

# TERRITORIAL CLAIMS BY DIVIDED NATIONS: APPLYING THE IRISH EXPERIENCE TO KOREA\*

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*The Republic of Korea (“ROK” or “South Korea”) in its Constitution makes a territorial claim on the entire Korean Peninsula. By definition, this includes all of the Democratic People’s Republic of Korea (“DPRK” or “North Korea”). Until 1998, the Constitution of Ireland contained a similar territorial claim on the entire island of Ireland, which included a claim on the province of Northern Ireland. This article examines the changes made to the Irish Constitution, and argues that a similar constitutional approach could be adopted by South Korea as a confidence-building measure in the interests of reducing tensions on the Korean Peninsula.*

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## I. INTRODUCTION

Divided nations<sup>1</sup> face a variety of legal issues including constitutional problems as a result of their unusual status.<sup>2</sup> One of their main concerns is defining the boundaries of the separated states.<sup>3</sup> The governments of divided nations may have conflicting territorial claims; indeed one government may claim the entire territory of its rival. To further complicate matters, such claims might be enshrined in constitutions thereby making political compromises difficult and causing possible harm to the goal of peaceful co-existence.

This article examines the Korean and Irish experiences regarding national division and the impact of those experiences on constitutional law. It then explores how Korea may learn from Ireland in this area specifically in terms of territorial claims.

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1. By "divided nations," I mean simply countries that have been unified political entities for significant periods of time that were then split into separate states. *See, e.g.*, NEW INTERNATIONAL ORDER AND FUTURE OF DIVIDED NATIONS (Hak-joon Kim & Gottfried-Karl Kindermann eds., 2003). For the order and spelling of Korean names in English, I have attempted to follow the individual preferences of the persons when known.

2. The very concept of a nation can be viewed as having an artificial character. JUERGEN HABERMAS, *National Unification and Popular Sovereignty*, in HABERMAS AND THE KOREAN DEBATE 103-119, 113 (Sang-Jin Han ed., 2003). For instance, Habermas has argued that the modern nation state is ultimately a construct. *Id.* Although this perspective is mostly based on European history, it has some relevance for Asia.

3. Here I generally assume that the separate entities are viewed as states under public international law based on the three requirements for statehood as famously set forth in the Montevideo Convention: 1) a defined territory, 2) a permanent population, and 3) the capacity to engage in formal relations with other states. Convention on the Rights and Duties of States, arts. 1, 3, Dec. 26, 1933, 49 Stat. 3097. *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987). However, Northern Ireland in its present form is clearly a political subdivision rather than an independent state under the requirements of the Montevideo Convention. Leaving aside the territorial question, Northern Ireland lacks the capacity to engage in diplomatic relations. By contrast, the two Koreas arguably both meet the test for statehood under the Montevideo Convention. *See* Damien P. Horigan, *The Hallstein Doctrine: A "Living Fossil" of International Law?*, 30 KOREAN J. INT'L L. 93 (2002). In any event, the international community has generally recognized the existence of two Korean states. *Id.* As a matter of practice, a number of Asian and European countries have pragmatically established full diplomatic relations with both Koreas. *Id.* Dual recognition is possible because currently neither Seoul nor Pyongyang insists on using the Hallstein Doctrine as a part of its foreign policy. *Id.* This makes the international relations aspect of the Korean Problem rather different from the standoff between Mainland China and Taiwan. *Id.*

Although the Koreans have sometimes been dubbed “the Irish of the East” or “the Irish of the Orient” in the realm of comparative cultural stereotypes,<sup>4</sup> the possible relevance of the Irish legal and political experience of national division to the Korean Problem has generally been ignored in the past. The probable reasons for this gap are explained below. Be that as it may, with brave efforts being made to overcome decades of conflict in Northern Ireland through peace, democracy, mutual understanding, and joint economic cooperation, the Irish experience has taken on a new relevance for Korea. Indeed, Ireland, when properly understood, represents a model that many Koreans might wish to follow.

## II. BACKGROUND

Korea and Ireland were both once unified political entities.<sup>5</sup> Each nation was split during the 20<sup>th</sup> century due largely to the influence of outside powers.<sup>6</sup> Today, within Korea and Ireland alike, people wish to see their respective countries reunified.<sup>7</sup>

In 1945, with the end of the Second World War, Korea was liberated from Japanese colonial rule, but subsequently divided into American and Soviet zones of military occupation.<sup>8</sup> The division was later solidified when two separate regimes were established, the Democratic People’s Republic of Korea (DPRK” or, informally, “North Korea”) with its capital in Pyongyang and the Republic of Korea (“ROK” or, informally, “South Korea”) with its capital in Seoul.<sup>9</sup>

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4. ROBERT J. MEYERS, *KOREA IN THE CROSS CURRENTS: A CENTURY OF STRUGGLE AND THE CRISIS OF REUNIFICATION* 8 (2001). Meyers writes, “[s]ome observers, and some Koreans themselves, describe Koreans as the ‘Irish of the East.’ In the context of a bar or restaurant scene, one presumably is talking about the enjoyment of food, drink, and song. Perhaps Irish also means people who may be irreconcilable . . . .” *Id.*

5. *See, e.g.*, ROBERT KEE, *A HISTORY OF IRISH NATIONALISM* (1972) [hereinafter KEE]; CHI YOUNG PAK, *KOREA AND THE UNITED NATIONS* (2000) [hereinafter PAK].

6. KEE, *supra* note 5, at 719-52; PAK, *supra* note 5, at 3-11.

7. RICHARD ROSE, *NORTHERN IRELAND: A TIME OF CHOICE* 7-11 (1976) [hereinafter ROSE]; KIM KYONG-DONG & LEE ON-JOOK, *THE TWO KOREAS: SOCIAL CHANGE AND NATIONAL INTEGRATION* 329-30 (Korean Studies Series. No. 23, 2003) [hereinafter KIM & LEE].

8. *See* SUNG CHUL YANG, *THE NORTH AND SOUTH KOREAN POLITICAL SYSTEMS: A COMPARATIVE ANALYSIS* (rev. ed. 1999) [hereinafter YANG] (which provides a good overview of the two Koreas).

9. Having been established in 1948, the ROK is slightly older than the Federal Republic of Germany (“FRG”), which was established in 1949 with the consolidation of three out of four of the Allied zones of occupied Germany, namely, the American, British, and French zones. REGINALD PECK, *THE WEST GERMANS: HOW THEY LIVE AND WORK* 11-13 (1969). Prior to German reunification, the FRG was popularly called “West Germany” in English. *Id.* The year 1949 also saw the establishment of the former German Democratic Republic (“GDR” or “East Germany”), which was based on the old Soviet zone. *Id.* The city of Berlin was itself divided and had a special legal status. *Id.* Reunified Berlin has replaced

Two and a half decades earlier, in a different part of the world, another country was split.<sup>10</sup> In 1920, the British government created the legal framework for separate parliaments in Dublin and Belfast.<sup>11</sup> Most of Ireland would later become the Irish Free State (*Saorstát Éireann*),<sup>12</sup> which was a dominion comparable in constitutional status to Australia, Canada, New Zealand, and South Africa at the time.<sup>13</sup> In 1937, the Irish Free State adopted a new Constitution and the state was renamed Ireland (*Eire*).<sup>14</sup> This entity finally became a fully sovereign republic in 1949.<sup>15</sup> However, the northeastern part of the island became the province of Northern Ireland.<sup>16</sup> Today, Northern Ireland remains a part of the United Kingdom (“UK”) along with England, Wales, and Scotland.<sup>17</sup>

Korea and Ireland are thus both divided nations. As such, they share certain characteristics.<sup>18</sup> A comparison of these two nations can be informative because they face certain similar issues in the fields of constitutional law and public international law. Nevertheless, the focus of this article is narrowly construed to evaluate constitutional territorial claims in two divided nations. Additionally, I will briefly address the question of citizenship in divided nations in which I argue that Koreans can learn from Irish experience in these matters.

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Bonn as the capital of reunified Germany. DIETMAR WILLOWEIT, *DEUTSCHE VERFASSUNGSGESCHICHTE* 354-366 (3<sup>rd</sup> ed. 1997) [hereinafter WILLOWEIT].

10. MIKE CRONIN, *A HISTORY OF IRELAND* 173-218 (2001) (which provides historical background on the partition of Ireland).

11. Government of Ireland Act, 1920, 10 & 11 Geo. 5, ch. 67 (U.K.).

12. For spelling Irish names in this article, in the interest of simplicity, I will be ignoring the *sineadh fada*, which is a diacritical mark used for indicating long vowel sounds.

13. Irish Free State (Agreement) Act, 1922, 12 Geo. 5, ch. 4. (U.K.). See also Irish Free State Constitution Act, 1922, 13 Geo. 5, ch. 1 (Session 2) (U.K.).

14. IR. CONST., 1937, art. 4.

15. Ireland Act, 1949, 12 & 13 Geo. 6, ch. 41 (U.K.).

16. *The State (Gilsenan) v. McMorrow*, [1978] I.R. 360, 367 (which considered the legal meaning of the term “Northern Ireland”).

