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Decoding the "Free Democratic Basic Order" for the Unification of Korea*

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Abstract

This article examines interpretations of the free democratic basic order (FDBO) in South Korea regarding the task of unification. The interpretation of the FDBO is a central issue in discussions around unification, because actors are bound by it in a fundamental sense, and also because conceptually it has the potential for bringing together the two Koreas in a peaceful and democratic way. The article first investigates the historical context in which the specific introduction and change of the FDBO in the constitution and other closely related legal norms occurred. Secondly, the article examines the diverging definitions of the contents and application of the FDBO with respect to unification by reviewing related Constitutional Court decisions as well as authoritative legal scholarship that comments on the matter.

Keywords: free democratic basic order, Korean unification, constitution, liberal democracy, constitutional interpretation, translation

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Introduction

This article examines the interpretation of the free democratic basic order (FDBO)[1] in South Korea (hereinafter, Korea) regarding the task of unification. At its core, the FDBO depicts a set of principles derived from liberal democracy that are considered the fundamental norms of the Korean Constitution: the rule of law, the sovereignty of the people, fundamental human rights, the division of powers, and institutions of majority rule. The interpretation of the FDBO is a central issue in regard to unification, because actors are bound by it in a fundamental sense, and also because it conceptually has the potential for bringing together the two Koreas in a peaceful and democratic way.

Due to historical and geopolitical reasons, German law and adjudication, and the concepts of the German legal tradition more generally, represent a crucial frame of reference for Korean constitutional theory and practice (cf. Choi 1981; H. Kim 1986). This applies in particular to constitutional concepts such as the FDBO. Korea and Germany are the only countries in the world in which the FDBO is part of two or more constitutional articles. As part of the idea of defensive democracy, in Germany the FDBO was originally introduced to the Basic Law in 1949 to protect democracy from its internal and external enemies. This was considered a countermeasure against what Germany had experienced in the Nazi era (cf. Thiel 2009). However, while in theory a quite convincing safety mechanism to protect

1. The original Korean term *jayuminjujeok gibon jilseo* can be translated into English in different ways depending on its interpretation. Based on the insight of this article's analysis on one side, there are conservative positions advocating an exclusive interpretation that, if reflected in its translation into the English, can be termed "basic order of liberal democracy" (BOLD). Here the emphasis is put on the particular concept of Cold War-liberal democracy, while the basic order is simply derived from the concept's main principles leading to a definite and closed interpretation. On the other side, liberal positions promote an inclusive interpretation that can be appropriately expressed in the term "free democratic basic order." In this case, the focus is on the fundamental imperative that the order of democracy must guarantee liberty or freedom in every sense, and, thus expresses an order that is open to varying interpretations regarding actual manifestations of democracy during a given period and at a given place. For reasons put forward in the remainder of the article, I use the term "free democratic basic order" (FDBO).

democracy, in practice the concept is highly contested because of its abstract nature (cf. Denninger 1977, 70), since whoever determines the interpretation of the FDBO in turn determines who violates the FDBO. So, unsurprisingly, in particular during the 1960s and '70s there had been fierce disputes over the FDBO in Germany, in the context of the student movement, and terrorism. The issue of unification, however, did not play a significant role in this respect (cf. Doehring 1985).

This is quite different in the Korean case because contrary to the German Basic Law the FDBO in the Korean Constitution is explicitly related to the task of unification. How widely or narrowly the FDBO is interpreted is particularly important in regard to the task of unification, since such interpretation can facilitate or hinder a unification process between the *liberal democratic* South Korea on one side and the socialist or *people's democratic* North Korea on the other. This is because, to achieve an effective and sustainable agreement on the terms of unification, it is necessary for both sides to make compromises and concessions when approaching each other. Thus, to understand the difficulties of effectively preparing for or promoting the process of unification, it is important to understand the function of the concept of the FDBO and its interpretation. Two research questions guide the ensuing investigation. First, why is the FDBO in the Korean Constitution so explicitly related to matters of unification? Second, how is the meaning of the FDBO interpreted?

Theoretical Assumptions

For the present article, law or legal norms can be conceptualized by drawing from three main qualities or dimensions: institutionality, contextuality, and interlegality. The *institutionality* of legal norms means that the law can be analytically described as an institution. To define institutions as "humanly devised constraints that structure political, economic, and social interactions" (North 1991, 97) signifies that institutions are guidelines for behavior that provide the structure as well as the agency for social interaction, and that they are simultaneously the manifestation of activities that reflect or

adapt to human behavior. For institutions, or in this case the law, to effectively fulfil these functions, they have to be rather stable, because otherwise they would not be able to provide the crucial trust and orientation for human interaction. However, at the same time, the law is not completely static or eternally fixed, but dynamic and flexible in that it changes across time and space. This characteristic is directly related to the contextuality and interlegality of legal norms.

The *contextuality* of law means that the interpretation and application of legal norms always depend on their local environment. Put differently, legal norms vary from context to context (i.e., country to country), and they change based on the time or era. Because of this, despite the effects of globalization, for the most part domestic legal norms are still determined by the sociocultural containers of nation-states and their respective boundaries. At the same time, the law alters along with changes in the sociocultural reality of a country, i.e., behavior, values, and customs, because if the gap between contents of legal norms and reality becomes too wide, the law cannot maintain its function for guidance and orientation, and thus is challenged and, ultimately, revised or discarded. Norms must be given their meaning (*Be-Deutung*) to make sense, and this is performed by historically embedded people.

