

INTRODUCTION

1. CONTEXT: PROBLEM-SETTING AND STRUCTURE OF THE RESEARCH

The problems existing between the two Koreas were considered more difficult to solve than any other international affairs in the Cold War period. In the early 1990s, however, the governments of North and South Korea began to change their policies towards each other with a more peaceful and pragmatic stance. This occurred in a new international environment, which came about as a result of the end of the Cold War. The most notable change in inter-Korean relations has been in the field of mutual economic cooperation. Such a trend is regarded as the watershed of inter-Korean relations, leading them towards real reconciliation and cooperation in the 21st century. These on-going economic cooperation projects will not, however, be promoted further, unless they solve critical questions involved in social, political and legal issues of importance to the two Koreas. Among them, especially, legal issues are newly emerging, but deeply affiliated with concrete fields of inter-Korean relations. A systematic approach is thus required for a comprehensive understanding of these issues.

This work is devoted to analyzing highly topical national and international legal issues of inter-Korean economic cooperation under the armistice system. The major emphases of this research are on the legal regime and questions of inter-Korean economic cooperation, including the future inter-Korean economic integration. This research will be evolving with three interrelated areas: the legal aspects of the Korean armistice system and inter-Korean relations; the legal framework of inter-Korean economic cooperation; and the legal foundations of inter-Korean economic integration. Before dealing with the main subjects, however, we preview a historical background why Korea was divided and how the Koreans sought to be reunified for the past half a century. In the following section, we inquire into the tradition and modernization of Korean law and society as an analytic foundation for studying inter-Korean affairs, because, without such basic considerations, the research results would of necessity be superficial or have spontaneous effect. Notwithstanding that it is seemingly irrelevant to the main subject of this research, this section nevertheless is expected to offer a stable basis for better understanding the origin of inter-Korean questions by reviewing the people and society of Korea we are touching in this work. Readers with a rather practical interest, however, may skip here. This section will start with introducing the ancient legal norms of East Asia and their evolution in the pre-modern Korean society. Based on that ancient legal research, a study of the 1894 Kabo reforms is carried out as a symbol of the legal and social modernization of Korea. The study of the Kabo reforms may suggest a way of understanding the current questions, by focusing on the historical turning point of Korean society.

Together, we examine the reception and development of the Western concept of law among nations (modern international law) in Korea. Because many parts of this work will be analyzed from an international legal perspective, examining the initial process and conditions under which Korea encountered modern international law may help in detecting why the two Koreas react to an international legal question as they do. This preview, consequently, may provide a juristic foundation for analyzing current legal issues arising between the two Koreas.

In Part I, Rethinking the Korean Armistice System and Inter-Korean Relations, we review the Korean armistice system as a basic environment of inter-Korean economic cooperation. Much attention is given to both the Korean armistice and the critical problems currently arising under the armistice system. They will be examined from an international legal perspective, respectively in Chapters I and II. The focus of the first chapter expands from the Korean Armistice Agreement of 1953 to the Basic Agreement of 1991. Within that time frame, we tackle several important legal problems concerned with formation, evolution and transformation of this armistice system. In Chapter II, the current inter-Korean conflicts are legally investigated, because pacific resolution of these conflicts may be the key to entering a new era of mutual cooperation. The first issue is how to ease inter-Korean military tension and construct a stable mutual military confidence. Military confidence is the initial condition for peace, stability and cooperation, not only on the Korean peninsula, but also in Northeast Asia. The second issue is the denuclearization of the Korean peninsula. The nuclear development of North Korea has been a critical issue affecting actual relationships among the countries concerned with this region including the United States. In particular, the denuclearization of North Korea is not only a regional, but also a global issue, because it is firmly tied to international legal aspects of the Nuclear Non-Proliferation (NPT) regime. In spite of complicated legal and political situations lying before them, fortunately, the states concerned have succeeded in solving this problem in a pacific manner, and are implementing inter-Korean nuclear peace in a practical field through the Light-Water Reactor (LWR) project. We examine the legal process for the groundbreaking of the LWR project and its implications in the establishment of the Nuclear Weapon-Free Korean Peninsula plan. It is expected to be a stepping-stone for making further cooperation in other fields between the two Koreas. The third and last problem addressed is concerned with the inter-Korean humanitarian issues. Because humanitarian questions are very sensitive to the Korean people, regardless of the north and south, finding a reasonable solution should be a crucial precondition for any kind of cooperation between them. Different from the universal concept of international human rights law, North Korea has developed its special meaning of “our own human rights” based on the *Juche* ideology, a North Korean transformation of socialism. Understanding North Korea’s concept of “our own human rights” thus may be the key to solving inter-Korean humanitarian issues in a better way. Referring to the provisions concerning “our own human rights” laid down at the 1972 Socialist Constitution of North Korea, we discuss the practical

problems in inter-Korean humanitarian issues and their international legal implications.