17. ROSE, *supra* note 7, at 14-17.

18. There are other divided nations in the world today. For example, Cyprus remains a divided island. JOSEPH R. RUDOLPH, JR., *Cyprus: Communal Conflict and the International System*, in *ENCYCLOPEDIA OF MODERN ETHNIC CONFLICTS* 55-60 (2003). The split there is clearly along ethnic, religious, and linguistic lines namely, Greek Cypriots/Christians versus Turkish Cypriots/Muslims. *Id.* The United Nations (“UN”) recognized the predominately Greek Cypriot government of the Republic of Cyprus as the island’s legitimate government. S.C.Res. 541 (Nov. 18, 1983). This entailed a rejection of the self-proclaimed “Turkish Republic of Northern Cyprus.” *Id.* As widely reported by the international media during 2004, an effort led by the UN to reunify the island failed. Shortly thereafter the Republic of Cyprus joined the European Union (“EU”). EUROPA, *The Member States of the European Union: Cyprus*, [http://europa.eu/abc/european\\_countries/eu\\_members/cyprus/index\\_en.htm](http://europa.eu/abc/european_countries/eu_members/cyprus/index_en.htm) (last visited Nov. 25, 2006).

In the past, Korea has been compared with Germany, another divided nation.<sup>19</sup> The German experience has had a profound impact on how many Koreans, and even some non-Koreans, continue to view inter-Korean relations.<sup>20</sup> Furthermore, because South Korean law has been influenced to a considerable extent by German civil law, it is natural that South Korean lawyers would pay special attention to developments in Germany.<sup>21</sup>

Both Korea and Germany were split along ideological lines.<sup>22</sup> However, before German reunification, West Germany's Constitution, in the form of the Basic Law (*Grundgesetz fuer die Bundesrepublik*

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19. See, e.g., KOREA AND GERMANY: LESSONS IN DIVISION (Myoung-Kyu Kang & Helmut Wagner eds., 1990); CONSTITUTIONAL HANDBOOK ON KOREAN UNIFICATION (Sung-Hee Jwa et al. eds., 2002) [hereinafter CONSTITUTIONAL HANDBOOK]; Jin Lee, *A Millennium Hope for Korea: Lessons from German Unification*, 9 MICH. ST. U.-DCL J. INT'L L. 453 (2000); Cecilia Y. Oh, *The Effect of Reunification of North and South Korea on Treaty Status*, 16 EMORY INT'L L. REV. 311 (2002); Curtis J. Milhaupt, *Privatization and Corporate Governance in a Unified Korea*, 26 IOWA J. CORP. L. 199 (2001). Yet, few attempts have been made to include other instances of divided nations. However, a South Korean scholar has done an interesting three-way comparison of Korea, Germany, and Yemen. Suhyong Choi, *Divided States* <http://wwics.si.edu/subsites/ccpdc/pubs/zart/ch5.htm> (last visited Nov. 25, 2006).

20. Unification Treaty, FRG-GDR, Aug. 31, 1990, 30 I.L.M. 457. Nevertheless, Germany is not the sole case of a previously divided nation that has since been reunified. See, e.g., NGUYEN KHAC VIEN, VIETNAM: UNE LONGUE HISTORIE 465-80 (5<sup>th</sup> ed. 2004). Vietnam serves as a dramatic example. *Id.* It was also divided into the Communist North, officially known as the Democratic Republic of Vietnam with its capital in Hanoi, and the non-Communist South, officially known as the Republic of Vietnam with its capital in Saigon. *Id.* However, Vietnam's reunification came about with the victory of the North over the South in 1975 and the creation in 1976 of a new entity, the Socialist Republic of Vietnam. *Id.* Reunified Vietnam joined the UN General Assembly in 1977. *Id.* Previously neither North Vietnam nor South Vietnam was a member of the UN. *Id.* Because Vietnam's reunification was the result of a lengthy war that was eventually won by Communist forces, Vietnam holds little appeal as a model for most South Koreans. *Id.* A more recent yet lesser known case would be that of Yemen. MICHAEL HUDSON ET AL., THE YEMENI WAR OF 1994 (Jamal S. al-Suwaidi, ed., 1995). The previous two Yemens, North Yemen, officially the Yemen Arab Republic with its capital in Sanaa, and South Yemen, officially the People's Democratic Republic of Yemen with its capital in Aden, merged in 1990 to form the Republic of Yemen. *Id.* However, since reunification, Yemen has experienced periods of political instability including a brief civil war during 1994. *Id.* See also ROBIN BIDWELL, THE TWO YEMENS (1983); CONTEMPORARY YEMEN: POLITICS AND HISTORICAL BACKGROUND (B.R. Pridham ed., 1984).

21. See, e.g., LEE SIK CHAI, AN INTRODUCTION TO KOREAN MARITIME LAW 7-8 (1999). Initially, much of the German legal influence was indirect via Japan. *Id.* However, there is some ongoing direct German influence. For example, a number of South Korean law professors have earned graduate law degrees from German universities. Likewise, South Korean law school libraries often hold sizeable collections of legal works written in German. Yet, from having done legal research in Korea, I can say that works on Irish law are virtually unobtainable in Seoul.

22. This made the German situation different from that of Ireland because most German citizens share the same German ethnicity broadly defined. See generally THE GERMAN QUESTION (Walther Hubatsch et al, eds., Salvator Attanasio, trans., 1967). Additionally, religion was not a factor in the political division of Germany. *Id.*

*Deutschland*),<sup>23</sup> did not make an explicit claim on East German territory.<sup>24</sup> Likewise, East Germany's Constitution (*Verfassung der Deutschen Demokratischen Republik*) did not make any claim on West German territory.<sup>25</sup> An important factor in this comparison is the collective role of

23. By using the term Basic Law instead of the word Constitution, a temporary status was implied. See ANKE FRECKMANN & THOMAS WEGERICHT, *THE GERMAN LEGAL SYSTEM* 24-26 (1999). Indeed, Article 146 of the Basic Law of 1949, entitled "Duration and validity of the Basic Law," declared that the "Basic Law shall cease to be in force on the day on which a constitution adopted by a free decision of the German people comes into force." Grundgesetz fuer die Bundesrepublik Deutschland [GG] [Basic Law], art. 146 [hereinafter Basic Law].

24. Basic Law, *supra* note 23, at art. 23. The 1949 version of Article 23 of the Basic Law, entitled "Jurisdiction of the Basic Law," described the extent of West Germany in terms of the states (*Laender*) in the federation including Berlin:

For the time being, this Basic Law shall apply in the territory of the *Laender* of Baden, Bavaria, Bremen, Greater Berlin, Hamburg, Hesse, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Schleswig-Holstein, Wuerttemberg-Baden, and Wuerttemberg-Hohenzollern. In other parts of Germany it shall be put into force on their accession.

*Id.* Here, it should be noted that Wuerttemberg-Baden and Wuerttemberg-Hohenzollern were merged to create the state of Baden-Wuerttemberg in 1951. WILLOWEIT, *supra* note 9, at 356-60. Furthermore, in 1956, the Saarland, which had been under French control, became a part of the FRG. *Id.* Incidentally, Berlin had a special status. *Id.* West Berlin was connected with the FRG while East Berlin served as the capital of the GDR. *Id.* Yet, the Four Powers retained certain special rights in regard to Berlin as a whole. *Id.*

25. Likewise, the old preamble of the Basic Law listed the *Laender* in the West at the time, although a reference to Germans living in the East was also made:

The Germans

In the *Laender* of Baden, Bavaria, Bremen, Hamburg, Hesse, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Schleswig-Holstein, Wuerttemberg-Baden, and Wuerttemberg-Hohenzollern,

Conscious of their responsibility before God and men,

Animated by the resolve to preserve their national and political unity and to serve the peace of the world as an equal partner in a united Europe,

Desiring to give a new order to political life for a transitional period,

Have enacted, by virtue of their constituent power, this Basic Law for the Federal Republic of Germany,

They have also acted on behalf of those Germans to whom participation was denied.

The entire German people are called upon to achieve in free self-determination the unity and freedom of Germany.

Basic Law of 1949, preamble (original preamble). With reunification said preamble was revised as follows:

Conscious of their responsibility before God and men,

Animated by the resolve to serve world peace as an equal partner in a united Europe, the German people have adopted, by virtue of their constituent power, this Basic Law.

the United States, the former Soviet Union, the United Kingdom, and France as the four occupying powers of Germany in 1945.<sup>26</sup> The Four Powers continued to exercise a measure of influence over all of Germany even after the creation of the FRG and GDR.<sup>27</sup> Such influence would last until a treaty, signed by the Four Powers and the two Germanys, restoring full sovereignty to a reuniting Germany came into effect.<sup>28</sup> Accordingly, in this aspect, the German situation is rather different from the current Korean situation.<sup>29</sup>

The Irish experience is less familiar to Koreans. It is perhaps also less familiar to foreign specialists on Korean affairs. Yet, as will be explained below, the Irish experience may prove helpful in examining the Korean problem from a new perspective.

### III. DIFFERENCES AND SIMILARITIES BETWEEN KOREA AND IRELAND

Admittedly, there are major differences between the situations in Korea and Ireland. Before proceeding further, I wish to briefly acknowledge a few of these differences. Additionally, I intend to explain in some detail my rationale for choosing these two countries.