Interlegality describes the phenomenon in which there are "different legal spaces superimposed, interpenetrated, and mixed in our minds, as much as in our actions, either on occasions of qualitative leaps or sweeping crises in our life trajectories, or in the dull routine of eventless everyday life" (Santos 1995). For the present study, this means that legal norms are interrelated across time and space. In other words, legal norms are less and less exclusively established in any one country without any reference to the norms or ideas of other countries or contexts, if indeed they ever have been, but rather are influenced by the preceding law—as in the case of German influences on Korean law. In the literature, this "influence" has been termed borrowing, transferring, copying, adopting, or transplanting, etc. Recently, *translating* has been added to the list to convey an idea of the phenomenon more concisely in its complexity (cf. Freeman 2007; Langer 2004; Lee and Mosler 2015). For the purposes of this study, translation can be defined as

an ongoing process of cultural, social, and political praxis performed by agents with individual dispositions who interpret an initial set of ideas in a source context to create an alternative set of ideas in another specific local realm with particular political, socioeconomic power constellations and historical traditions.[2]

On a more abstract level, we can describe the technical process in which an alternative set of ideas is created in another context, but with reference to the original set of ideas, as the encoding of concepts based on a coding system specific to the new context as well as the reading of this context by the coder so that it "makes sense" and has its intended (and unintended) effects. In other words, the way the initial set of ideas is ultimately translated depends on the given particularities of the new context that are objectively given; however, at the same time, the way of encoding depends on the subjective evaluations and intentions of the coder. Accordingly, in the case of Germany and Korea, it is self-evident that there are differences in the ultimate interpretation of the FDBO. To reveal the particular Korean translation, and to understand the underlying reasons, it is thus necessary to decode the Korean translation of the German FDBO.

In order to decode the Korean translation of the FDBO, this study proceeds in two steps. The first section investigates from a generative-historical and subjective-teleological perspective the introduction and development of the FDBO based on the above assumptions, and is guided by the canons for interpreting the meaning of legal statutes. This involves looking into the sociopolitical background of the introduction of, or change to, the related norms, as well as their immediate history (*context*), and taking into account the purpose of the initial lawgiver (*translation*). The subsequent, second section examines the academic discourse on the interpretation of the FDBO regarding unification since 1990 when, after the democratic transition in academia and public life, unification discourse started to develop. Here the focus is particularly put on alternative interpretations.

2. Among other things, this definition has borrowed the explicit phrases "initial set of ideas" and "particular political, socioeconomic power constellations and historical traditions" from Frankenberg (2010).

The Development of Major Legal Norms Related to Unification

The Constitutions

1) The Third Amendment (1960)—Art. 13 on Political Parties

The Second Republic (1960–1961) was based on the Third Amendment to the 1948 Korean Constitution, at which point the strong presidential system was changed into a parliamentary cabinet system in order to decentralize political power. This was a direct reaction to the authoritarian government under President Syngman Rhee, who was driven out of office by the April Revolution in 1960. One of the many legally dubious acts of the Rhee administration (which had accumulated to such an extent that they unleashed a revolutionary backlash) was the ban of the Progressive Party (PP) in 1958. The dissolution of the PP was based on the allegation that it was ideologically pro-North Korea, and that it had planned to overthrow the government. However, in actual fact, the leader of the PP, Jo Bong-am, and his party had become a political threat to the Rhee government, and therefore had to be eliminated. Against this backdrop, the drafters of the Third Amendment introduced Article 13 to the constitution, which included the protection of political parties unless they violated the "constitution's democratic basic order." Actors directly involved in the drafting of the constitution and its interpretation, such as constitutional scholar Han Tae-yeon and assemblyman Jeong Heon-ju, made it unmistakably clear that they were drawing on the FDBO of the German Basic Law, and that—based on their experiences—they meant this stipulation to prevent excessive encroachment upon political parties by the state (cf. Mosler 2016b, 250–254). Two years later, when the constitution was changed again after the 1961 military coup by Park Chung-hee, the article on parties was amended and the respective paragraph became even more similar to its German counterpart.[3]

3. Here constitutional scholars such as Yu Jin-u and Park Il-gyeong were involved in the drafting process. The final decision, however, was taken by the regime's Supreme Council for National Reconstruction [Gugka jaegeon choego hoeui].

> If the purposes or activities of a political party are contrary to the *fundamental democratic order*, the Government may bring action against it in the Constitutional Court for its dissolution, and the political party shall be dissolved in accordance with the decision of the Constitutional Court. (Art. 7, Constitution 1963; emphasis mine)

At first it might seem to contradict common sense if an authoritarian government strengthens political party democracy in the constitution. However, in light of many other legal changes as well as the actual interpretation and application of legal norms, it quickly becomes obvious that these reforms, in particular the nominal adoption of the German Basic Law's wording, were only a façade. The new rulers' reading of these legal norms and their actual intentions are reflected in the enactment of the Anti-Communism Act in 1961, which thenceforth, together with the National Security Act (NSA; see below), was used as a powerful instrument to suppress opposition.