In Part II, Legal Framework of Inter-Korean Economic Cooperation, we concentrate more on the concrete legal regime and questions of inter-Korean economic cooperation. At first, the two different economic systems are contrasted to illustrate the background of inter-Korean economic cooperation. Based on this institutional research, in Chapter IV, the legal regime governing current inter-Korean economic cooperation is scrutinized. Having analyzed the constitutional frameworks and common legal basis of bilateral economic cooperation, we introduce the new legal development of North Korea for foreign business and investment. Because North Korea's foreign business laws have been in many parts modeled after those of China, a comparative legal view is maintained in this research. In Chapter V, international legal aspects of bilateral economic cooperation between the two Koreas are reviewed. The important questions discussed here are as follows: the legal implications of inter-Korean economic relations; the legal protection against political risks in inter-Korean economic cooperation; the collision of domestic laws relating to inter-Korean economic relations; the double taxation avoidance; and the dispute settlement process in inter-Korean economic cooperation. In Chapter VI, lastly, a multilateral investment project currently being carried out in the Rajin-Sonbong Free Economic and Trade Zone (RSFETZ) of North Korea is analyzed. The main attention paid in this case study is on how the mutual investment cooperation in the RSFETZ is legally controlled. For more development of the RSFETZ, North Korea has been establishing a special legal regime that makes foreign investment easier than in other regions. We examine not only the legal structure of North Korea for this grand regional development project, but also the legal measures for business partnership with South Korea. In this section, especially, the recent development of the North Korean legal regime for inducing foreign investment will be referred with special reference to the new Socialist Constitution of 1998.

In Part III, Legal Foundations of Inter-Korean Economic Integration, we explore legal aspects of future inter-Korean economic integration. Chapter VII surveys the formation of *de jure* peace by reviewing the potential of the peace treaty-making between the two Koreas, which would replace the current Armistice Agreement. The future peace treaty, a precondition for transforming the current armistice system into a stable peace system on the Korean peninsula, is thus a necessary step towards the economic integration of the two Koreas. We check the basic conditions and practical procedures for concluding a peace treaty under the Vienna Convention on the Law of Treaties of 1969. It would be a valuable experiment for the two Koreas to tackle the peace treaty-making question under the general principles of international law. In Chapter VIII, we review several important cases of international economic integration tried in various forms in the postwar period. In the first case, the formation of a European single market, we mainly reexamine the question on the national sovereignty of member states in the process of international economic integration. In the second case, the Benelux Economic Union, we investigate not only how the Benelux

countries obtained market integration under definite political separation, but also how they technically developed the integration level from the customs to the economic union. The Benelux Economic Union is presumed to be a good model for the two Koreas in the process of their economic integration, because this economic union has been successfully accomplished under the political separation of member states. In the German market integration case, we inquire into the legal principles of the unified economy laid down in two important documents: the Treaty of German Union and the Unification Treaty. This is a useful example of the reunification process of a former divided country. We finally examine the China-Hong Kong market integration just completed a few years ago. Through the handover of Hong Kong in 1997, China became a unique state in current international society, maintaining two different economic systems under one constitution. The China-Hong Kong market integration is especially significant in the fact that the Hong Kong Special Administrative Region is allowed to operate its capitalist economic system for 50 years even after political absorption. Their legal harmonization process, although likely to encounter many difficulties, will surely be a meaningful lesson for the two Koreas which should prepare to go down a similar path in the future. In Chapter IX, lastly, we propose a hypothetical model of inter-Korean economic integration. It will not be a new development, but an application of the previous step-by-step model illustrated by actual international economic integration cases. By examining each stage, eventually, the legal problems which could happen in that process are made clear.

2. BACKGROUND: DIVISION OF KOREA AND THEIR EFFORTS TO BE REUNIFIED

Protruding into the Pacific at the northeastern tip of the Asian continent, the territory of Korea consists of the Korean peninsula and its adjunctive islands.¹ The first tribal state on the Korean peninsula was a theocratic kingdom known as *Kochoson* which was founded in 2333 B.C. After the rise and fall of various tribal states, the Era of the Three Kingdoms began as early as the first century B.C. when the three major states, *Kokuryo*, *Paekche*, and *Shilla* sustained a balance of power. Around 676, *Shilla* finally defeated the other two kingdoms and created the first unified nation in the Korean history. Afterwards, Korea remained unified for nearly 1300 years through the successive reigns of the *Koryo* (918–1392) and *Choson* (1392–1910) dynasties. Sharing a unique culture, tradition and language, the Koreans developed a single national entity

¹ The Korean peninsula faces Japan across the East Sea (Sea of Japan) in the east and the Korean Strait in the south. In the west and the north, the Yellow Sea and two rivers, the Amnok (Yalu) and the Tuman (Tumen), make natural borders between Korea and its neighbors, continental China and Russian Siberia. The total area of the peninsula is 222,154 sq. km. and runs about 1100 km from north to south with a maximum width of 320 km and a minimum of 200 km. On the territorial sovereignty of the Republic of Korea, see Art. 3 of the ROK Constitution of 1987.

during this period.² At the end of the 19th century, however, the Koreans failed to adapt to the new global wave of industrialization and imperialism. As a result, they lost the chance to build a modern nation-state and unfortunately were annexed by Japan in 1910. Under Japanese annexation, however, the Koreans continued the struggle for their independence, mainly led by the Korean Government-in-Exile in Shanghai, China.