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The Germans in the Laender of Baden-Wurttemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Rhineline-Paltinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein, and Thuringia have achieve the unity and freedom of Germany in free self-determination. This Basic Law is thus valid for the entire German People.

*Id.*, preamble (as amended). Similarly, the former East German Constitution never made a precise territorial claim, but it too at times made mention of the division of Germany. GDR CONST. of 1949. The original East German Constitution refers to Germany as being an “indivisible democratic republic consisting of the German *Laender*.” *Id.* at art. 1. When a new East German Constitution was proclaimed in 1968, the GDR was described as being a “Socialist state of the German nation.” GDR CONST. of 1968, art. 1. No mention was made of the *Laender*. *Id.* The GDR had a more centralized form of government with very little room for local autonomy. (The *Laender* in the East have since been revived). In 1974, the Constitution was substantially amended. GDR CONST. of 1968 (as amended in 1974). By this time, the GDR was declared to be a “Socialist state of the workers and peasants.” *Id.* at art. 1. No mention was made of the German nation per se. *Id.*

26. HAGEN SCHULZE, *GERMANY: A NEW HISTORY* 276-97 (trans. Deborah Lucas Schneider 1998).

27. See HERMANN WEBER, *GESCHICHTE DER DDR* (2d ed. 1999) [hereinafter WEBER]. See also DAVID CHILDS, *THE GDR: MOSCOW’S GERMAN ALLY* (1983) (for a general history of the GDR).

28. Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, 29 I.L.M. 1186.

29. Constitutionally, German reunification involved an expansion of the territory of the Basic Law set forth in Article 23. See WILLOWEIT, *supra* note 9, at 425-26. A new Constitution for a reunited Germany as originally envisioned under Article 146 of the Basic Law was not established. *Id.* But, what might be called the Article 23 approach was selected as the basis for a speedy reunification that was partly motivated by concerns about the then uncertain future of the Soviet Union and what impact that might have on Germany. *Id.*

Although Northern Ireland has endured a history of political violence, the conflict has been mostly, albeit not entirely, waged within the province between various paramilitary groups from the extremes of the two main religious-political-ethnic communities, namely, the Protestant/Unionist/Ulster-Scot community and the Roman Catholic/Nationalist/Northern Irish community.<sup>30</sup> However, there has been no direct military confrontation between Ireland and the UK since the 1920s.<sup>31</sup>

By contrast, the two Koreas fought directly with each other during the Korean War from 1950 until 1953.<sup>32</sup> Hostilities ended in an armistice agreement rather than a final peace treaty,<sup>33</sup> and therefore, North and South Korea are still at war.<sup>34</sup> The Korean War involved a number of outside powers.<sup>35</sup> China, and to a lesser extent the Soviet Union, supported North Korea<sup>36</sup> while the United States and various other countries supported South Korea under a special UN Command.<sup>37</sup> Moreover, as tragic as the conflict in Northern Ireland has been over the decades, the scale of death and destruction during the three years of the Korean War was much greater.

Subsequently, mutual distrust and the heavily fortified “demilitarized zone” (DMZ), which still divides North and South Korea, has resulted in decades of virtually no communication between family members that were separated by the war.<sup>38</sup> In Ireland, however, individuals can easily travel between Dublin and Belfast, and crossing the inter-Irish border tends to be uneventful.<sup>39</sup>

30. See ROSE, *supra* note 7, at 139-42.

31. See PAUL BEW ET AL., *NORTHERN IRELAND 1921-2001: POLITICAL FORCES AND SOCIAL CLASSES* (rev. ed 2002) (providing a history of Northern Ireland as a province of the UK).

32. See PAK, *supra* note 5, at 75-82.

33. See BYUNG-HWA LYOU, *PEACE AND UNIFICATION IN KOREA AND INTERNATIONAL LAW* (Occasional Papers/Reprints Series in Contemporary Asian Studies, No. 2, 1986) [hereinafter LYOU] (for a detailed treatment of the Korean Armistice Agreement and related matters).

34. Lee Chang Choon, *The Basic Legal Framework of Relations Between the Two Koreas in NORTH-SOUTH KOREAN RECONCILIATION AND LEGAL PREPARATIONS IV* – 11 (Ewha Graduate School of International Studies & American Enterprise Institute for Public Policy, 2000). Although also ideologically divided, ties between the two Germanys were closer than those between the two Koreas. David Childs, *Relations between the two German states*, in *WEST GERMANY TODAY* 139-64 (Karl Koch ed., 1989).

35. PAK, *supra* note 5, at 76-82.

36. *Id.* at 40-43.

37. See S.C. Res. 82 ¶ 1-8, U.N. Doc. S/1501 (June 25, 1950); S.C. Res. 83, ¶ 1-6, U.N. Doc. S/1511 (June 27, 1950); S.C. Res. 88 ¶ 1, U.N. Doc. S/1892 (Nov. 8, 1950); see also PAK, *supra* note 5, at 88-89.

38. See KIM & LEE, *supra* note 7, at 337-45; YANG, *supra* note 8, at 5, 149-50, 154-55. See also JASPER KIM, *CRISIS AND CHANGE: SOUTH KOREA IN A POST-1997 NEW ERA* 143-44 (2005) [hereinafter KIM].

39. In fact, when I traveled between Dublin and Belfast by train there were no immigration or customs formalities at all. So, that’s very different from the Korean DMZ.

Additionally, Ireland and the UK are both members of the European Union (EU).<sup>40</sup> The countries share certain key values when it comes to democracy, the rule of law, and market forces.<sup>41</sup> Furthermore, Ireland and Northern Ireland are both common law jurisdictions,<sup>42</sup> and therefore they have largely similar sets of laws and legal systems.<sup>43</sup>

In Northeast Asia, however, there is currently no major regional intergovernmental organization like the EU.<sup>44</sup> While the two Koreas are both members of the UN General Assembly, they still do not have formal diplomatic relations with one another. Moreover, North and South Korea have vastly different political, economic, and legal systems.<sup>45</sup> North Korea has developed its own local offshoot of Stalinism known as “self-reliance” (*juche*) while South Korea has become a representative democracy with an advanced economy.<sup>46</sup>

The partition of Ireland, on the other hand, was essentially a piece of colonial gerrymandering performed with the intention of creating an entity with a Protestant majority consisting of mostly Ulster-Scots with ancestral

40. The impact of the EU on Ireland is considered in JAMES GOODMAN, *SINGLE EUROPE, SINGLE IRELAND?: UNEVEN DEVELOPMENT IN PROCESS* (2000).

41. Indeed, such values could be said to be regional values across the EU. For example, Habermas has considered the role of democracy in shaping the future of the EU. JUERGEN HABERMAS, *TIME OF TRANSITIONS* 73-109 (Ciaran Cronin ed., Max Pensky trans., 2006).

42. See T.F. O’Higgins, *The Irish Legal System*, 31 *THE IRISH JURIST* 1-2 (1996) [hereinafter Higgins]; see also Brice Dickson, *Northern Ireland’s Legal System – An Evaluation*, 43 *NORTHERN IRELAND AND LEGAL QUARTERLY* 315, 317 (Winter 1992) [hereinafter Dickson] (suggesting reforms to the Northern Irish legal system); W.N. Osborough, *Constitutionally Constructing a Sense of Oneness: Facets of Law in Ireland after the Union*, 37 *THE IRISH JURIST* 227 (n.s. 2002) (describing influences on the development of the Irish legal system).

43. Higgins, *supra* note 42, at 1-2; Dickson, *supra* note 42, at 317.

44. Regional integration in Asia is deeper in Southeast Asia than it is in Northeast Asia. Damien P. Horigan & Brendan M. Howe, *International Organizations*, in *INTERNATIONAL STUDIES PRIMER* 228-31 (Brendan M. Howe ed., Jang-Hee Yoo Series on International Studies, vol. 2, 2005). Most of Southeast Asia comes under the Association of Southeast Asian Nations (“ASEAN”), which is based in Jakarta. *Id.* ASEAN has reached out to countries in other parts of Asia. *Id.* Mention should also be made of the Asia-Pacific Economic Cooperation (“APEC”), which is more of a high level policy forum than a traditional international organization. *Id.* Nevertheless, APEC has a secretariat based in Singapore. *Id.* APEC includes member economies from Northeast Asia, Southeast Asia, and the Pacific Region. *Id.*

45. For an overview of the North Korean legal system, see CHONGKO CHOI, *BUKHAN BEOP [North Korean Law]* (2<sup>nd</sup> ed. 2001) [in Korean]. For a useful work in English on the South Korean legal system, see *RECENT TRANSFORMATIONS IN KOREAN LAW AND SOCIETY* (Dae-Kyu Yoon ed., 2000); see also Greyson Bryan, Scott Horton & Robin Radin, *Foreign Investment Laws and Regulations of the Democratic People’s Republic of Korea*, 21 *FORDHAM INT’L L.J.* 1677 (1998).