2) The Seventh Amendment (1972)—Preamble on the Method of Unification

The authoritarian government of President Park Chung-hee was under considerable external pressure at the beginning of the 1970s, at which point North Korea was still the more successful system in terms of economic development, and détente had set in as a result of the changes in relations between the USA, China, and the USSR, as an outcome of activities around the Nixon Doctrine. Being client states of the two great powers and their respective security structures, North and South Korea felt compelled to prepare a possible transition to a post-Cold War era independently from their patrons, which ultimately led to each strengthening their system vis-à-vis the other (cf. Im 2014, 520–528; Kihl 1984, 56–57; Woo 1991, 119–125). President Park also felt threatened domestically in diverse ways. In early 1968, a North Korean assassination squad had been able to reach an area very close to the presidential palace before it could be eliminated by the South Korean security service. In April 1971, President Park won presidential elections only by a tiny margin of not more than eight percent against the oppositional New Democratic Party's candidate Kim Dae-jung, and a

month later his Republic Democratic Party narrowly won the general elections against the New Democratic Party by a margin of merely 24 seats. Thus, the seventh amendment leading to the "worst constitution in Korean history" (Sung 2002, 2) was intended to regain control by further strengthening the power of the already powerful president.

The official explanation for the enactment of the Yusin Constitution by the Emergency State Council (*bisang gungmu hoeui*) stressed the matter of preparing for unification, which is why the constitution was also depicted as an interim constitution that would be substituted by a new constitution as part of the effort to achieve unification. Proponents of the amendment such as the constitutional scholar Kal Bong-Kun argue in a fatalistic fashion that the Yusin Constitution was a "historical request" to deal with the challenges to the South Korean regime from inside and outside (cf. Kal 1976, 56). This is also confirmed by Kim Ki-chun (1976), who as a civil servant at the Ministry of Justice participated in the drafting process and was also instructed to provide a commentary on the constitution. There he argues that to achieve peaceful unification it is necessary to "indigenize democracy," which heretofore had been "uncritically emulated from the West." Thus, to draft the Yusin Constitution was a "rational modification . . . according to the level of national income, the level of development of the people, and the domestic and international situation and conditions" of Korea at that time. He further argues that liberal democracy in such advanced countries as the USA, France, Germany, etc. is also modified according to the local specificities (K. Kim 1976, 38–43). In particular, he stresses the resemblance of the Yusin Constitution, as a codification of the ideology of peaceful unification, to the respective regulations of the German Basic Law (K. Kim 1976, 50).

Within this context, the matter of unification for the first time was introduced as a "national task" explicitly and extensively in the text of the constitution. It starts with the preamble that speaks of the "mission" of the Koreans as a people to achieve national unification, and also includes a direct reference to the FDBO; art. 43, para. 3 determines the pursuance of unification as the "duty" of the President; and art. 35 to art. 42 regulate the function, jurisdiction, and constitution of the National Council for Unifica-

tion, an organ that is directly controlled by the president.[4]

> We the people of Korea . . . having assumed the mission . . . based on the historical sense of duty for a peaceful unification of the homeland to build a new democratic republic that further strengthens the *free democratic basic order* . . . ." (Preamble, Constitution 1972; emphasis mine)

3) The Ninth Amendment (1987)—Art. 4 on Unification

The current constitution that was enacted in the process of democratic transition in 1987 was an almost complete makeover of its predecessors. The constitutional drafting process was jointly led by politicians of the ruling Democratic Justice Party and the oppositional Democratic Party for Unification (DPU), and for the first time since 1960 the opposition had a say in designing the country's basic laws. While articles regarding the obviously antidemocratic National Council for Unification were completely deleted, regulations in the preamble on the national territory and the president's duty to pursue unification were retained.

Legal norms in the constitution that are directly and explicitly related to the matter of unification can be found in the preamble, art. 4, art. 66, art. 69, and art. 91, para. 1. The innovation among these was the introduction of an independent article on the national task of unification repeating the trope of peaceful unification based on the FDBO.

> The Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the *free democratic basic order.* (Art. 4, Constitution 1987; emphasis mine)

It is noteworthy that the unification article goes back to a proposal by the oppositional DPU which, however, in its original form, did not include the phrase "based on the free democratic basic order" (cf. Mosler 2016c). It is reasonable to assume that in the final drafting stage actors from the ruling camp probably added this clause to the document, or arranged for its addi-

4. According to art. 46 of the 1972 constitution, the president has also to swear an oath to "pursu[e] the peaceful unification of the homeland."

tion, though there is no official documentation on this matter. Various scholars have argued that the article on unification including the FDBO was added to ensure monopoly over the process and contents of unification-related matters (cf. Jang 1990, 24; Jhe 2004, 95; K. Kang 2011, 50; C. Kim 2014, 98). In other words, this amendment can be understood as a form of "political insurance" (Ginsburg 2003) for the ruling camp (cf. Mosler 2016c).