With the end of World War II and their continuous struggle against the colonial rule, the Korean people were finally freed from the 35-year Japanese occupation on August 15, 1945. In spite of their independence, environments on and around the Korean peninsula prevented the Koreans from establishing a unified state. It was mainly the result of the accord between the Allies on the postwar Korean question. The origin of the postwar Korean question can be traced back to March 3, 1943, when President F.D. Roosevelt and Secretary of State Cordell Hull of the United States met with British Foreign Minister Anthony Eden to discuss the future of Manchuria, Taiwan, Indo-China and Korea. At this meeting, President Roosevelt proposed to place Korea under the trusteeship of the United States, China, and the Soviet Union.³ The Korean question was discussed at the successive conferences among the Allies in Cairo, Teheran, Yalta, and Potsdam. At the Cairo Conference in November 1943, the leaders of the three great powers⁴ were determined that “in due course”⁵ Korea should become free and independent.⁶ This accord was put forward again at the Teheran Conference.⁷ At the Yalta Conference in February of 1945,⁸ meanwhile, Roosevelt and Stalin agreed that the Russians should accept the surrender of the Japanese in the north, the Americans, in the south.⁹ Military representatives of the two countries reached an understanding that the line for this purpose should be the 38th parallel.¹⁰ According to the Yalta agreement, later, the Soviet troops took

² See Lee Ki-baik, *A New History of Korea*, Ilchokak Publishers, Seoul, 1984, pp. 1–9.

³ See C. Hull, *The Memoirs of Cordell Hull*, Macmillan, New York, 1948, p. 1596.

⁴ F.D. Roosevelt (USA), W. Churchill (Great Britain), and Chiang Kai-shek (China).

⁵ On the meaning of “in due course,” see T. Dennett, *In Due Course*, in American Council of Institute of Pacific Relations (ed.), *Far Eastern Survey* 14:1 (1945), pp. 1–4.

⁶ On the Korean question in the Cairo Conference, see Cho Soon-sung, *Korea in World Politics 1940–1950*, Univ. of California Press, Berkeley, 1967, pp. 17–21. See also US Dept. of State, *Foreign Relations of the United States (FRUS): Diplomatic Papers, Conferences at Cairo and Teheran 1943*, Washington D.C., 1961, pp. 399–401.

⁷ *Ibid.*

⁸ On the Korean question at the Yalta Conference, see J. Snell et al. (eds.), *The Meaning of Yalta*, Louisiana State Univ. Press, Baton, 1956, pp. 127–30; D. Clements, *Yalta*, Oxford, 1970, pp. 245–9. For the original materials of the Yalta Conferences, see R.F. Fenno, *The Yalta Conference*, Lexington, 1972; Z.C. Szkopiak (ed.), *The Yalta Agreement: Documents prior to, during, and after the Crimea Conference 1945*, London, 1986.

⁹ See M. Donelan and M. Grieve (eds.), *International disputes: Case Histories 1945–1970*, Europa Publication, London, 1973, p. 56.

¹⁰ The 38th parallel as a dividing line in Korea had never been the subject of international discussion among the wartime leaders. This line was “proposed as a practical solution when the sudden collapse of the Japanese war machine created a vacuum in Korea.” See H. Truman, *Years of Trial and Hope*, Doubleday and Co., New York, 1956, p. 317.

over Japanese authority to north of the 38th parallel and the US forces did to south of that line. At the Potsdam Conference held just before the end of the World War II, the agreement of the Korean question between the Allies was briefly reassured.¹¹

As the war came to an end, the Allies took the division of Korea into serious consideration. Their plan began to take shape at the Moscow Conference of December 1945.¹² At the Moscow Conference, the foreign ministers of Great Britain, the USSR, and the United States agreed to establish a Joint Commission of the United States and the USSR to arrange a provisional government in consultation with Korean democratic parties and organizations.¹³ The Joint Commission met in Seoul in March 1946, but broke up in disagreement in May of that year.¹⁴ A further meeting of the Joint Commission in May 1947 brought no better result. Afterwards, the two sides started to pursue their agendas separately in the north and south; the Russians supporting the Communists, and the Americans the nationalist parties.

Having realized that the establishment of a single government was nearly impossible, the UN convened the United Nations Temporary Commission on Korea (UNTCOK)¹⁵ following the first resolution¹⁶ of the so-called Korean Question¹⁷ on November 14, 1947. The UNTCOK decided to postpone the election in the north until it would become feasible. Under the monitoring of the UN, subsequently, a general election was held to the south of the 38th parallel on May 10, 1948. By the May 10 election, the Republic of Korea (ROK) was formally inaugurated in the south with Dr. Syngman Rhee¹⁸ as its first president on August 15, 1948.¹⁹ In the north,

¹¹ See H. Feis, *Between War and Peace: The Potsdam Conference*, Princeton, 1960, p. 115.

¹² See L.M. Goodrich, *Korea: A Study of US Policy in the United Nations*, Council on Foreign Relations, New York, 1956, p. 16.

¹³ *Ibid.*

¹⁴ See Song Gun-ho *et al.*, *Recognition of History of Korean Liberation* (available only in Korean), Hangilsa Publishers, Seoul, 1979, pp. 84–9. On the Joint Commission, see B. Cumings, *The Origin of the Korean War: Liberation and Emergence of Separate Regimes*, Princeton, 1981 or Suh Dae-sook, *The Korean Communist Movement: 1918–48*, Princeton, 1967.

¹⁵ To provide assistance for state-making, unification and the reconstruction of Korea, the UN created a number of subsidiary organs during the early days of its involvement. These included UNCOK (The UN Commission on Korea), UNCURK (The UN Commission for Unification and Rehabilitation of Korea) and UNKRA (The UN Korean Reconstruction Agency). See Pak Chi-young, *Korea and the United Nations*, in *Korea and World Affairs* 19:4, Seoul, 1995, p. 613.