46. See YANG, *supra* note 8, at 847-54; KIM, *supra* note 38, at 100-36. Incidentally, *juche* is covered in various parts of the North Korea’s constitution. See, e.g., DPRK CONST., preamble & art. 3.

roots in the Scottish Lowlands<sup>47</sup> who would presumably remain loyal to London.<sup>48</sup> The rest of the island was to be predominately Irish Roman Catholic.<sup>49</sup>

The division of Korea, a country that was virtually homogeneous in terms of ethnicity, language, and culture and that furthermore had a very long history as a unified political entity, came about with the defeat of Japan at the end of the Second World War.<sup>50</sup> The division was solidified with the dawn of the Cold War.<sup>51</sup> Today, the Cold War is long over in Europe, but it continues to some extent on the Korean Peninsula.<sup>52</sup>

Yet, despite these differences there are several important similarities.<sup>53</sup> Both Korea and Ireland have been colonized by larger neighboring countries,<sup>54</sup> and the impact of that colonization can still be felt today. Moreover, reunification<sup>55</sup> is a goal for some of the inhabitants of Korea and Ireland alike. Yet, a relatively quick reunification, as took place in Germany<sup>56</sup> when the GDR was essentially annexed by the FRG, may not be suitable for either Korea or Ireland. In any event, more than a few people in Korea and Ireland are wary of a quick reunification for political and economic reasons. After the initial euphoria in Germany subsided, several negative aspects of the German reunification came to light.<sup>57</sup> First, German reunification has proven to be an expensive undertaking with higher taxes

47. [IRISH] DEPARTMENT OF FOREIGN AFFAIRS, FACTS ABOUT IRELAND 80 (6<sup>th</sup> rev. ed., 1985). Lowland Scots traditionally spoke Scots, a Germanic language similar to English, but distinct from being merely a Scottish dialect of English. David Murison, *The Future of Scots*, in WHITER SCOTLAND?: A PREJUDICED LOOK AT THE FUTURE OF A NATION 171-86 (1972). By contrast, Highlanders traditionally spoke a form of Gaelic similar to Irish. Derick S. Thomson, *Gaelic Scotland*, in WHITER SCOTLAND?: A PREJUDICED LOOK AT THE FUTURE OF A NATION 128-59 (1972).

48. See ROSE, *supra* note 7, at 10.

49. See KEE, *supra* note 5, at 719-31.

50. See YANG, *supra* note 8, at 5.

51. *Id.* at 149-50.

52. *Id.* at 154-55.

53. My point is that as divided nations Korea and Ireland do share enough traits to make a comparison worthwhile.

54. Japan occupied Korea and England occupied Ireland. YANG, *supra* note 8, at 5; see generally KEE, *supra* note 5. In both cases, attempts were made to integrate the colonies into the respective colonial powers. *Id.* Specifically, the Japanese annexed Korea while Ireland and Great Britain once shared the same parliament. JOUNGWON KIM, DIVIDED KOREA: THE POLITICS OF DEVELOPMENT 1945-1972, at 11 (1976); KEE, *supra* note 5, at 149-60.

55. Many people use the words "reunification" and "unification" interchangeably. However, in this context I generally prefer reunification because the nations that I am examining in this article were once single political entities and thus I feel that reunification is a slightly more accurate term than unification.

56. See RICHARD KIESSLER & FRANK ELBE, DER DIPLOMATISCHE WEG ZUR DEUTSCHEN EINHEIT (1993) (for a study of the process of German reunification) [hereinafter KIESSLER & ELBE].

57. See HAROLD R. KERBO & HERMANN STRASSER, MODERN GERMANY 113-19 (2000).

overall and higher unemployment notably in the East.<sup>58</sup> Second, a number of Germans from the former GDR still feel somewhat out of place in reunified Germany. They are sometimes nostalgic about the supposedly simpler times in the old GDR<sup>59</sup> because the economic and social consequences of reunification still remain nearly two decades later.<sup>60</sup> These issues have spooked several South Koreans,<sup>61</sup> and in this regard, it should be noted that the gap in living standards between the two Koreas appears to be much greater than the previous gap between the two Germanys.<sup>62</sup>

Examining the partition of Ireland, together with the Northern Ireland Peace Process that resulted in the Good Friday Agreement<sup>63</sup> of 1998,<sup>64</sup> offers a fresh way of looking at the Korean problem and indeed at the plight of divided nations generally.<sup>65</sup> The key to the peace process has been a creative legal and political compromise that can be viewed as generally

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58. *Id.* at 115-17.

59. This was certainly one factor behind the substantial regional support in the eastern *Laender* for the Party of Democratic Socialism (*Partei des Demokratischen Sozialismus*), or PDS, which was the successor to the former East German ruling party, the Social Unity Party (*Sozialistische Einheitspartei Deutschlands*) or SED. In this connection, the PDS should not be confused with Social Democratic Party (*Sozialdemokratische Partei Deutschlands*), or SPD, which appeals mostly to certain voters from the Western *Laender*. For some details on the 1990 transformation of the SED into the PDS, see WEBER, *supra* note 27, at 356-61. More recently, the PDS has been renamed the Left Party/PDS (*Linkspartei.PDS*) and it has been attempting to appeal to voters beyond its traditional Eastern base. *Die Linkspartei, Die Linke.PDS* <http://sozialisten.de/sozialisten/aktuell/index.htm> (last visited Nov. 25, 2006).

60. See Christopher Flockton, *The German Economy since 1989/90: Problems and Prospects*, in GERMANY SINCE UNIFICATION: THE DEVELOPMENT OF THE BERLIN REPUBLIC 63-87 (Klaus Larres ed., 2d ed. 2001).

61. South Korean views on reunification were the subject of an innovative study by a cultural anthropologist. ROY RICHARD GRINKER, *KOREA AND ITS FUTURES: UNIFICATION AND THE UNFINISHED WAR* (1998).

62. Nicholas Eberstadt, *A Quantitative Comparison of Socio-Economic Conditions in North and South Korea: Implications for a Prospective Reunification*, in CONSTITUTIONAL HANDBOOK (VOL. IV), *supra* note 19, at 895-952 (discussing how obtaining economic statistics on North Korea has proven to be an obstacle).

63. Northern Ireland Office, *The Agreement* (last visited Nov. 25, 2006) <http://www.nio.gov.uk/the-agreement>. Officially, the main part of the Good Friday Agreement is known as "An Agreement Reached at the Multi-Party Talks on Northern Ireland." *Id.* Alternative popular names are the Belfast Agreement or the Stormont Agreement. *Id.*

64. Northern Ireland Act, 1998, ch. 47 (U.K.).

65. Notable academic works on the Northern Ireland Peace Process include the following: AUSTEN MORGAN, *THE BELFAST AGREEMENT: A PRACTICAL LEGAL ANALYSIS* (2000) [hereinafter Morgan]; RICK WOLFORD, *ASPECTS OF THE BELFAST AGREEMENT* (2001); JOHN MCGARRY, *NORTHERN IRELAND AND THE DIVIDED WORLD: THE NORTHERN IRELAND CONFLICT AND THE GOOD FRIDAY AGREEMENT IN COMPARATIVE PERSPECTIVE* (2001); Donal O'Donnell, *Constitutional Background to and Aspects of the Good Friday Agreement – A Republic of Ireland Perspective*, 50 *Northern Ireland Legal Quarterly* 76 (Spring 1999).

acceptable to Dublin, London, and the main parties in Northern Ireland.<sup>66</sup> However, it has certainly not been all smooth sailing since 1998. The provincial government was suspended in 2000<sup>67</sup> and then again in 2002.<sup>68</sup>

Nevertheless, for purposes of this article, the Northern Ireland Peace Process is informative on the subject of constitutional territorial claims of divided nations because dropping the distinct territorial claim in the Irish Constitution was an important part of the process.<sup>69</sup> My argument is that a similar process could be applied to the ROK Constitution in the interest of fostering better ties with the DPRK.

#### IV. CONSTITUTIONS AND TERRITORIAL DESCRIPTIONS

Constitutions sometimes describe the territorial extent of the nation. This is frequently established by listing political subunits. For instance, the Malaysian Constitution clearly lists all the member states of the federation,<sup>70</sup> while the United States Constitution speaks of the “several States.”<sup>71</sup>

Another approach is to refer to particular geographical features and historical boundaries. Even boundaries said to date from a specific period of time in the past may be referred to. For example, the Cambodian Constitution refers to a particular map.<sup>72</sup> The Singapore Constitution, on the other hand, makes no precise references to territory.<sup>73</sup>

Often the territory described corresponds with the territory under actual government rule, however that is not always so. Some national constitutions make claims on territory that is under the effective control of another political entity. Indeed, a government-in-exile might have a purported constitution that claims territory that is entirely under the effective control of another regime.

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66. Of course, representative democracy has been an important factor in the Northern Ireland Peace Process. Democracy was also important in German reunification. However, the role that democracy may eventually play in Korean reunification remains uncertain.

67. Northern Ireland Act, 1998, ch. 1 (U.K.).

68. Northern Ireland Assembly Elections Act, 2003, ch. 3 (U.K.); Northern Ireland Assembly (Elections and Periods of Suspension) Act, 2003, ch. 12 (U.K.).