It is also important to note the changes in the preamble. Already in the Eighth Amendment of 1980, unification was beginning to be distanced from the FDBO phrase and instead directly related to the "start of the Fifth Republic" (1981–1987). The phrase "strengthening of the free democratic basic order" followed only a clause later and was linked more directly to providing "for the fullest development of individual capabilities in all fields, including political, economic, civic, and cultural life." At the time of the Ninth Amendment in 1987, finally, this clause remained by and large the same with one exception. Instead of "duty for a peaceful unification of the homeland," the preamble now speaks of the duty for "*democratic reforms* and peaceful unification of the homeland" (emphasis mine). So, on top of the Eighth Amendment that changed the direct semantic relationship between unification and the FDBO to an indirect one, the Ninth Amendment changed the exclusiveness of the semantic relationship between unification and FDBO to inclusiveness, by adding the duty of democratic reforms. *De jure* this permits the assumption that the FDBO can be understood as a more generally applied order (and not only or not mainly in regard to unification) and that the meaning and contents of the FDBO have changed to have potentially more open and tolerant qualities. However, legal reforms that ensued shortly after the Ninth Amendment and the successful bid for presidency by Roh Tae-woo, Chun Doo-hwan's designated candidate, de facto point to a reconfirmation of the exclusive reading of the FDBO in general and to unification in particular.

The National Security Act (NSA)

The interlinkage of the NSA with the matter of unification is twofold, since it not only protects national security against anti-state groups, i.e., North

Korea, but also because it explicitly includes the FDBO as a good to be protected. The NSA was enacted only a few months after the formal establishment of South Korea in 1948 "to punish any person who, by violating the constitution, has organized an association or group for the purpose of claiming the title of the Government, or upheaving the state" (NSA, art. 1). Since art. 3 of the constitution states that the whole Korean peninsula belongs to South Korea, it allows for the interpretation that any group or organization besides the South Korean government that claims to be legal and/or legitimate governing actor over regions within this territory can be outlawed as an anti-state group, which is obviously aimed at the North Korean government. What is more, at the eighth revision of the NSA in 1991 the FDBO phrase was added to the core articles of the act that restrict and punish activities such as infiltration from and escape to North Korea, encouraging South Koreans to act in favor of the interests of North Korea, praising the North Korean regime, meeting, corresponding with, or acting beneficially to North Korea, or withholding information on any related matters "with the knowledge of fact that it may endanger the existence and security of the state or the *free democratic basic order*" (arts. 5–9; emphasis mine).

Overall, it can be argued that the NSA contradicts the constitution in that it punishes behavior that is theoretically granted by the principle of the sovereignty of the people, and the right to participate in the constitutional endeavor of unification. Due to a decision by the Constitutional Court in 1990 (89-heonga-113), the NSA was revised in 1991 to include the FDBO phrase as a qualifier to alleviate the danger of misusage of the NSA as a means for suppression of critical or oppositional activities.[5] This was intended to resolve the formerly posited unconstitutionality of the NSA because now people would be punished based on the NSA only in those cases where the FDBO was violated. Regardless of whether one follows this official reasoning or not, it is a fact that by inserting the FDBO phrase into the NSA, the NSA became closely interrelated to the constitution and the matter of unification (cf. Kuk 1994).

5. Constitutional Court's "Adjudication on the Constitutionality of Article 7 of the National Security Act" (*Gukgaboanbeop je 7 jo-e gwanhan wiheon simpan*), April 2, 1990.

The Inter-Korean Exchange and Cooperation Act (IKECA)

The introduction of the Inter-Korean Exchange and Cooperation Act (IKECA) half a year later in August 1990 provided a legal way to promote activities for unification. It also represents another important element of the legal framework regulating relations between North and South Korea. Until then the NSA had been the only law to control activities on the peninsula. The official reason for enacting the IKECA—which took place between the fall of the Berlin Wall and the dissolution of the Soviet Union—was to "contribute to peace on and unification of the Korean peninsula by prescribing matters necessary to promote reciprocal exchange and cooperation between the area south and north of the Military Demarcation Line" (art. 1). However, the IKECA also has a two-edged character. On the one hand, it is true that, by creating the statute, the narrow legal monopoly held by the NSA over inner-Korean relations was broken since the IKECA provided the option to allow interaction, which was not the case before (Jhe 1996; Park 2001). However, on the other hand, there has been reasonable criticism of the fact that interactions are nevertheless heavily regulated by the authorities (cf. J. Hong 1994; Oh 1992; C. Yi 1993). What is more, ultimately the IKECA is also confined to the boundaries of the FDBO because, as elaborated above, unification is constitutionally restricted to activities not violating the FDBO. In this regard, the IKECA contradicted the NSA; however, shortly before the enactment of the IKECA bill, the Constitutional Court ruled that the NSA had to be reformed to include the FDBO in its central articles (April 2, 1990), which were implemented a year later (May 31, 1991), thereby technically solving the issue.

Competing Interpretations of the FDBO

Dogmatic Definitions of the FDBO

The Constitutional Court stated in its 2001 decision (2000-heonma-238) that the prime basic value of the constitutional order is *liberal democracy,*

which is a fusion of liberalism that excludes intervention by state powers, respects individuals' freedom and originality, and embraces diversity as well as a notion of democracy that is characterized by the principles that assume state power to be under the jurisdiction of the people and the government to be controlled by the people.[6] This basic value that forms the basis of the constitutional order is called the basic order. In 1990, for the first time, the Constitutional Court defined the meaning and contents of the FDBO (89-heonga-113). The definition (see below) is a close adaptation of the one provided by the German Constitutional Court (BVerfGE 2, 1, 12) when ruling on the dissolution of the Socialist Reich Party in 1952.