¹⁶ This resolution stated as follows: 1) the UNTCOK would be established to oversee a fair election throughout Korea; 2) a general election according to population ratio would be held in Korea prior to March 31, 1948; 3) the government and National Assembly would be formed as quickly as possible after the election; and 4) foreign troops would withdraw from the peninsula within 90 days after the formation of the government. UN GA Res. 112:II (November 7, 1947).

¹⁷ For details on the origin and evolution of the Korean Question in the UN, see Chapter I.3.c of this book.

¹⁸ See *infra* note 68 at 13.

¹⁹ In accordance with the establishment of the ROK government, the UN General Assembly acknowledged that it was the sole legitimate government over that part of Korea [south of the 38th parallel], where the UN Temporary Commission on Korea was able to observe the election. UN GA Res. 195 (December 12, 1948).

meanwhile, the Kim Il-sung-led regime, which had already completed a socialist revolution under Soviet guidance, organized the *Chosun* (Korean) Workers' Party and the People's Congress in April 1948. Following the Communist agenda, North Korea held an election for the Supreme People's Assembly on August 25 of that year.²⁰ On September 8, 1948, finally, the first Constitution of the Democratic People's Republic of Korea (DPRK) was announced and the DPRK was officially inaugurated the next day with Kim Il-Sung²¹ as its head. Following these incidents, two political regimes backed by the USA and the USSR were set up in the north and south of the Korean peninsula. With the birth of the two separate systems, eventually, the division of the Korean peninsula became an undeniable reality and led the two Koreas into a horrible civil war (1950–3).²²

After the cease-fire in July 1953, they continued hostile stance. During the Cold War period, the two Koreas even more suffered from political and ideological conflicts and took few initiatives to improve their relations, not only because of the complicated international circumstances around the Korean peninsula, but also because of mutually hostile national policies. By the end of the 1960s, the two Koreas had regarded each other as just hostile and illegal regimes. In the early 1970s, however, new change was taking place in the underground relationship between the two sides.

On July 4, 1972, the two Koreas suddenly announced the Joint Communiqué including the “seven principles for peace and reunification of the divided fatherland”²³ after several secret meetings between high-level governmental officials.²⁴ This was definitely a progressive development compared to the previous relations between the two Koreas. In spite of such an idealistic Communiqué, neither reunification nor a friendly relationship was attained. The two Koreas, unfortunately, did not overcome their deep-rooted and long-standing mutual mistrust. A second dark period had set in by the end of the 1980s. During this period, the two Koreas continuously maintained a political and military standoff.

A new wave of reconciliation between the two Koreas came with the end of the Cold War. Beginning with the 1990s, several important events happened in and around the Korean peninsula. Among them, the dissolution of the former Soviet

²⁰ On the foundation of the North Korean socialist regime, see Kim Han-gil, *Modern History of Korea*, FLPH, Pyongyang,, 1979, pp. 210–7.

²¹ On Kim Il-sung, see Suh Dae-sook, *Kim Il Sung: The North Korean Leader*, Columbia Univ. Press, New York, 1988.

²² See Donelan and Grieve, *op. cit.*, pp. 56–7.

²³ In the seven principles, the two sides have agreed on the following: 1) to make independent efforts to achieve the reunification through peaceful means; 2) neither to defame nor slander one another; 3) to carry out various exchanges in many areas; 4) to cooperate positively to seek an early success of the Red Cross Conference; 5) to install and operate a direct telephone line between Seoul and Pyongyang; 6) to create and operate a Coordinating Committee; and 7) to convince that these agreements correspond with the common aspiration of the entire people eager to see early unification of the father land. For details, see Kim Myung-ki, *South-North Joint Communiqué and International Law* (available only in Korean), Beobmunsa Publishers, Seoul, 1975.

²⁴ See *Korea Herald* (July 4, 1972).

Union and the unification of East and West Germany were the most conspicuous events in both an international political and an emotional sense given relating to inter-Korean relations. Together, the two Koreas joined the United Nations in 1991. Following these changes,²⁵ they resumed high-level talks and finally adopted the Agreement on Reconciliation, Nonaggression and Exchanges and Cooperation between North and South Korea (The Basic Agreement). The Basic Agreement, in its four chapters with twenty-five articles, presents progressive legal measures for shaping new inter-Korean relations.²⁶ Based on the switching approach, they are now entering an era of real peace and cooperation in the 21st century's setting of international environment.

3. JURISPRUDENCE: ANALYTIC FOUNDATION FOR UNDERSTANDING THE LAW AND SOCIETY OF KOREA

The Beginning of Legal Concepts in Ancient East Asia

Discussion of the function of law in any society presupposes an analysis of the national legal system of its traditional society.²⁷ As in the West, the main function of law in ancient East Asia was to maintain social order and to secure a better life for the members of society.²⁸ Each law and legal system, however, has changed its special role according to historical steps.²⁹

The positive legal concept of East Asia started with the Legalist School in ancient

²⁵ Together with such changes in international environment, the death of the North Korean president, Kim Il-sung, in 1994, and a number of floods rendered the new regime of North Korea under Kim Jong-Il look for a way to open its doors to the outside in order to overcome the crisis. On the political situation of the post-Kim Il-sung era of North Korea, see T. Henriksen and J. Mo. (eds.), *North Korea after Kim Il Sung: Continuity or Change*, Hoover Institution Press, Stanford, 1997.