69. Desmond M. Clarke, *Nationalism, the Irish Constitution, and Multicultural Citizenship*, 51 NORTHERN IRELAND LEGAL QUARTERLY 100 (Spring 2000). This has had implications on what it now means to be Irish. *Id.* See also Brian Gill, *Transient Nationalism: Evolved Patriotism in the Republic of Ireland*, 1 GONZ. J. INT'L L. (1997-98), available at <http://www.gonzagajil.org/>.

70. MALAY. CONST., pt. I, art. 1.

71. U.S. CONST., art. 1.

72. CAMBODIAN CONST., art. 2.

73. The Constitution simply defines Singapore as the Republic of Singapore. SING. CONST., pt. I, art. 2-3. Singapore is the name of the country as well as the name of the main island. There is no direct reference to the numerous smaller islands such as Sentosa and Pulau Ubin that are, nevertheless, clearly under Singapore's control. See generally SING. CONST.

Here I am not referring to maritime boundary, island, or even land border disputes of the relatively minor sort that might be resolved by normal diplomacy or even recourse to the International Court of Justice (“ICJ”) at The Hague.<sup>74</sup> Rather, I mean those claims on large proportions of territory that are clearly enshrined in national constitutions.

In those instances, where the constitutional territorial claim does not match the extent of the state’s *de facto* territory, then such claim takes on more of a symbolic, emotional, or political tone that can have a major impact on the other state. Such a claim is, arguably, less of a standard legal provision. Nevertheless, it could still be interpreted as a legal claim.<sup>75</sup> As such, there may be a range of legal implications. For instance, people from the allegedly *de jure* territory not under the effective control of the state might assert the right to seek citizenship.<sup>76</sup>

#### V. KOREA’S TERRITORIAL CLAIMS

South Korea makes a territorial claim that includes all of North Korea.<sup>77</sup> The claim in Article 3 provides, “[t]he territory of the Republic of Korea shall consist of the Korean Peninsula and its adjacent islands.”<sup>78</sup> This poses a number of problems and in order to understand the breadth of this claim it is necessary to begin with small doses of geography and history.

By definition, a peninsula is a strip of land surrounded by water on three sides.<sup>79</sup> For the Korean Peninsula, the bodies of water are located to the west, east, and south.<sup>80</sup> To the west of the Korean Peninsula is the

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74. For instance, Singapore and Malaysia currently have a case pending in the ICJ regarding the sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks, and South Ledge. ICJ, *Press Release 2006/38* (posted Nov. 16, 2006), available at <http://www.icj-cij.org/icjwww/idocket/imas/imasiframe.htm>.

75. *McGimpsey v. Ireland*, [1990] 1 I.R. 110, 118-19.

76. This is not merely a hypothetical problem. During recent years, North Koreans fleeing the DPRK have made a number of dramatic attempts to enter embassies and other establishments in Beijing and beyond. Most of these individuals apparently intend to settle in South Korea. See Eric Yong-Joong Lee, *Human Rights Protection of North Koreans in a Third Country: A Legal Approach*, 4 JOURNAL OF KOREAN LAW 155 (2004) [hereinafter LEE]. See also Benjamin Neaderland, *Quandary on the Yalu: International Law, Politics, and China’s North Korean Refugee Crisis*, 40 STAN. J. INT’L L. 143 (2004).

77. ROK CONST., art. 3. The ROK Constitution has been “amended” multiple times. See generally ROK CONST. However, the key amendment was that of October 1987 when the Constitution was extensively rewritten in order to provide for a more representative form of government and better protection of individual rights. In essence, South Koreans got a brand new Constitution. See Jong-sup Chong, *Political Power and Constitutionalism*, in RECENT TRANSFORMATIONS IN KOREAN LAW AND SOCIETY 11-32 (Dae-Kyu Yoon ed., 2000).

78. ROK CONST., art. 3. Although guided by semi-official translations for Korean and German constitutional materials, I have made some minor editorial changes to better reflect the meanings of the original texts as I understand them.

79. THE CONCISE OXFORD ENGLISH DICTIONARY 1055 (10<sup>th</sup> rev. ed. 2002).

80. See YANG, *supra* note 8, at 6-9.

Yellow Sea, which Koreans often refer to as the “West Sea” (*Seohae*).<sup>81</sup> To the east is the somewhat controversially named Sea of Japan, which most Koreans strongly prefer to call the “East Sea” (*Donghae*).<sup>82</sup> To the south lies the Korea Strait.<sup>83</sup> A question that arises, however, regards how far north the Korean Peninsula extends.

Presumably, the ROK Constitution is referring to contemporary borders between North Korea, China, and Russia. These borders more or less follow the Yalu River and the Tumen River.<sup>84</sup>

The last political entity that ruled Korea before the Japanese colonial era (1910-1945), the Joseon Dynasty (1392-1910), had similar borders.<sup>85</sup> Yet, further back in the Northeast Asian history, various Korean kingdoms controlled significant parts of what are now Manchuria and the Russian Far East,<sup>86</sup> and today, there are still large ethnic Korean communities living in these areas.<sup>87</sup> It is important to recognize that it is possible that a future Korean government, perhaps an ultra-nationalist government of a reunified Korea urged on by irredentists, may someday make a claim on all or part of those territories.<sup>88</sup>

In addition to the peninsula, it is necessary to consider the islands. Some islands are clearly Korean like Jeju.<sup>89</sup> However, others are not. In particular, South Korea has had a long-running diplomatic dispute with Japan over the Liancourt Rocks, which are known in Korean as *Dokdo* and

81. Some Korean-made maps produced in English use Yellow Sea while others use West Sea or both. *Id.* Occasionally, the Yellow Sea is called *Hwanghae* in Korea, which literally means Yellow Sea. *Id.* In the far northwest, part of the Yellow Sea is sometimes called the “Korea Bay.” [SOUTH] KOREAN OVERSEAS INFORMATION SERVICE, A HANDBOOK OF KOREA 17 (3<sup>RD</sup> ed., 1979) [hereinafter HANDBOOK OF KOREA].

82. *See, e.g.*, [SOUTH] KOREAN INFORMATION SERVICE, FACTS ABOUT KOREA 8, 10, 16, 19, 20, 22 (rev. ed. 2001) [hereinafter FACTS]. Many South Koreans want maps produced in English to avoid using the name “Sea of Japan” in favor of the name “East Sea.” *Id.* For a sense of widespread South Korean feelings on this matter, see Shin Kim, *East Sea Forum*, <http://www.eastsea.org/> (last visited Nov. 25, 2006). Of course, the Japanese and some Westerners still typically prefer the name “Sea of Japan.” JOHN BENSON ET AL, JAPAN 10-11 (rev. ed., 2003). And, in any event, the “East Sea” is really only east if one is on the Korean Peninsula.

83. YANG, *supra* note 8, at 6-9; FACTS, *supra* note 82, at 8-11.

84. YANG, *supra* note 8, at 156-57.

85. FACTS, *supra* note 8, at 22.

86. *Id.* at 16-21.

87. *See* Global Korean Network of Los Angeles, [http://www.gkn-la.net/main/projects/history/history\\_project.htm](http://www.gkn-la.net/main/projects/history/history_project.htm) (last visited Nov. 25, 2006 ) [hereinafter GKN].

88. Such a hypothetical claim might seem far-fetched, but unusual claims are sometimes made by states. Consider the claim by the Philippines on the Malaysian state of Sabah. *See, e.g.*, EDGARDO L. PARAS & EDGARDO C. PARAS, INTERNATIONAL LAW AND WORLD POLITICS 701-24 (rev. ed. 1994).

89. YANG, *supra* note 8, at 160-61.

in Japanese as *Takeshima*.<sup>90</sup> The Liancourt Rocks, which are currently occupied by South Korea,<sup>91</sup> are tiny in terms of land area, but they offer rich fishing grounds,<sup>92</sup> and because seafood is important part of the typical diet for Koreans and Japanese alike, the ownership of this land is highly contested.

Yet, a more immediate problem is the fact that by claiming the entire peninsula South Korea is claiming all of North Korea's effective territory. By making such a constitutional territorial claim, the ROK is indicating that it is the *de jure* government of all of Korea, although Seoul does not diplomatically recognize Pyongyang.<sup>93</sup>

An interpretation of the ROK's territorial claim by the ROK Supreme Court in 1996 held that North Koreans are ROK citizens and not foreigners.<sup>94</sup> As such, they are automatically entitled to reside in South Korea.<sup>95</sup>

North Korea makes a slightly different sort of claim.<sup>96</sup> Rather than claiming land, the DPRK claims to represent all Koreans in Article 1 by stating, "[t]he Democratic People's Republic of Korea is an independent Socialist state representing the interests of all the Korean people."<sup>97</sup>

Incidentally, in its original 1948 Constitution, North Korea declared Seoul in the South to be the capital of the DPRK, and not Pyongyang in the North.<sup>98</sup> Clearly, that could be viewed as a territorial claim on the South.<sup>99</sup>

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90. See, e.g., Mark S. Lovmo, *The Territorial Dispute Over Dokdo* <http://www.geocities.com/mlvmo/page4.html> (last visited Oct. 4, 2006) [hereinafter LOVMO].