> To violate the free democratic basic order can be defined as to seek to destroy or drastically change our internal system such as respect for the fundamental human rights, separation of powers, the institution of parliament, the multiparty principle, the election system, an economic order whose framework is constituted by private property and a market economy, and the independence of the judiciary, by making it difficult to maintain a governmental system under a rule of law that excludes any form of tyranny or arbitrariness such as one-person or one-party dictatorship of anti-state groups, and is based upon the basic principles of self-governance of the people as expressed by the will of the existing majority, and freedom and equality. (Korean Constitutional Court, 89-heonga-113)

While the Korean definition is an almost literal translation of that of the German Constitutional Court, there are some small but noteworthy differences. Almost everything else being equal, the Korean version does not spell out the "right of a person to life and free development" as well as the "responsibility of government" as fundamental principles of the FDBO. In addition, the Korean version features a core principle that is not part of the German version: "an economic order whose framework is constituted by private property and market economy." As will be seen below, in academia

6. Constitutional Court's "Revocation of Activities for Deciding on the Special Act on Clarifying the Truth of Jeju 4.3 Incident and Restoring the Honor of the Deceased" (*Jeju 4.3 sageon jinsang gyumyeong mit huisaengja myeongye hoebok-e gwanhan teukbyeolbeop uigyeol haengwi deung chwiso*), September 27, 2001.

there is dispute over the issue of whether or not the economic order should be an integral part of the FDBO. The Constitutional Court, too, seems to be undecided on the question when it states that "[t]he fundamental ideology of our constitution is to accept the welfare state principle, and seek to achieve both real freedom and equality in order to remove the contradiction that accompanies the two fundamental orders of the free democratic basic order and the market economy order" (96-heonga-4).[7] Also, in other decisions the Constitutional Court speaks of the "free democratic basic order *and* the market economy order" (89-heonga-113; emphasis mine), and thus leaves room for the interpretation that these are two separate orders, and that the latter is not necessarily an integral part of the former. In two recent decisions,[8] when referring to the 1990 decision's definition of the FDBO, the Constitutional Court even omits economic order from the quote completely (2004-heonna-1). In its decision on the dissolution of the United Progressive Party the Constitutional Court (2013-heonda-1) defined the democratic basic order (DBO) as "political order" that does not (at least not explicitly) include aspects of an economic order such as private property and market economy. In this case, however, the interpretation was obviously limited to the DBO only, and does not provide any substantial insight in relation to its views on the FDBO, other than that it distinguishes between the two.

Similarly, constitutional scholars in Korea are divided over the question of how exclusive or inclusive the definition of the FDBO is supposed to be. One crucial question is whether the DBO in the article on political parties is the same as the FDBO in the preamble and in the article on unification. This again is related to the question of whether the Korean FDBO is the same as the German FDBO. While one group of scholars argues for a specific Korean FDBO interpretation (cf. Kal 1976, 90–97; Kim 2002, 147–152; Kwon 2010, 156–159), the other group asserts that the FDBO in Korea and

7. Constitutional Court's "Constitutional Request on Guarantee of Automobile Accident Compensation Act Article 3, Provision No. 2 Law" (*Jadongcha sonhae baesang bojangbeop je 3 jo danseo je 2 ho wonjecheong)*, May 28, 1998.
8. Constitutional Court's "Impeachment of President Roh Moo-hyun Case" (*Roh Moo-hyun daetongyeong tanhaek sageon*), 14 May 2004, and "Dissolution Petition of the United Progressive Party Case" (*Tonghapjinbodang haesan cheonggu sageon*), December 19, 2014.

in Germany can be considered the same (cf. Han 1983, 184–189; J. Hong 1992, 34; Kay 2005, 297–298). Ultimately, in Korea the dogmatic controversy over the interpretation of the FDBO is about whether or not to include aspects of the economic and social order in the definition of the FDBO, and, if so, which aspects are to be included (see Fig. 1). The political order is the core content of the definition on which almost everyone agrees. Social democratic aspects nowadays are also seldom excluded from the definition. The crucial question is whether to include the economic order (e.g., private property and market economy), and how to deal with allegedly opposing principles such as socialism and peoples' democracy.

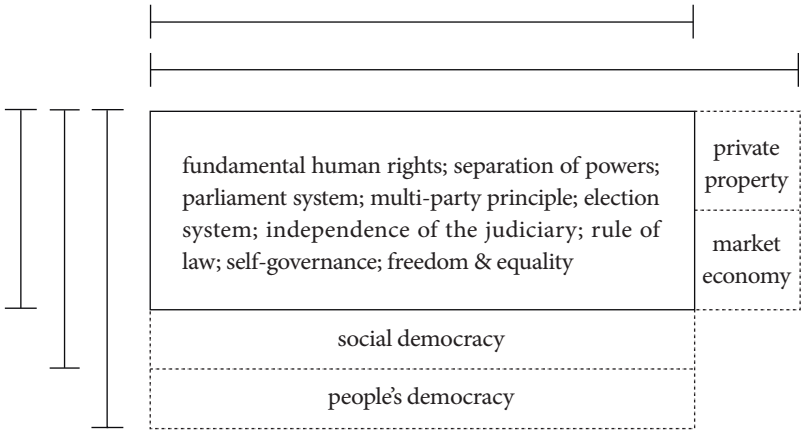

Figure 1. An illustration of variations of FDBO interpretations.