²⁶ See Chapter I.4 of this book.

²⁷ See Park Byung-ho, *Traditional Korean Society and Law: Introduction to the Law and Legal System of Korea* (available only in Korean), Seoul, 1983, p. 149. With regard to comparative legal research on national laws, R. David has stated that: "Comparative law constitutes an indispensable instrument for a renewed study of our own legal science; it helps us to know, understand and penetrate our own law." See R. David and J. Brierley, *Major Legal Systems in the World Today*, The Free Press, London, 1968, p. 8. On this subject, see also K. Zweigert and H. Kotz, *Introduction to Comparative Law*, Oxford, 1998; L. Friedman, *Some Thoughts on the Rule of Law, Legal Culture, and Modernity in Comparative Perspective*, in T. Shiibashi (ed.), *Toward Comparative Law in the 21st Century*, Chuo Univ. Press, Tokyo, 1998, pp. 1075–90; and R. David et al. (eds.), *International Encyclopedia of Comparative Law*, Oceana, New York, 1973–. Comparative legal research papers concerning the current legal problems between East Asia and the West may be found at Kim Chin's *Selected Writings on Comparative and Private International Law*, Rothman Co., Littleton, 1995.

²⁸ See J. Stone, *The Province and Function of Law*, Harvard, 1950, p. 596. On the law and social order relationship, see M. Rheinstein (ed.), *Max Weber on Law in Economy and Society*, A Clarion Book, New York, 1954, pp. 11–40.

²⁹ Karl Mannheim contended that each epoch should redefine such basic concepts as state, sovereignty, law and so on in terms of its own social order. See K. Mannheim, *Man and Society in an Age of Reconstruction*, Harcourt, New York, 1948, p. 377.

China.³⁰ Leading thinkers of the Legalist School, such like Han-fei-tzu (韓非子)³¹ and Li Ssu (李斯),³² maintained the rule of law. They believed that severe laws and harsh punishment were the only means of bringing the order and security for which they yearned.³³ As time went by, Legalism was challenged by Confucianism. The Confucian School denied that uniformity and equality were inherent in any society.³⁴ They emphasized the harmonious operation of these differences in order to achieve a fair social order.³⁵ The conflict between Legalism and Confucianism resulted in the victory of the latter with the establishment of the *Han* 漢 dynasty in China (206B.C.–220A.D.). Since then, law was enacted, applied and implemented from a Confucian point of view.

Evolution of Law and the Legal System in Pre-Modern Korean Society

In the Korean peninsula, agriculture developed rapidly in the 3rd century B.C. At that time, there were several theocratic states in Korea, including the *Kochoson* 古朝鮮, the first state in Korean history. In the *Kochoson* region, the firm establishment of patriarchal authority and the accumulation of private wealth brought notable political and social changes to the tightly-knit communal life of the previous period.³⁶

The nature of primitive law in this period was simple and severe. The societies of this age were content with the minimum degree of legal regulation necessary to maintain the norms of social order. In the *Kochoson*, a penal law code consisting of eight articles was observed, but the stipulations of only three of the provisions are known with certainty:

1. One who kills another shall immediately be put to death;
 2. One who causes bodily injury to another shall pay compensation in grain; and
 3. One who steals another's possessions shall be made the slave of his victim.
- However, exemption from this penalty may be obtained by payment of 500,000 "coppers."³⁷

³⁰ The first unified state, *Ch'in*, was established and governed based on the Legalist school of thought.

³¹ On his works, see M. Loewe, *Early Chinese Texts: A bibliographical Guide*, The Society for the Study of Early China, Univ. of California Press, Berkeley, 1993 (1st ed.).

³² Han-fei-tzu and Li Ssu were both disciples of Hsun tzu.

³³ The Legalist School was based on the idea that human nature is basically evil, as Hsun-tzu said. All men, Han Fei tzu insisted, act from motives of selfishness and self-profit, and so show calculating minds in their attitude toward one another. It is this fact that makes the system of rewards and punishment possible. See Fung Yu-lan, *A History of Chinese Philosophy* 1, Princeton, 1952, pp. 312–5.

³⁴ See T'ung-Tsu Ch'u, *Law and Society in Traditional China*, Mouton & Co., Paris, 1965, pp. 226–31.

³⁵ *Ibid.*

³⁶ See J. Wanne, *Traditional Korea: A Cultural History*, Chungang Univ. Press, Seoul, 1972, p. 39. An excellent explanation on the Korean ancient law is addressed in Lee Jeong-kyu's *History of Korean Legal System* (available only in Korean), Kukhakjaryowon Publishers, Seoul, 1996, pp. 11–2.

³⁷ See Koo Byung-sak, *History of Ancient Law in Korea* (available only in Korean), Korea Univ. Press, Seoul, 1984, pp. 6–7.

These legal provisions constitute an evidence for understanding the social values of this era.³⁸

Entering the era of the Three Kingdoms, the first legal code, Yul-lyoung 律令 was promulgated by the *Koguryo* 高句麗 dynasty in 373 A.D., and other codes and statutes were enacted by the *Shilla* 新羅 dynasty in 520.³⁹ With such codes, the three kingdoms of Korea could set up a highly developed state system.⁴⁰

The medieval time in Korea began with the *Koryo* 高麗 dynasty (918–1392). The constitutional basis of the *Koryo* dynasty can be found in the “Ten Instructions” (訓要十條) given by the founder of the *Koryo*, Wang-Keon 王建,⁴¹ which had a great influence on the *Koryo* government in making its policy by the end of the dynasty.