91. North Korea also views these rocks as Korean islands. See e.g., *Tok-Islet Is Korea's* (posted on Mar. 31, 2005), available at <http://www.korea-np.co.jp/pk/>. "Tok" is an alternative transliteration for "Dok."

92. See LOVMO, *supra* note 90.

93. As was noted earlier, at the time of writing, there has not yet been a final peace treaty ending the Korean War rather there is still just an armistice agreement. See generally LYOU, *supra* note 33. Although both Koreas are now members of the UN, they still lack formal diplomatic relations with one another. Nevertheless, unlike the situations in mainland China and Taiwan, a number of nations do maintain official ties with both Koreas. See e.g., HAK JOON KIM, UNIFICATION POLICIES OF SOUTH AND NORTH KOREA, 1945-1991: A COMPARATIVE STUDY 341 (3<sup>rd</sup> ed. 1992). Some, such as the five Nordic nations (Denmark, Finland, Iceland, Norway, and Sweden), have done so for decades. *Id.*

94. Chang Myung-Bong, *Territorial Clause and North Koreans' Legal Status based on South Korean Constitution in Unification Era* [sic], in NORTH-SOUTH KOREAN RECONCILIATION AND LEGAL PREPARATIONS I - 1-7 (Ewha Graduate School of International Studies & American Enterprise Institute for Public Policy 2000) (which examined this decision and its implications in a conference paper).

95. Theoretically, all North Koreans could obtain South Korean citizenship. *Id.*

96. Incidentally, the DPRK Constitution has been viewed as being odd even when it is compared to other Marxist-Leninist constitutions. See JAN-ERIK LANE, CONSTITUTIONS AND POLITICAL THEORY 122-23 (1996).

97. DPRK CONST., art. 1.

98. DPRK CONST. of 1948, at art. 103, as cited in, Chang Myung-Bong, *Bukhan Heonbeop 50 Nyeon* [Fifty Years of North Korean Constitutions], in BUKHANBEOB 50

However, North Korea now takes a more realistic approach. The current DPRK Constitution merely states that Pyongyang is the capital.<sup>100</sup>

Another article in the current DPRK Constitution, which refers to the situation of the millions of overseas Koreans, states,<sup>101</sup> “[t]he Democratic People’s Republic of Korea shall champion the democratic, national rights of Overseas Koreans and their rights recognized by international law.”<sup>102</sup>

There is no equivalent to this provision in the South Korean Constitution although there is a provision that protects the rights of ROK citizens living overseas which states, “[i]t shall be the duty of the State to protect citizens residing abroad as prescribed by law.”<sup>103</sup>

The South’s provision is more specific and modest because it would not impact ethnic Koreans who are not ROK citizens.<sup>104</sup> According to their Constitutions, both Koreas desire national reunification. However, each assumes its own social system will prevail. Article 4 of the South Korean Constitution states, “[t]he Republic of Korea shall seek reunification and shall formulate and carry out a policy of peaceful reunification based on the principles of freedom and democracy.”<sup>105</sup>

Elsewhere, in describing the duties of the President, the ROK Constitution twice refers to reunification stating, “[t]he President shall have the duty to pursue sincerely the peaceful reunification of the homeland.”<sup>106</sup>

The President, at the time of his inauguration, shall take the following oath:

I do solemnly swear before the people that I will faithfully execute the duties of the President by observing the Constitution, defending the State, pursuing the peaceful reunification of the homeland, promoting the freedom and welfare of the people and endeavoring to develop national culture.”<sup>107</sup>

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NYEON, GEU DONGCHYANG GWA JEONMANG [FIFTY YEARS OF NORTH KOREAN LAW AND RECENT DEVELOPMENTS] 43-73, 63 (Lee Jang-Hie ed. 1999) [In Korean].

99. In this connection, it is worth noting that Seoul had been the capital of the Joseon Dynasty. HANDBOOK OF KOREA, *supra* note 81, at 756-61.

100. DPRK CONST., art. 166.

101. Large populations of Overseas Koreans can be found in parts of China, Russia, Uzbekistan, Japan, and the United States. Smaller ethnic Korean communities exist elsewhere in countries like Canada and Australia. *See* GKN, *supra* note 87.

102. DPRK CONST., art. 15.

103. ROK, art. 2(2).

104. For example, a person of Korean ancestry born in the USA would be an American citizen rather than a ROK citizen under American law.

105. ROK CONST., art. 4.

106. *Id.* at art. 66(3).

107. *Id.* at art. 69.

Meanwhile, the North Korean Constitution declares:

The Democratic People's Republic of Korea shall strive to achieve the complete victory of Socialism in the northern half of Korea by strengthening the people's power and vigorously performing the three revolutions - the ideological, cultural and technical - and reunifying the country on the principle of independence, peaceful reunification and great national unity.<sup>108</sup>

In June 2000, a historic three-day summit<sup>109</sup> was held in Pyongyang between then ROK President Kim Dae-jung and the DPRK's leader Kim Jong Il.<sup>110</sup> This was the first time the top leaders of the two Koreas met.<sup>111</sup> Indeed, it has been the only such meeting although lower level contacts have been maintained.<sup>112</sup> The summit concluded with a Joint Declaration signed by both parties.<sup>113</sup>

In the Joint Declaration, the two leaders agreed that the two Koreas would "resolve the question of reunification independently and through the joint efforts of the Korean people, who are the masters of the country."<sup>114</sup> Among other things, they also noted a common ground between "the South's concept of a confederation and the North's formula for a loose federation," and they agreed to "promote reunification in that direction."<sup>115</sup> At the conclusion, Kim Dae-jung invited Kim Jong Il to visit Seoul, and Kim Jong Il agreed that he would "visit Seoul at an appropriate time."<sup>116</sup>

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108. DPRK CONST., art. 9.

109. After the summit was over, it was discovered that officials in the South had apparently used the Hyundai Group to pay the leadership of the North to stage the summit. BBC News, *Seoul paid for summit with North* (posted Jan. 30, 2003), available at <http://news.bbc.co.uk/2/low/asia-pacific/2708405.stm>.

110. For a taste of contemporary North Korean propaganda in English, see <http://www.korea-dpr.com> (last visited Nov. 25, 2006). This website was set up by the Korean Friendship Association. A related website is that of the Japanese office of North Korea's official Korean Central News Agency. See <http://www.kcna.co.jp/> (last visited Nov. 25, 2006) [In English & Korean].

111. This historic meeting was one of the factors behind Kim Dae-jung winning the Nobel Peace Prize in 2000. Norwegian Nobel Committee, *Nobel Peace Prize Laureates* [http://www.nobel.no/eng\\_lau\\_list.html](http://www.nobel.no/eng_lau_list.html) (last visited Nov. 25, 2006).

112. See, e.g., *Korean deputies in favour of talks: 'Baby steps to mend ties' the highest-level contact in 5 years*, SUNDAY MORNING POST (Hong Kong), Apr. 24, 2005, at 7.

113. Joint Declaration, N.Korea-S.Korea, June 15, 2000. Typically, South Korean sources refer to the declaration as the "South-North Joint Declaration" whereas North Korean sources call it the "North-South Joint Declaration."

114. *Id.* at sec. 1.

115. *Id.* at secs. 1 & 2.

116. *Id.* at last paragraph.

Since then, however, no major moves have been made towards the reunification of Korea.<sup>117</sup> Kim Dae-jung's successor, President Roh Moo-hyun, has had to contend with a series of domestic crises including an attempt to remove him from office as well as the ongoing concern regarding the North's nuclear ambitions and its ballistic missile activity.<sup>118</sup> Moreover, at this time, Kim Jong Il has failed to visit Seoul.<sup>119</sup>

With the parties' failure to reunify, refugees continue to flee political repression, religious persecution, and food shortages in North Korea.<sup>120</sup> The immediate destination is often China, which has the longest and most accessible border with North Korea.<sup>121</sup> Nevertheless, the Chinese government merely treats these individuals as illegal economic migrants and sometimes forcibly returns these people to the North Korean authorities.<sup>122</sup> However, some of the North Korean refugees have been able to escape to South Korea.<sup>123</sup>

## VI. THE IRISH CONSTITUTION

The entire island of Ireland had been under British control for centuries,<sup>124</sup> and while the political entity for much of that time was the Kingdom of Ireland, the monarch was actually the English King.<sup>125</sup> However, the Act of Union of 1800 formed the "United Kingdom of Great Britain and Ireland."<sup>126</sup> All of Ireland was thus an integral part of the UK for over a century.

As noted earlier, in 1920, Ireland was partitioned into two parts.<sup>127</sup> In 1922, twenty-six of Ireland's thirty-two counties achieved a measure of

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117. However, Kim Dae-jung's "Sunshine Policy" towards the North has been essentially continued by his successor, Roh Moo-hyun, as the "Peace and Prosperity Policy." KIM, *supra* note 38, at 146.

