, Oxford 2002.

48 See below B.III.

serve as an example.[49] On the one hand, these acts constitute criminal offenses under North Korea law. On the other hand, such acts are in a certain way regarded as official acts, which are sure to be exempted from any penal prosecution in North Korea. These cases are on the brink between trustworthy belief in non-prosecution and obvious and thus punishable breach of law. For some reasons, the position taken by the German Constitutional Court concerning spies in the ex-GDR seems transferable to the Korean situation.[50] As the principle of "nulla poena" finds its justification in the fact that the trust in non-prosecution should weigh more, than the demand for justice, it can be transferred to our case. It is not the fault of citizens to live in a state, which disrespects law. Therefore, the trust of these citizens in non-prosecution of certain acts should weigh as much as the same belief of citizens in a democratic constitutional state. However, this reasoning indicates a restriction on the trust of the public officials in non-prosecution. If they committed their acts abroad and thus risked to be punished by the competent authorities, there was no trust-worthy belief in non-prosecution.[51] In these cases they just hoped not to be caught and punished like ordinary criminals and it goes without saying that such belief is not protected by article 13 KC.

The Constitution puts high limits to the penal prosecution of acts, considered legal in the North prior to reunification, but constituting criminal offenses in the South. The trust of Northern citizens' in their system prevents retaliation for acts committed in the North.

4. Principle of Equality

Finally, the principle of equality would create certain problems in the case of reunification. In Korean Constitutional doctrine it is generally accepted that the idea of relative equality has to be respected.[52] Hence, in similar situations citizens have to be treated equally. The principle does not respond to the question of whether or not to grant an advantage to citizens or to restrict their freedoms; instead it requires that if such measures are taken, these measures have to conform to the principle of equality. Of course, this principle is not absolute. Unequal treatments of citizens can be justified, if there is a legitimate reason for this.[53]

In the context of reunification, two main problems with regard to the principle of equality will occur. First, it will be necessary to apply different laws in the North and the South. To give only two possible examples: public officials in the North and in the South will have

49 See the analysis by *Raphael Perl*, Drug Trafficking and North Korea: Issues for U.S. Policy, CRS Report for Congress December 5, 2003.

50 See above A.III.4.

51 Thus members of North Korean special units, who committed sabotage acts in the South, can still be punished under South Korean law.

52 See *Kim* (note 30), p. 151.

53 See *Kim* (note 30), p. 153.

to be paid differently for doing the same work and Southerners will be allowed to travel freely in the North and to move their residence there, while Northerners might be prohibited from traveling to the South for some time. However, such unequal treatment could be justified by differences between North and South. The big difference in economic productivity justifies very different salaries and these differences have also to be applied to public officials to prevent an enormous income gap between public and private employees in the North. The same is true for restrictions of the freedom of movement, since there is no risk that waves of Southerners will immediately move to the North in contrast to the other direction. As long as fundamental differences persist between the North and the South, many different treatments of citizens in the North and in the South will be acceptable.

A second possibility of unequal treatment raises much more constitutional concerns. As it has been ascertained before, article 11 KC of the Constitution requires the legislator and the executive to distribute advantages equally. In the process of reunification many different victims of the North Korean regime will claim compensation for their losses and political pressure presumably will lead to the fulfillment of at least some of these demands. When such compensation is granted, the principle of equality has to be respected, thus differentiations between different victims are only permitted when legitimate reasons justify such unequal treatment. Of course, differentiations are allowed and necessary between citizens, which suffered from different hardships. Yet, there always has to be a reason, why one group is receiving a certain amount of money and another one receives none or lower compensation. For example, it would be a non-justified unequal treatment to grant financial compensation to the ones, who were expropriated by the DPRK and to deny it to those, who were politically prosecuted and imprisoned in North Korean work camps. There remains a certain margin of appreciation of the competent authorities, but all decisions have to be non-arbitrary and just. If they are not, the disadvantaged might be able to claim compensation based on the principle of equality and additional costs would be caused. These constitutional requirements demand to examine very cautiously, to whom compensation should be granted and why other groups can be neglected. To reach convincing and conclusive results, it seems desirable to adjudicate upon one general law of compensation for injustices committed in the North, in which all demands are to be settled. Such a procedure has the big advantage to allow a good survey over the different victims and would thus reduce the risk of granting compensation unequally. Furthermore, the overall financial burdens caused by compensation could be foreseen.

5. Conclusion

As conclusion one might say that the existing constitution is able to cope with most problems in reunification. In some cases, necessary measures would have to be very carefully analyzed, to make sure they are constitutional but in many other situations the margin of appreciation will be broad and most measures can comply with the KC without too much uncertainty. As long as the Constitutional Court will follow the concept proposed by the

German experience – that reunification broadens the margin of appreciation of the government – and the government respects Human Rights as much as possible, only few constitutional problems will arise. Still, some amendments to the Constitution are desirable to refute doubts about the constitutionality of certain measure.

III. Necessary Constitutional amendments

In this paper, several possible necessities of constitutional amendments have been mentioned and such amendments shall be outlined in this chapter.