Different from the *Koryo* dynasty which had maintained customary laws, Tae’jo 太祖, the founder of the following *Chosun* 朝鮮 dynasty (1392–1910), set an example by codifying the laws, and his successors continued the codification endeavor.⁴² A basic legal code of the *Chosun* dynasty was the “Great Code of State Governance” (經國大典) of 1485.⁴³ The Great Code of State Governance was followed by a series of new codes, most of which were revisions and elaborations of each code based on its predecessors.⁴⁴

As shown above, the law in pre-modern Korea had the following functions. First, the law was regarded as an instrument of “social control” or “social engineering,”⁴⁵ under the Confucian view. With this perspective, the primary role of law was to maintain Confucian morality and order in society. Second, the law was mainly concerned with status-relationships, paying little attention to individual rights. Third, the law played a limited role in private society, mainly because the legal code included few provisions on family, marriage, adoption, inheritance, and property.⁴⁶ Many of

³⁸ See Lee Ki-baik, *op. cit.*, p. 55.

³⁹ These are recorded in *Historical Records of the Three Kingdoms in Korea* (三國史記) written in 1145 A.D. by a great Korean Historian, Kim Bu-shik 金富植. See Lee Jeong-kyu, *op. cit.*, p. 13.

⁴⁰ Despite the existence of these historical records, little has been known about the types of codes and sub-statutes that were promulgated in the *Shilla* dynasty. A partial answer to this enigma, however, was offered by the discovery of the so-called civil governance document of *Shilla* villages (presumably from AD 755), which gives the statutes on *Shilla* households and tilled land.

⁴¹ For more information on the Ten Instructions of Wang-Keon, see Harm Pyong-choon, *The Korean Political Tradition and Law*, Royal Asiatic Society: Korea Branch, Hollym Corporation Publishers, Seoul, 1971, pp. 47–51.

⁴² For details, see Lee Ki-baik, *op. cit.*, pp. 223–6.

⁴³ See Kim Chin, *Korean Law Study Guide*, Univ. of California Press, San Diego, 1985, pp. 4–5. The *Great Code of State Governance* sanctioned the application of the *Great Ming Chinese Legal Code* as the common law. It consisted of six sub-codes that corresponded to six departmental divisions of the government: personnel, revenue, rites, military affairs, punishment and public works. See Lyu, S.K., *Translation of Great Code of State Governance* 譯註 經國大典 (available only in Korean), Seoul, 1985 (1st ed.).

⁴⁴ See Kim Chin, *Ibid.* For details, see Lee Jeong-kyu, *op. cit.*, 14–8.

⁴⁵ See R. Pound, *An Introduction of the Philosophy of Law*, Yale, 1955, p. 47.

⁴⁶ On the civil laws of pre-modern Korea, see Lee Jeong-kyu, *op. cit.*, pp. 317ff.

these matters were largely left to customs or *li* which played a more important part in regulating the activities of people.⁴⁷

Modernization of Law in Korea: The Kabo Reforms of 1894

The Kabo Reforms of 1894 were a signal of modernization of law in Korea.⁴⁸ As a result of the Reforms, a group of modern-style laws were enacted; legislation was proceeded against a wide variety of malignant social practices and conventions such as the torture of criminal suspects, the selling of human beings, strict class distinctions, and the prohibition of the marriage of widows.⁴⁹ It was a steppingstone of independent legal modernization of Korea. The legal development of Korea, however, was disrupted by the Japanese annexation of 1910. The Japanese occupational period between 1910 and 1945 was the dark age of Korean law. Most of the laws at that time were enacted by the Japanese colonial government in order to exploit the natural resources and labor power of the Korean peninsula.⁵⁰ During the Japanese occupational period, the constitutionality of Korea remained in existence by the Korean Government-in-Exile (KGE) set up in Shanghai, China, right after the March 1 Movement for Independence.⁵¹

In the meantime, the Western law of nations, which developed as a set of legal norms suitable for the modern European state system, was gradually applied to non-Christian civilizations in Asia and Africa from the latter part of the 19th century.⁵² In this process, a big confrontation came about in East Asia, which had a traditional legal orders originating from its own culture.⁵³ One of the questions raised before East Asian states – China, Japan, and Korea – was how to open doors to the

⁴⁷ Litigation was discouraged; people were treated in a humiliating manner before the court. As a result, there has been a tendency among the people up to the present day to avoid litigation. See T'ung-Tsu Ch'u, *op. cit.*, pp. 283–4.

⁴⁸ The Kabo Reforms of 1894, symbolic of modernization in Korea, were carried out by an organ that may be called the Deliberative Council called *Kungukkimucheo*. In this Reform, various measures were undertaken in social, administrative and legal areas. See Lee Ki-baik, *op. cit.*, pp. 291–5.

⁴⁹ Over 208 major pieces of law were promulgated between July 30 and December 17 of that year. See Hahm Pyong-choon, *Koreans Jurisprudence, Politics and Culture*, Yonsei Univ. Press, Seoul, 1986, p. 126.

⁵⁰ See Lee Ki-baik, *op. cit.*, p. 443.