118. See, e.g., *Country profile: South Korea* BBC NEWS (Asia-Pacific), Nov. 10, 2006, [http://news.bbc.co.uk/2/hi/asia-pacific/country\\_profiles/1123668.stm](http://news.bbc.co.uk/2/hi/asia-pacific/country_profiles/1123668.stm). See also CNN, *North Korea claims nuclear test*, Oct. 9, 2006, <http://cnn.org/2006/WORLD/asiapcf/10/09/korea.nuclear.test0510/index.html>.

119. See, e.g., *Country profile: North Korea* BBC NEWS (Asia-Pacific), Oct. 9, 2006, [http://news.bbc.co.uk/1/hi/world/asia-pacific/country\\_profiles/1131421.stm](http://news.bbc.co.uk/1/hi/world/asia-pacific/country_profiles/1131421.stm).

120. LEE, *supra* note 76, at 155.

121. See, e.g., *N Koreans leave Canadian embassy*, BBC NEWS (Asia-Pacific), Dec. 23, 2004, <http://news.bbc.co.uk/1/hi/world/asia-pacific/4119839.stm>.

122. Bruce Klinger, *The tortuous North Korean refugee triangle*, Asia Times Online, Sept. 22, 2004, <http://www.atimes.com/atimes/Korea/FI22Dg01.html>.

123. See, e.g., *Briefing to the 59th Session of the UN Commission on Human Rights*, HUMAN RIGHTS WATCH, Feb. 27, 2003, <http://www.hrw.org/un/chr59/dprk.htm>.

124. KEE, *supra* note 5, at 3-5.

125. See BRIAN DOOLAN, *PRINCIPLES OF IRISH LAW 1-7* (5<sup>th</sup> ed. 1999) (which provides a brief overview of Irish legal history).

126. See Act of Union, 1800, 39 & 40 Geo. 3, ch. 67 (U.K.).

127. Government of Ireland Act, 1920, 10 & 11 Geo. 5, ch. 67 (U.K.).

political independence in the form of dominion status while the remaining six counties formed the new British province of Northern Ireland.<sup>128</sup>

Until 1998, the Constitution of Ireland made a clear territorial claim on all of Ireland, stating, “[t]he national territory consists of the whole island of Ireland, its islands and the territorial seas.”<sup>129</sup> Hence, this claim included the entire UK province of Northern Ireland.<sup>130</sup> A related provision ran as follows:

Pending the re-integration of the national territory, and without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory, the laws enacted by that Parliament shall have the like area and extent of application as the laws of the Saorstát Éireann and the like extra-territorial effect.<sup>131</sup>

This was thus a limitation on the application of Irish law to the territory under the actual control of Dublin.<sup>132</sup> To some it might seem to have been a weakened territorial claim, but to others it would simply have seemed practical.

The UK is famous for lacking a written constitution in the form of a single document.<sup>133</sup> Nevertheless, the UK’s full name is the “United Kingdom of Great Britain and Northern Ireland” thereby implying at least a connection to Northern Ireland.<sup>134</sup> However, under the Northern Ireland Peace Process, the UK clearly indicated that it was willing to permit Northern Ireland to reunite with the republic (i.e., with the rest of the island) if the majority of the people in the North choose to do so someday.<sup>135</sup>

As part of the Northern Ireland Peace Process, Ireland amended its Constitution.<sup>136</sup> The two new provisions are as follows:

128. JOE MCCARTHY, IRELAND 29 (1966). Incidentally, Northern Ireland is a slightly odd name because the northern most point in Ireland is actually located in County Donegal, which is controlled by the republic. *Id.* Northern Ireland’s unofficial name of Ulster is also problematic because the boundaries of contemporary Northern Ireland do not precisely correspond to those of the ancient Irish province of Ulster. *Id.*

129. IR. CONST., 1937, art. 2.

130. See generally, John A. Murry, *The 1937 Constitution – Some Historical Reflections*, in IRELAND’S EVOLVING CONSTITUTION, 1937-1997 (Tim Murphy & Patrick Twomey, eds., 1998); FERGUS RYAN, CONSTITUTIONAL LAW 33-34 (2001).

131. IR. CONST., 1937, art. 3.

132. *McGimpsey v. Ireland*, [1990] 1 I.R. 110, 119.

133. See generally A.W. BRADLEY & K.D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW (12<sup>th</sup> ed. 1997). Nonetheless, the UK can be said to have a body of constitutional law encompassing various texts and practices. *Id.*

134. Presumably, if Northern Ireland left the United Kingdom, then the country’s name would be changed accordingly.

135. For background information, see MORGAN, *supra* note 65, at 137-43.

136. IR. CONST., art. 2 (as amended). Besides Articles 2 and 3, Article 29, which covers International Relations, was amended to enable Ireland to consent to be bound to the British-

It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.<sup>137</sup>

It is the firm will of the Irish nation, in harmony and friendship to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island. Until then, the laws enacted by the Parliament established by this Constitution shall have the like area and extent of application as the laws enacted by the Parliament that existed immediately before the coming into operation of this Constitution.<sup>138</sup>

Institutions with executive powers and functions that are shared between those jurisdictions may be established by their respective responsible authorities for stated purposes and may exercise powers and functions in respect of all or any part of the island.<sup>139</sup>

The new provisions clearly indicate a profound change in vision in the interest of peace on the island.<sup>140</sup> Instead of being overly concerned with

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Irish Agreement (a bilateral treaty connected with the overall Good Friday Agreement) and to provide an Irish constitutional basis for institutions created by the Agreement. *Id.* at art. 29. These amendments were made by means of a referendum held in May 1998. *Id.* They survived a challenge that went up to the Irish Supreme Court. *Riordan v. An Taoiseach* (No. 2), [1999] 4 I.R. 343.

137. IR. CONST., art. 2 (as amended).

138. *Id.* at art. 3.1.

139. *Id.* at art. 3.2.

140. However, the Preamble with its decidedly nationalist and religious tone remained unchanged:

In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,  
We, the people of Eire,  
Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,  
Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,  
And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,

formalistic models of either federation or confederation, the Good Friday Agreement and the relevant amendments to the Irish Constitution focus on democracy, tolerance, and pragmatism. This has given hope to many people living in both parts of the island.

#### VII. IRELAND AS A POSSIBLE MODEL FOR KOREA

Despite on-going difficulties in its implementation, the Northern Ireland Peace Process offers a possible model for improving relations between North and South Korea. As I mentioned earlier, there are many differences between the situation in Ireland and the situation in Korea, but there are still lessons that may be learned. In the context of constitutional claims on territory, the revision of the Irish Constitution could inspire constitutional change in Korea.

Perhaps largely because of its own claim to be the legitimate revolutionary government of all Koreans, the DPRK has not been particularly concerned about Article 3 of the ROK Constitution. Instead, the DPRK has often focused on a criminal statute, the ROK's National Security Law (*Gukga Boan Beop*).<sup>141</sup> This statute contains a rather controversial definition of an "anti-government organization":

For the purposes of this Act, the term 'anti-government organization' means a domestic or foreign organization or group which uses fraudulently the title of the government or aims at a rebellion against the State, and which is provided with a command and leadership system.<sup>142</sup>

Although North Korea is not mentioned by name, the regime in Pyongyang is implied.<sup>143</sup> Violations of certain provisions of the National Security Law are punishable by death.<sup>144</sup> Nonetheless, it should be noted that there has been an effective moratorium on capital punishment in South Korea since December 1997.<sup>145</sup>

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Do hereby adopt, enact, and give to ourselves this Constitution.

*Id.* at preamble.

141. ROK National Security Law. An English translation published by the South Korean government can be found in the STATUTES OF THE REPUBLIC OF KOREA (1997 & updates) although strictly speaking only the Korean language version is official. Some in the South have been critical of the statute. *See, e.g.,* Kuk Cho, *Tension Between the National Security Law and Constitutionalism in South Korea: Security for What?*, 15 B.U. INT'L L.J. 125 (1997).

142. ROK National Security Law, § 2(1).

143. SE-JIN KIM, *THE POLITICS OF MILITARY REVOLUTION IN KOREA* 145 (1971).

144. ROK National Security Law, §§ 3 & 4. *See also* Brad Adams, *South Korea Should Act Like It Knows*, Apr. 13, 2006, <http://hrw.org/english/docs/2006/04/12/nkorea13167.htm>.

145. Human Rights Watch, *Human Rights in South Korea*, July 2004, at <http://hrw.org/english/docs/2004/07/08/skorea9047.htm>.

Amending the ROK Constitution to release the territorial claim could be a confidence-building measure to dramatically demonstrate that the South does not wish to absorb the North in the way that West Germany absorbed East Germany.<sup>146</sup> Dropping the territorial claim on the North does not imply abandoning the goal of reunification because Korean reunification is covered elsewhere in the constitution.<sup>147</sup>

Depending on the circumstances, foregoing the territorial claim may be conditioned on North Korean actions such as a suitable revision of Article 1 of the DPRK Constitution. Indeed, certain conservative politicians in the South, who tend to be extremely critical of the North, might insist on such a condition at the very least. Presumably, some of these politicians do not care for Article 9 of the DPRK Constitution, although Article 1 would seem to be the more objectionable of the two provisions.