A first option of constitutional amendments would be the abrogation of norms in the Constitution, which are directly related to unification. Paragraph 3 of the preamble, articles 4, 66 § 3, 69, 72, 92 all regard question of how and by whom to reach reunification and could thus be deleted, if the constitutional goal of reunification has been achieved. It is questionable, if they should be replaced by other norms. One may debate if a declaratory norm codifying the broad margin of appreciation of the competent authorities, would be beneficial to the clarity of constitutional law. Yet, from a constitutional point of view, it is not necessary to introduce such a norm, as the constitution is aware of these necessities.

One could also think about replacing some of these norms by articles, which declare the intention to preserve national unity in the future. In Germany not only the goal of reunification was deleted from the preamble of the Grundgesetz, but also the affirmation of the will to strive for national unity. This decision led to heated discussions among constitutionalists, if it was constitutional to delete the affirmation of this will.[54] Even though the question of the constitutionality of such a deletion would probably not arise in the Korean case, political discussions might come up about this issue. To prevent such discussions, it would be possible to change the preamble, deleting the goal of reunification in paragraph three, but retain the wording of paragraph four, which pronounces the goal of consolidation of national unity. Such a solution would have the further advantage, to show clearly that after more than half a century of division, the mere fact of formal reunification is not sufficient to achieve the long term goal of an overall sentiment of Koreans being one nation again.[55] Thus, after deleting and substituting the reunification-deleted articles of the Constitution the matter of unification would be present in one or two norms. Paragraph 4 of the preamble would pronounce the goal consolidation of national unity. If judged necessary, a new article 4 would ascertain that in the process of transition the special circumstances of reunification should be taken into account, when judging the constitutionality of measures decided on in the reunification process.

54 For unconstitutionality *Dietrich Murswiek*, in: Rudolf Dolzer and Klaus Vogel (eds.), Bonner Kommentar zum Grundgesetz, 134th actualization, Preamble, para 184; for constitutionality *Horst Dreier*, in: Horst Dreier, Grundgesetz I, Tübingen 2004 Preamble, para 77.

55 This is another possible lesson from German Reunification: long years of division cannot be just forgotten in the euphoria of reunification. The great costs for the West and the still existent disadvantages in the East have led to a still visible division between the two former parts of the country.

Beside these general constitutional amendments, two other amendments have been proposed above. First, one could allow the prosecution of persons, who committed certain, enumerated and especially grave crimes in North Korea, but which are protected from prosecution by the "nulla poena"- principle. If those responsible for such acts should be prosecuted despite this principle, a constitutional amendment would be necessary.[56] For example one could introduce a second sentence in article 13 § 1 KC, reading:

> "These principles shall not apply to crimes against humanity committed on the North Korean territory prior to Reunification".

Of course, the exact wording of such exception is debatable. The acts, which could give place to prosecution, can be defined in an abstract way as proposed above, or with an exact enumeration of crimes, of which penal prosecution seems indispensable. This is a question of political will rather than constitutional points of view. Yet, given the exceptional character of this rule, one should refrain from retroactively punishing acts, which cannot be considered as grave crimes. Furthermore, one could narrow the scope of the exception by only allowing the prosecution of high-ranking officials, following the example of the Nuremberg and Tokyo war criminal trials. This would probably still fulfill most wishes for retaliation, without however threatening potentially many people in the North with penal prosecution. Such an approach would limit the restriction of the "nulla-poena"-principle and would perhaps counter the reproach of victor's justice, most certainly used by the adversaries of this exception.

This article has proposed a further constitutional amendment for the freedom of movement.[57] This amendment could ascertain that during the transition process the freedom of movement can be restricted more severely than in normal times. Alternatively, it could be provided that this freedom cannot be immediately enjoyed by citizens in the North, but that during a certain period of time, they can only travel at the discretion of the legislator. The competent authorities for constitutional amendments have to decide to what extent to restrict this freedom by. However, if a constitutional amendment seems necessary, one should pay attention to guarantee as much freedom as possible to the citizens in the North.

To conclude it can be ascertained that in most cases, constitutional amendments are not a question of legal necessity but of political intentions.

C. Concluding observations

In a reunification process many constitutional problems will occur, posing important challenges to political decision makers. Some of these problems are described above; many others probably cannot even been foreseen today. Still, the contribution of constitutional doctrine to the reunification process is crucial. The respect of the norms of the Constitution

[56] See above B.II.3.b.

[57] See above B.II.2.

guarantees that fair and non-arbitrary decision, not unnecessarily narrowing the liberties of the citizens, will be taken. This will certainly improve on the population's perception of reunification. In the same time, the Constitution does not withstand actions by the government required by the reunification process, even if they lead to strong restrictions of citizens' Human Rights.

When analyzing Korean reunification from a constitutional point of view the German experiences can be very valuable. Not because they provide a perfect procedure which just has to be copied, but because they showed many problems of reunification and proposed answers, many of which worked out fine and some of which didn't.