On a more general note, referring to the premise that the constitutionally demanded unification should be a "peaceful unification," the Constitutional Court (89-heonga-113) reasons that "for unification based on the free democratic basic order, sometimes it is inevitable to accept North Korea as a political reality." Also, "in the course of contact and dialogue, and within the limits of the free democratic basic order, sometimes there can be cases in which some of their [North Korea's] positions have to be accepted," and it

"can be in accordance with the spirit of the constitution" in cases "when helping each other as a display of pure brotherly love to cooperate with each other regardless of the [opposing political] systems."

Interpretations of the FDBO in Regard to Unification

1) Mainstream Interpretation of the FDBO in Regard to Unification

Conservative mainstream positions on the interpretation of the FDBO in regard to unification (cf. Sang-cheol Kim 2000; Sang-kyum Kim 2004; S. Lee 2010; Pyo 2012a, 2012b) can be said to be implicitly the hegemonic mainstream within constitutional scholarship. In general, there are not many explicit accounts of the question of how to interpret the FDBO on this matter; however, the implicit perspective does not deviate from the broader political discourse on the FDBO and unification. Scholars that can be categorized as belonging to this conservative category distinguish the FDBO from the DBO, and argue that it is different from the German concept (cf. Pyo 2012b, 597–598) in order to emphasize the legitimacy and superiority of the South Korean state ideology and system over the North Korean one. Accordingly, to maintain this existing exclusive order as it is, they mostly neglect the possibility for rapprochement based on compromises in regard to the political, social, or economic order (cf. Pyo 2012a, 149). The pursuit of a unification policy that adopts socialist aspects is neglected (cf. Pyo 2012b, 597; S. Lee 2010, 243–245), because they think the constitution does not allow for any change to the present South Korean system (Sang-cheol Kim 2000, 2–3; Sang-kyum Kim 2004, 238; S. Lee 2010, 243–245). That is why many of them argue for a form of unification in which North Korea is "absorbed by" (*heupsu*) or "joins with" (*gaip*) the South Korean system. In this context, they often refer to the case of German unification (S. Lee 2010, 236, 239; Pyo 2012b, 602).

2) Alternative Interpretations of the FDBO in Regard to Unification

There are various alternative interpretations of the FDBO in regard to unification. This first group of scholars argues that DBO and FDBO are the

same, and that the FDBO in Korea can be interpreted in the way the German FDBO is understood (Huh 2014; K. Kang 2011; B. Kim 1994). This, however, makes it necessary to reinterpret the Korean FDBO as it is interpreted by the mainstream. It is argued (Huh 2014, 57–65) that the FDBO has to be interpreted in a rational way so that it does not become an impediment to unification, and it is contended that the original concept of the FDBO stems from the German Basic Law, that the FDBO is different from liberal democracy, that it is not in conflict with social democracy. Also, the principle of democracy in general demands that unification is based on a compromise and on negotiations between North and South Korea, and that the FDBO cannot be understood as advocating a one-sided unification based on absorption. In addition, the FDBO should be interpreted less specifically when it comes to the economic order. In this regard, Huh (2014) suggests excluding the terms "private property" and "market economy" from the definition of the FDBO by the Korean Constitutional Court in 1990, to avoid unnecessary obstacles in the unification process. The FDBO is sufficiently encompassing to facilitate a more flexible unification process in which aspects of social democracy can be incorporated. However, at the same time, the FDBO does not allow any norms that are characteristic of a people's democracy since, from the perspective of liberal democracy, it can be argued that in a people's democracy fundamental human rights are not guaranteed, and people's democracies lack democratic legitimization. Kang (2011) assumes that the FDBO means, first and foremost, an opposition against a unification led by North Korea, but is not—at least in the first place—thought to be the basis for a unification that requires that North Korea changes into a liberal regime. As a remedy for this allegedly self-contradicting constitutional regulation, Kang (2011) suggests a reinterpretation that is based on a wider perspective of the basic principles and values of the constitution. When seen from this perspective of the "essence of pure liberal democratic principles" *(sunsuhan jayuminjujuui wolli-ui bonjil*), the idea of absorbing (*heupsu*) North Korea even contradicts the FDBO (Kang 2011, 51). In this regard, some argue for excluding the contents of economic order, such as the market economy and private property rights, from the FDBO definition. This would widen the concept and thus could help with

finding some common ground with North Korea. It is argued that, in regard to the formal contents of the constitution, this should be realized by changing the FDBO phrase to the more encompassing DBO phrase in order to provide the nominal means for a wider interpretation (*deo pongneolbeun haeseok*) that would help to solve the impeding effect of the unification article (Kang 1994, 47).

