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Session 2: Constitutional Framework of Treaty-Making and Implementation in South Korea

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Conventionally the executive's diplomatic and treaty-making power – which reflected the State's decision-making in relation to foreign affairs and international relations – was so highly political that it was entrusted to the executive branch exclusively. However, globalization has blurred the line between foreign affairs and domestic matters. In the area of law, this trend has diluted the dichotomy between international and domestic law, as the scope of international law's influence on the national legal order has expanded. Accordingly, the demand for democratic control over the treaty-making power held by the executive branch has become stronger. How to make the people and the national legislature involved in the treaty-making procedures has become a significant issue.

Concurrently, South Korea finds itself subject to a unique situation concerning treaty-making. Firstly, in line with the global trend, there is a robust demand for making commercial treaties, ie. free trade agreements (FTAs), in relation to which many internal and external interests are entangled. Secondly, in terms of post-colonial justice, politically sensitive conflicts are emerging with regard to the interpretation and implementation of treaties and international arrangements between Korea and Japan. Thirdly, as a divided country, inter-Korean agreements and their implementation often raise hard problems to solve.

1. What is the status of international law in domestic law in your country? Is it relevant to distinguish between different forms of international law for this purpose? Does the Constitution specify the status of international law in domestic law?

The Korean Constitution touches on the international law in the following provisions:

- Article 6(1): Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea.
- Article 60(1): The National Assembly shall have the right to consent to the conclusion and ratification of treaties pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties of friendship, trade, and navigation; treaties pertaining to any restriction in sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters.
- Article 73: The President shall conclude and ratify treaties; accredit, receive or dispatch diplomatic envoys; and declare war and conclude peace.
- Article 89: The following matters shall be referred to the State Council for deliberation: ...

3. Draft amendments to the Constitution, proposals for national referendums, proposed treaties, legislative bills, and proposed presidential decrees; (emphasis added).

It is generally understood that the forms and status of international law recognised in the Korean legal system are specified in Article 6(1) of the Korean Constitution. In this provision, "treaties duly concluded and promulgated under the Constitution" refer to the bilateral or multilateral treaties which were concluded and ratified via a constitutionally prescribed process by the subject who was endowed with treaty-making power by the Constitution and then entered into force domestically by promulgation. The reference to "generally recognized rules of international law" concerns the sort of international rules which were recognised by a meaningful number of member states of the international community as well as Korea (eg. customary international laws, general legal principles, Article 38. 1 of the ICJ Statute).

With regard to the relationship between international law and domestic law, an adversarial account of monism and dualism does not mean much practically. In South Korea, at a conceptual level it is generally understood that Article 6(1) presupposes dualism and that international and domestic law systems are treated as separate and independent. In reality, the status of international law in the domestic legal system is commonly tested when matters in the domestic courts attempt to invoke international law as a legal source.

It is at this point, when the international and domestic law collide with each other, that the status of competing legal sources has to be determined. As a first step, when it comes to the treaties, the constitutional text[1] and judicial practice[2] presuppose the supremacy of the Constitution over all kinds of treaties.[3],[4] The status of 'treaties' in domestic legal order can then be figured out through the interpretation of Article 6(1) in connection with Article 60(1) of the Constitution: (a) the treaties categorised in Article 60(1), which require consent from the National Assembly to be ratified, are regarded as having the same effect as statutes legislated by the National Assembly, whereas (b) other kinds of treaties – which are not specified in Article 60(1) of the Constitution – have the same effect as administrative decrees, which rank lower than statutes legislated by the National Assembly, as they were concluded and ratified within the executive branch only, without parliamentary involvement.

The domestic effect and application of 'generally recognized rules of international law' is not fixed in theory and practice, but depends on the determination of the courts concerned, case by case.

[1] Constitutional authority for the establishment of treaties is based on the text of Article 6 para 1 of the Constitution("Treaties duly concluded and promulgated under the Constitution..."), and Article 5 of the Addenda("... [T]reaties in force at the time this Constitution enters into force, shall remain valid unless they are contrary to this Constitution.") indicates the supremacy of the constitution over treaties and other forms of international agreements.
[2] Constitutional Court Decision No. 2012 Hun-Ma 166, 28 Nov. 2013.
[3] Therefore, the subject of adjudication on constitutionality of statutes at the Constitutional Court includes treaties and generally recognized international laws, a well as statutes legislated by the National Assembly.
[4] Even international human rights treaties are not given a higher normative rank than domestic laws nor constitutional status . Yoomin WON (2018), 'The role of international human rights law in South Korean constitutional court practice: An empirical study of decisions from 1988 to 2015', 16 International Journal of Constitutional Law 596, 623-4.

2. *How are treaties entered into in your country? Where relevant, use the Paris Agreement on Climate Change as an example. Is it relevant to distinguish treaties from other forms of international agreements for this purpose, or to distinguish between different types of treaties? How are these procedures reflected in the Constitution?*

Treaty-making involves the international procedures for concluding treaties between the parties, and the domestic procedures for approval and effectuation of the signed treaty. The domestic procedures in South Korea is as follows:

① According to Article 73 of the Constitution, the President who has the power to conclude and ratify the treaties appoints the representatives and lets the negotiation begin therethrough;[5]

② The representatives enter negotiations and to draft an agreed text of the treaty and, if necessary, to modify it or identify reservations;

③ The representatives sign on to the treaty and send the agreed text and the corresponding Korean text to the *International Legal Affairs Bureau* under the *Ministry of Foreign Affairs* to ask for initiating domestic procedures for concluding treaty;

④ The treaty is reviewed by the *Ministry of Government Legislation* to assess whether it is in accordance with the domestic laws already, or if it is necessary to legislate for implementing the treaty. The Ministry then presents an opinion upon whether the treaty needs the National Assembly's consent as per Article 60(1) of the Constitution;

⑤ The *International Legal Affairs Bureau* refers the treaty to the *State Council* (presidential Cabinet) for deliberation on the Government's decision on the treaty, in accordance with Article 89 of the Constitution.