⁵¹ On the March 1 Movement for Independence and the Korean Government-in-Exile, see F. McKenzie, *Korea's Fight for Freedom*, Yonsei Univ. Press, Seoul, 1975, pp. 239–50. On the constitutional buildings of the KEG, see Kim Jun-yeop, *Chang-cheong* 長征 2 (available only in Korean), Nanam Publishers, Seoul, 1993, p. 397.

⁵² *Ibid.*

⁵³ On the third world's attitudes towards modern international law, see J.A. Thomas, *History and International Law in Asia: A Time for Review*, in R. Macdonald (ed.), *Essays in Honour of Wang Tieya*, Kluwer, The Hague, 1987, pp. 813–57; R.P. Anand, *Attitude of the Asian-African States Toward Certain Problems of International Law*; A.P. Sinha, *Perspective of the Newly Independent States on the Binding Quality of International Law*, in S. Surakiat and S. Frederick (eds.), *Third World Attitudes Toward International Law*, Kluwer, 1987, pp. 5–22 and 23–32.

advancing powers of the West.⁵⁴ To these countries, opening their doors meant exposing themselves to an unknown world order and bringing about internal changes in their traditional socio-political systems. In the end, however, all joined the family of nations, accepting the legal norms that had governed relations among the modern European nation-states.⁵⁵ Differences in timing and mode of “opening the doors” and the consequences thereof, finally, have resulted in forming different customs and state practices in each country with respect to modern international law.

The formation of the Korean view on modern international law and relations began with opening its doors to the West in the late 19th century. Korea was given a European concept of the law of nations via China which had experienced it before.⁵⁶ When modern international law was first introduced to the silent kingdom of *Chosun* more than a century ago, the government of *Chosun* regarded it as something to avoid. Driven by the fears resulting from the traumatic experiences with the gunboat diplomacy of the Westerners in the mid-nineteenth century,⁵⁷ *Chosun* was firmly determined to reject modern international law. As resistance gradually slackened, however, *Chosun* accepted it in the end. In the late 19th century, finally, the study of modern international law started in Korea.⁵⁸ After concluding the Treaty of Kangwha⁵⁹ in 1872 with Japan, Emperor Kojong (高宗) ordered officials to import a few books for the further study of international law. Among them, W.A.P. Martins’ translation of H. Wheaton’s *Elements of International Law*⁶⁰ was the most important

⁵⁴ See Pae J.S., *The Historical Background to the Development of International Law in Korea*, in Pae J.S. et al. (eds.), *Korean International Law*, Center for Korean Studies, Berkeley, 1981, p. 1.

⁵⁵ *Ibid.*

⁵⁶ The Chinese began contact with Westerners as early as the middle of the seventeenth century, when Dutch merchants insisted on the immunity of envoys from detention and arrest. (See J.E. Wills, *Ch’ing’s Relations with the Dutch, 1662–1690*, in J.K. Fairbank (ed.), *The Chinese World Order: Traditional China’s Foreign Relations*, Cambridge, 1968, p. 248.) Beginning with the Opium War in 1839, however, unfortunate experiences with Western firepower brought China a certain practical familiarity with “unequal” treaties. The first unequal treaty imposed upon China was the Treaty of Nanjing signed on August 29, 1842, which was followed by more than a thousand successive unequal treaties. (See Wang Tieya (ed.), *The Comprehensive Collection of Old Treaties, Agreements, Regulations, etc., between China and Foreign Countries, 1689–1949*, Beijing, 1952–1962). With these unequal treaties, eventually, an era of Western intrusion was opened which lasted more than 100 years, until the People’s Republic of China (PRC) abrogated them in 1949. (Art. 55 of the Common Program of the Chinese People’s Political Consultative Conference of September 29, 1949).

⁵⁷ For details, see Pae J.S., *op. cit.*, p. 2.

⁵⁸ See Chai N.Y., *Korea’s Reception and Development of International Law*, in Pae J.S. et al. (eds.), *op. cit.*, pp. 8–9.

⁵⁹ By the Treaty of Kangwha, Korea opened its doors to foreign trade and the residence of consuls in the territory.

⁶⁰ See H. Wheaton, *Elements of International Law*, Brown & Co., Boston, 1855 (6th ed.). The Chinese version of 1864 was entitled *Wanguo Gongfa* 萬國公法, meaning “Public Law of All Nations.” For the Chinese edition, see W.A.P. Martin, *Wanguo Gongfa* (萬國公法), reprinted by the Institute of Materials for Korean Studies, Seoul, 1981. One more influential book was Theodore D. Woolsey’s *Introduction to the Study of International law* (Charles Scribner & Co., New York, 1869), later translated by W.A.P. Martin under the name of 公法便覽, meaning “Manual of Public Law.”

source.⁶¹ At that time, the main purpose of studying international law was to keep away from unequal treaties with the Western powers or Japan.⁶²

Yielding to foreign pressure, Korea opened a new era in 1882 by concluding the Treaty of Friendship and Commerce⁶³ with the United States (The 1882 Treaty). The 1882 Treaty was the first experience for Korea to enter official diplomatic relations with a Western state in the form of a treaty.⁶⁴ Moreover, it was a great historical event to change the focus of its traditional foreign policy from China to the United States.⁶⁵ With the conclusion of the 1882 Treaty, Korea pledged to respect all conventional and customary norms of international law. In 1885 and 1887, finally, the Chosun government invoked international law in two major confrontations with the Western powers.⁶⁶

Upon opening its door to the outside, meanwhile, modern international law started to be taught in the law schools of Korea. At the Seoul YMCA, a young pioneer of international law, Syngman Rhee⁶⁷ gave a lecture on international law. In 1907, a governmental prosecutor, Yi Jun⁶⁸ who studied international law was dispatched to the second Hague Peace Conference with two other envoys by Emperor Kojong. They appealed the illegality of the 1905 Protectorate Treaty between Japan and

⁶¹ An official record at that time shows that it was read very widely among intellectuals. See *Sunjong Ilki*.