Another group of scholars also believes that FDBO and DBO are the same concepts (Chang 1996; Jhe 2004; J. Park 1997; Sung 2012b, 2014). What distinguishes this group from the preceding group that opposes the idea of tolerating aspects of people's democracy is that they contend—for the sake of a constructive process of unification—that the FDBO should be conceptualized in such a way that it does not exclude aspects of peoples' democracy or socialism per se (J. Park 1997, 617–618). They assert that holding on to the principles of liberal democracy does not mean to completely exclude social democratic or socialist elements in the unification process or the unification constitution (Chang 1996, 371–372; Jhe 2004, 137). According to their interpretation, it does not necessarily contradict the constitution to make compromises between the two countries' ideologies and political systems, and to pursue a partial combination of the political systems (Jhe 2004, 95). Thus, it is proposed not to discard or delete the FDBO from the constitution, but to retain and reinterpret it, because the importance of unification dictates that the will for unification should be expressed in an independent article (Jhe 2004, 206). As long as they disavow tyranny and stick to peaceful activities, even communist parties ought to be allowed after unification (Sung 2014, 8). Thus, following the examples of countries that are paragons of liberal democracy such as the USA, France, Italy, or Japan, the basic order of a unified Korea's constitution ought to allow for people's democracy (Sung 2012a, 427). It has also been suggested that one has to go even further and overcome the limits and negative effects of existing liberal democracies by developing liberal democracy to supersede mutually exclusive ideologies and the logic of system competition (J. Park 1997, 621–622). For the basic order of a unified constitution that would mean that it is based on democracy, however, it must overcome the limits of mere "formal liberalism" and promote real equality and welfare (J. Park

1997, 626).

Yet, another group of scholars (Jang 1990; M. Kim 1989) proposes to simply delete the FDBO phrase from the constitution. This is because they agree on the fact that the Korean FDBO is different from the German one, and thus is more restrictive. They contend that it hinders unification by mutually "merging" (*hapbyeong)* the two countries. Because an actually "peaceful unification" process *naturally* means negotiation and compromise between the two Koreas, that would entail the possibility that, besides liberal democratic ideas, potentially also socialist aspects can become part of the final outcome of these exchanges (Jang 1990, 24). Accordingly, in order to enable this unification through merging, actors in the process have to leave sufficient room for negotiation and compromise. This is only possible when discarding the narrow FDBO to possibly negotiate aspects of liberal democracy as well as of socialism or peoples' democracy. Based on this logic, it has been suggested that art. 3 (national territory) should be changed to include the phrase "peaceful unification" and to abolish art. 4 (unification) altogether (Jang 1990, 26). An alternative proposal argues for simply erasing the phrase "based on the free democratic basic order" or the term "free" in art. 4 (M. Kim 1989, 83).

Another way of looking at these competing interpretations is to say that the mainstream approach the conservatives adopt is a maximalist approach while the alternative approach the liberals take is a minimalist approach. While the maximalist position puts forward a fundamentalist argument that interprets liberal democracy as a comprehensive doctrine, the minimalist position draws on John Rawls' *The Law of Peoples* (1993), in which the importance of tolerance and mutual coexistence of liberalist and non-liberalist regimes is stressed. Chung (2012, 111) argues against a fundamentalist understanding, and interprets liberal democracy as being limited to political liberalism. The minimalist liberal democratic unification approach includes the following normative meaning. There is a passive meaning to preventing the South Korean liberal democratic regime being absorbed by the North Korean non-liberal democratic regime, and there is an active meaning to the South Korean liberal democratic regime recognizing North Korea's non-liberal democratic regime. This way of understand-

ing liberal democracy advocates an overall regime of mutual coexistence and tolerance of North and South Korea, which would request that both Koreas give up the pursuit of hegemony and their fundamentalist stance. It would request that both refrain from fundamentalism, which could lead to clashes. Liberal democracy's core values of coexistence and tolerance would work as a superordinate norm for the whole Korean peninsula.

The above examination of the FDBO in general and in respect to unification by the Constitutional Court, as well as by authoritative constitutional scholars, reveals that there are two main discourse coalitions, one of which favors a conservative, narrow, and exclusive interpretation, while the other supports a liberal, wide, and inclusive interpretation.[9] Despite a relative balance between conservative and liberal interpretations within the *legal discourse* on the FDBO, arguments for a wider and more flexible interpretation that could serve as a basis for rebalancing the biased debate in politics so far have not sufficiently spilled over into the *political discourse*.

Conclusion

The study set out to examine the interpretation of the FDBO in Korea regarding the task of unification, and in doing so posed the questions of why the FDBO in the Korean Constitution is so explicitly related to matters of unification, and how its meaning is interpreted.

The first part of the analysis showed that conservative or authoritarian forces initiated the introduction of the FDBO to the constitution and the NSA at critical junctures in contemporary Korean history, when the existing political power constellation was potentially threatened, in order to strengthen the South Korean government's hostile anticommunist posture towards North Korea and to be used against domestic opposition under the guise of liberal democracy (cf. J. Lee 1999, 114–115). The enactment of the IKECA and the reform of the NSA were also part of this strategy of legal

9. This is, of course, a simplification of various nuances within the two categories' individual arguments and views.

monopolization of unification-related matters (cf. C. Kim 2014, 98) at a point in time when Korea transitioned to a more open and democratic society at the beginning of the 1990s.