Regardless of the dynamics of domestic South Korean politics, the plight of North Korean refugees is a real concern in South Korea and elsewhere.<sup>148</sup> Fortunately, if language similar to what is found in Article 2 of the Irish Constitution is used by the ROK, then North Korean refugees could still assert the right to ROK citizenship and eventual reunification would not be hindered by merely dropping the current territorial claim. As a possible face-saving measure, the DPRK may choose to insert a similar provision to enable South Koreans to claim DPRK citizenship.<sup>149</sup>

#### VIII. KOREA'S MOVEMENT TOWARDS REUNIFICATION?

A key to the Northern Ireland Peace Process has been the recognition that Ireland would be reunified peacefully and with the democratic consent of the majorities in both parts of Ireland.<sup>150</sup> Although the current political situation on the Korean Peninsula is quite different from that of Ireland, one could reasonably maintain that Korea should only be reunified peacefully. Ideally, the majority of the population in each of the Koreas should indicate unequivocal support for reunification which could be done by means of

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146. See, e.g., Kang Sung-Hack, *Steps to Confidence-Building for Disarmament between North and South Korea*, in 2 KOREAN POLITICS: STRIVING FOR DEMOCRACY AND UNIFICATION 501 (2002).

147. ROK CONST., 1948, arts. 4, 66(3), 69.

148. In the United States, North Korean refugees are protected by a special federal statute. North Korean Human Rights Act 2004, 22 U.S.C. § 7801 (2006).

149. Already one might argue that the DPRK Constitution apparently enables South Koreans to become DPRK citizens based on the claim that the DPRK represents the interests of all the Korean people. DPRK CONST., art. 1. In any event, it is unlikely that many South Koreans would actually want to move to the DPRK. Under current conditions, the idea would probably only be attractive to a handful of student activists and maybe a few elderly ROK citizens born in the North might wish to return to their hometowns.

150. IR. CONST., art. 3. See also British-Irish Agreement, Apr. 10, 1998, U.K.-Ir.

referenda.<sup>151</sup> Holding either a referendum or multiparty elections in North Korea would obviously require historic change. This scenario further assumes that the DPRK does not collapse. Nevertheless, such popular consent would arguably not be required under international law.<sup>152</sup>

Regardless of any considerations of international law, obtaining popular consent in both Koreas would be desirable because Korean reunification would be even more difficult than German reunification in light of the vast difference in the legal, political, economic, and educational systems of the two Koreas. Moreover, the relative size of North Korea in terms of both population and *de facto* territory vis-à-vis South Korea would make it more difficult for South Korea to absorb North Korea than it was for West Germany to absorb East Germany.

Socially, North Koreans and South Koreans have had virtually no interaction with one another for more than half a century.<sup>153</sup> By contrast, during the 1970s and 1980s, millions of West Germans visited East Germany, letters were sent between the two Germanys, TV broadcasts from both Germanys were received in many areas, and so on.<sup>154</sup> In other words, the peoples of the two Koreas are currently much further apart socially than the peoples of the two Germanys were before the process of German reunification began. Some of the challenges a reunified Korea would face can be gleaned from the practical difficulties experienced by North Koreans who have defected to South Korea and their difficulties in adjusting to life in a Capitalist society.<sup>155</sup>

Korean reunification would have an impact on Northeast Asia and beyond.<sup>156</sup> Assuming that a true peace treaty someday replaces the Korean Armistice Agreement, there would be no absolutely necessary role for regional powers as there was with Germany under the Four Powers. However, outside powers could still be involved in the same manner as they are with the Six Party Talks on North Korea's nuclear program.<sup>157</sup> These

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151. It should be noted that referenda were not used in the process of German reunification. Nevertheless, the clear victories of pro-reunification parties in a series of elections in both Germanys indicated popular support for the case of reunification. *See, e.g.,* BARRY TURNER, GERMANY PROFILED: ESSENTIAL FACTS ON SOCIETY, BUSINESS, AND POLITICS IN GERMANY 29-30 (1999).

152. It has been maintained that there is no requirement under international law for a plebiscite to be held on the issue of a transfer of national territory. ANTHONY CARTY, THE DECAY OF INTERNATIONAL LAW: A REAPPRAISAL OF THE LIMITS OF LEGAL IMAGINATION IN INTERNATIONAL AFFAIRS 56 (1986).

153. This observation is based on several years that I spent living in South Korea.

154. This observation is also personal from having lived for one year in what was then West Germany.

155. KIM & LEE, *supra* note 7, at 281-319.

156. *See generally* JAPAN AND KOREAN UNIFICATION (Young-Sun Lee & Masao Okonogi eds., 1999).

157. KIM, *supra* note 38, at 148-51.

talks have involved the two Koreas, China, Russia, Japan, and the United States.<sup>158</sup>

For years, commentators in the West have been predicting a sudden collapse of the North Korean state.<sup>159</sup> So far, however, the DPRK has defied such expectations.<sup>160</sup> The demise of the Soviet Union, as well as the fall of Communism in Eastern Europe and even in nearby Mongolia, did not lead to any major changes in the DPRK's system of government.<sup>161</sup> Indeed, Pyongyang has been wary of loosening political controls in light of those events in the late 1980s and early 1990s.<sup>162</sup> Despite North Korean famines, along with periodic flooding which may have killed a large yet undetermined number of individuals and forced others to flee the country, the regime remains in place.<sup>163</sup> While China's economic reforms have been studied by certain top officials, there has been little tinkering with the DPRK's economic system.<sup>164</sup> Any radical change involving a dramatic opening to the outside world surely would call into question the very existence of North Korea as a state. Hence, the regime in Pyongyang has little incentive to enact major economic let alone political reforms.

Of course, there is the possibility of "regime change" brought about by American military action.<sup>165</sup> With North Korea being one of the two remaining members of the so-called "Axis of Evil," one cannot completely rule out a sudden collapse directly caused by Washington.<sup>166</sup> However, the price in blood as well as dollars could be high even assuming both China and Russia were willing to permit an American invasion of what is now an

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158. *Id.* at 149.

159. *See, e.g.*, ROBERT DUJARRIC, KOREAN UNIFICATION AND AFTER: THE CHALLENGE FOR U.S. STRATEGY 1-2 (2000) [hereinafter DUJARRIC].

160. Kim Il Jong himself has also defied some expectations that had surrounded the succession question. YANG, *supra* note 8, at 675-84.

161. Kim Il Jong has largely followed the policies of his father including the official ideology of *juche*. RICHARD SACCONI, NEGOTIATING WITH NORTH KOREA 30-32 (2003).

162. DUJARRIC, *supra* note 159, at 2. The North Korean leadership apparently perceives that policies like perestroika and glasnost were major factors in the fall of the Soviet Union and the collapse of Communist governments in Eastern Europe and Mongolia. *Id.*

163. During 1989, the flow of thousands of East Germans to Austria and then West Germany mostly via Czechoslovakia or Hungary was a factor in the eventual downfall of the GDR. *See e.g.*, KIESSLER & ELBE, *supra* note 56, at 222-23.

164. Regardless of the issue of the island of Taiwan, China is not a divided nation in quite the same way that Germany was or Korea still is. Therefore, it seems to be easier for the Chinese government to introduce economic reforms and yet maintain political control. The same appears to be true for the *doi moi* policy of economic reforms in Vietnam. The DPRK is arguably an artificial entity while Vietnam is perhaps a more "natural" country.

165. *See generally* Jasper S. Kim & Brendan M. Howe, *Pre-emption Against Pyongyang: Is a Military Strike on Korean Peninsula Legal?*, 4 JOURNAL OF KOREAN LAW 123 (2004); *see also* Matthew Klapper, *The Bush Doctrine and North Korea*, 8 GONZ. J. INT'L L. (2004-05), available at <http://www.gonzagajil.org>.

166. With US forces operating in both Iraq and Afghanistan, such an attack on North Korea seems unlikely for now regardless of any North Korean nuclear deterrent.

apparently nuclear-armed North Korea.<sup>167</sup> The official North Korean position has long been a defiant one, though. The leadership has declared that its Socialist system will not collapse due to any outside pressure.<sup>168</sup>

#### IX. CONCLUSION

As we have seen, there is more than one constitutional approach to dealing with national division. While the former version of the West German Basic Law did not make a territorial claim on East Germany, the Irish Constitution previously did make a claim on Northern Ireland.<sup>169</sup> The lack of a constitutional territorial claim by West Germany did not hinder German reunification. Similarly, the dropping of the territorial claim in the Irish Constitution as a part of the Northern Ireland Peace Process need not hinder reunification of the island someday.

The amended version of the Irish Constitution represents a possible model for South Korea. As a result, following the Irish model could improve inter-Korean ties and thereby ease tensions in Northeast Asia without giving up the goal of eventual reunification.

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167. Depending on the circumstances, Japan and even South Korea might also be against such an attack. Certainly, there have been differences between how South Korea and the U.S. each deal with North Korea. KIM, *supra* note 38, at 143-46.

168. See, e.g., Li Sam Ro, *The Reunification of Korea and Peace and Security in Asia*, in KOREAN UNIFICATION: IMPLICATIONS FOR NORTHEAST ASIA 29-34 (1993).

169. Basic Law of 1949, art. 23; IR. CONST., 1937, art. 2.