⁶² See Hahm Pyong-choon, *op. cit.*, pp. 122–30.

⁶³ The official title of this Treaty of 1882 is “Treaty of Peace, Amity, Commerce and Navigation Between the United States of America and the Kingdom of Korea or Chosen.” The original version of the 1882 Treaty may be found at W. Malloy (ed.), *Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers 1 (1776–1909: Treaties between US and Other Powers)*, Washington, Government Printing Office, 1910.

⁶⁴ The US-Korean negotiations in 1882 were said to be conciliatory in letter and spirit. The American official documents said that the Korean monarch “danced with joy” when the American minister, Lucius Foote, reached the kingdom to present his credentials in May 1883. See G.M. McCune and J.A. Harrison, (eds.), *Korean-American Relations: Documents Pertaining to the Far Eastern Diplomacy of the United States 1 (1883–6)*, p. 105.

⁶⁵ See Chai N.Y., *op. cit.*, pp. 10–3.

⁶⁶ In 1885, Korea castigated the British for occupation of Keomun-do Island in the southern part of Korea by persistently referring to international law. In 1887 the Chosun government again invoked a principle of international law in ousting an American naval *attaché*, George C. Faulk as *persona non grata*. In these two incidents, Chosun attained its goals by invoking principles of international law. For details on these incidents, see Chai N.Y., *op. cit.*, p. 14.

⁶⁷ See R. Allen, *Korea's Syngman Rhee: An Unauthorized Portrait*, Charles E. Tuttle Co., Rutland, 1960, p. 46. As a young pioneer of international law in Korea who studied at Harvard and Princeton (Ph.D. with the topic, *Neutrality as Influenced by the United States*, 1912), he was one of the leaders of the Korean independence movement in the Japanese occupational period. He was elected the first President in the Constituent Assembly held on July 20, 1948. For details, see R. Oliver, *Syngman Rhee: The Man behind the Myth*, New York, 1951; *Syngman Rhee and American Involvement in Korea 1942–1960*, Panmun Books Co, Seoul, 1978; or Kim Quee-young, *The Fall of Syngman Rhee*, Institute of East Asian Studies, Berkeley, 1983.

⁶⁸ On his life and thought, see Lee Sun-jun, *A Bibliography of Yi Jun* (available only in Korean), Eulchi Publishers, Seoul, 1994, pp. 175–220.

Korea under modern international law.⁶⁹ During the Japanese occupational period (1910–45), however, the study and practice of modern international law were nearly extinct.

Three years after the liberation, in 1948, two sovereign states were created in the north and south of the Korean peninsula. A capitalist and anti-Communist regime was established in the south under the auspices of the United States, while a dogmatic socialist regime was constructed in the north under the leadership of Kim Il-Sung with Soviet guidance. A horrible civil war (1950–3) resulted. Such a domestic situation had an influence on the doctrines of international law and relations of the two Koreas.

With regard to the status of international law in the domestic legal system, meanwhile, the constitutions of the two Korea take somewhat different stands. The 1987 Constitution of South Korea provides, in Article 5(1), that it makes an effort to maintain international peace and repudiates all aggressive wars. This provision may reflect the purpose of the United Nations. Article 6(1) of the South Korean Constitution also stipulates that: "Treaties duly concluded and promulgated under the Constitution and the generally recognized rule of international law have the same effect as the domestic laws of the Republic of Korea."⁷⁰ North Korea seems to be less enthusiastic to international law. The 1992 Socialist Constitution of the DPRK was silent as to the domestic status of international treaties to which North Korea was a party,⁷¹ but granted a power to the Supreme People's Assembly and Central People's Committee to ratify or abrogate treaties concluded with foreign states.⁷² The new Socialist Constitution of 1998, however, lays down striking provisions in Articles 15–7 which adopt general principles of international law as its constitutional rules.

⁶⁹ For details, see a photocopy of the original article: *Courrie de la Conference de La Paix* by William T. Stead on July 5, 1907 (translated into English by Yi Jun Peace Museum in The Hague, The Netherlands).

⁷⁰ On the interpretation of Article 6(1) of the South Korean Constitution, see Lee Han-ki, *An Introduction to International Law* (available only in Korean), Pakyoungsa Publishers, Seoul, 1990, pp. 153–6.

⁷¹ The North Korean orientation towards international law was revealed in the Political Term Dictionary published in Pyongyang in 1970. According to the Dictionary, international law is the "rules of action regulating the relations that arise from the process of struggle and cooperation among nations." See Academy of Social Science, *Political Term Dictionary*, Social Science Publishers, Pyongyang, 1970, p. 64. For details, see Cho Sung-yoon, *Law and Legal Literature of North Korea: A Guide*, Library of Congress, Washington D.C., 1988, p. 191.

⁷² See Kim Chin, *Korea Law Study Guide*, San Diego, 1995, p. 14.