The second part of the analysis, the investigation of constitutional and scholarly discourses, revealed the two main competing perspectives on the meaning of the FDBO specifically regarding unification. The literature survey demonstrated that the *conservative positions* still reproduce the old translation of the FDBO that supports exclusiveness and opposition to North Korea. The *alternative positions*, on the other hand, propose a retranslation of the FDBO that promotes inclusiveness and openness towards unification with North Korea. The FDBO interpretation in decisions by the Constitutional Court showed variations over time, leaving room for a more flexible reading of the concept, and thus contains the potential for retranslation.

As recent research shows (Mosler 2016a), this division over the interpretation of the FDBO can also be found in public discourse, which is dominated by a conservative, anticommunist reading that can be traced back to the beginnings of the Cold War (cf. Choe 2016; Jeon 2002; Kuk 1994; I. Lee 2012; J. Lee 1999, 117, 120; S. Lee 2004; D. Lim 2005; Moon 2006; Mosler 2016a, 2016c). Conservatives base their positions on republican conceptualizations of the interest of the state or the good of the nation's collective (i.e., top-down), as well as in Cold War liberalism, ultimately to emerge with a restricted interpretation of democratic principles and a narrow definition of liberal democracy and the FDBO, while liberal discourse coalitions take a perspective from beneath that accounts for the interests of individuals and civil society, and put forward a wider interpretation of democratic principles, and a broad definition of the FDBO (cf. Mosler 2016a). The conservative bias in the discourse to a certain degree can be explained by the liberals' negligence of the FDBO per se as an allegedly antidemocratic concept, whereby they surrender their say on its interpretation (cf. Choe 2016; J. Kang 2002, 2009; Mosler 2016a).

What do these opposing interpretations mean for the task of unification? From the conservative perspective, the processes of unification cannot help but become unilateral since the South Korean system is supposedly the "right" or "superior" one, whereas history has proven that the North Korean

system has failed. The North Korea policy of the last two administrations of Lee Myung-bak and Park Geun-hye can be taken as representative examples demonstrating how this can affect the task of peaceful unification (cf. Ahn 2015; Byun 2015). It is not difficult to see that this preserves and reproduces an antagonistic set-up on the Korean peninsula. The effect of this dominating, overly narrow and biased maximalist interpretation of the FDBO is that a unification process is more impeded than facilitated by it, because it adopts a strong hardliner position advocating a one-way unification with little room for compromise or concessions.

Meanwhile, the liberal perspective, based on the principle of mutual rapprochement, emphasizes bilateral interactivity and readiness for compromise and concessions as a necessary condition for peaceful unification. This proactive approach was in part reflected in the North Korea policy of the administrations of Kim Dae-jung and Roh Moo-hyun (cf. Huh and Hwang 2010) as well as of the administration of Moon Jae-in. Of course, none of these administrations was or is without flaws, nor do these alternative interpretations of the FDBO provide a perfect solution. Yet, agonism does not mean the absence of antagonism but rather a mode of political interaction that can partially sublimate antagonism. In other words, the destructive Schmittian friend-foe-relation can be changed into a potentially constructive relationship between opponents because opponents at least basically acknowledge the legitimacy of each other's demands. In this way, the alternative perspective can be described as a minimalist approach to the interpretation of the FDBO.

In conclusion, it can be pointed out that it is both possible and necessary to recode the FDBO in a way that actually facilitates a unification process on the Korean peninsula. This critical account of the unification discourse in regard to the framing of the FDBO reveals three potentials that are worth exploiting. First, despite the dominating narrow definition of the FDBO in Korea currently, the various interpretations in the examined literature display a diversity of meanings and potential applications of the FDBO in the future. This points to the FDBO's potential to be helpful, if interpreted more widely or flexibly, for providing the grounds for a *Korean Grundkonsens* that could facilitate the initiation and promotion of a unifica-

tion process in the long term. At present, this is a potential only because the challenging reinterpretations of the FDBO are weak and passive. Second, the fact that this kind of potential obviously exists but is not yet exploited in turn indicates that dormant alternative approaches to the interpretation and application of the FDBO could have an immediate effect once they are adopted and promoted. Third, public opinion seems to be receptive to a wider interpretation and application of the FDBO regarding unification.[10] Thus, to think about and to negotiate what (liberal) democracy or the FDBO are supposed to mean in the Korean context is an important endeavor and ought to be studied further.

10. The results of IPUS' annual "Unification Attitude Surveys" (2007–2016) over the last decade suggest a great potential for a far more open and flexible attitude towards modes of unification among the South Korean citizenry than the conservatively dominated FDBO discourse would allow to be considered. An average of 36.9% of the respondents favor an eclectic regime type of a unified Korea consisting of a compromise between the political systems of North and South Korea (IPUS 2016). Hence, despite the huge differences in the political regimes, the potential threat of North Korea, and a general history of anticommunism as well as the discursive hegemony of the conservatives, still a large proportion of people think it would be advisable in the case of unification to build a new political system that might even incorporate features from the North Korean system.

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