(a) If the treaty falls under types provided in Article 60(1) of the Constitution, then the Government submits the bill of treaty to the National Assembly. The National Assembly shall then consider and give consent (or not) to the conclusion and ratification of the treaty.

(b) If the treaty does not fall under types provided in Article 60(1) of the Constitution, it does not need to be submitted to the National Assembly;

⑥ The President ratifies the treaty by exchanging or notifying instruments of ratification, to represent the State will be legally bound to the treaty.

⑦ The treaty must be promulgated in order to enter into force domestically. Article 6(1) of the Constitution stipulates 'promulgation' [6] as a requirement for domestic effectuation of treaties.

3. *Is there any debate in your country on the adequacy of the procedures entering into treaty commitments and other forms of international agreements from the standpoint of transparency and accountability? Is there any pressure for change?*

One of the toughest debates on the procedures of treaty-making involved the *Free Trade Agreement between the Republic of Korea and the United States of America (KORUS FTA)*. Negotiations started in

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[5] As for the commercial treaties (treaties of commerce) according to the *Act on the Conclusion Procedure and Implementation of Commercial Treaties* (enacted in 2012), before entering into commercial negotiations, the *Minister of Trade, Industry and Energy* has to formulate a plan for concluding a commercial treaty (Art. 6 para 1 of the Act), and has to promptly report it to the *Trade, Industry and Energy Committee of the National Assembly* (Art. 6 para 2 of the Act).

[6] "Promulgation" is distinguished from "publication" which is just a procedural action to officially announce a concluded treaty to the public. Treaties without promulgation would neither enter into force domestically nor bind the courts and the people.

2006. The National Assembly bi-partisanly opposed concluding *the KORUS FTA,* on the basis that some of the contents of *the KORUS FTA* cut across the roles of the legislature and the judiciary. Many people also worried (and feared) the negotiations were unfair and that there would be negative repercussions from the opening of markets to the US. Citizens protested against the Government's unilateral push forward, but the President and the Government still concluded the agreement. During this process, Assemblymen criticised the Government for excluding opposition parties in the process of negotiations and requested the release of the information relevant to the agreement, but the Government did not do this.

This case led 23 Assembly Members to request a review by the Constitutional Court on 7 September 2006. They argued that the Government decision to proceed with the FTA negotiation without any prior consent from the National Assembly and their refusal to provide information related to the FTA violated their rights to deliberate and vote on the policy/FTA.[7] The claimants argued that *the KORUS FTA* was a treaty that required the National Assembly's consent in its conclusion and ratification (as per Article 60 of the Constitution), and that consent from the National Assembly should have been understood as consent to the 'entire' process of treaty-making which would have been substantively ensured by sharing information during the entire process of treaty-making and providing the National Assembly with the opportunity for statement and inquiry. The claimants also argued that the Government should have presented a bill of the treaty/FTA to get consent prior to the international negotiations. The Government counter-argued that the National Assembly's consent before the phase of negotiations and conclusion was not constitutionally required.[8]

At the same time, academic and practical debates took place regarding the interpretation of the National Assembly's consent stipulated in Article 60(1) of the Constitution. As the main focus of the debate was the right moment for consent, opinions varied, from the moment before the appointment of the representatives, to the last moment just before President's ratification. In general, the parliamentary intervention in treaty-making is conceived as a means of democratic control over the executive's exercise of a foreign power. Yet, given the president is also granted democratic legitimacy directly from the people in presidential systems, it was also pointed out[9] that too much emphasis on the parliament's power is not necessarily the best answer. Either way, it is important to note that the constitutional powers on decision-making relating to foreign relations should be properly distributed between the branches and cooperatively exercised.

Despite opposition from various groups, *the KORUS FTA* was concluded in April 2007 and the National Assembly eventually passed the bill of ratification on 22 November 2011. Interestingly, the *Ministry of Foreign Affairs* ended up conceding translation errors in drafting the treaty text and corrected 296 errors in total. A series of debates and problems that emerged during the process of *the KORUS FTA* led to a more profound discussion on the need for control over the government's treaty-making power

[7] Constitutional Court Decision No. 2006 Hun-Ra 5, 25 Oct. 2007.

[8] However, the Constitutional Court avoided a substantive review by dismissing the case on the grounds that individual Assembly Members had no standing to request an adjudication on competence dispute on behalf of the National Assembly (pertaining to infringement on the National Assembly's right to consent), and the Assembly Members' rights to deliberate and vote could be only infringed by the other members or Chairman of the Nationa Assembly, not by institutions outside of the Assembly.

[9] Seon-Taek KIM (2007), 'The Constitution's Distribution of Foreign Affairs Power between the Executive and Congress', 13 KJCL 281, 300. [In Korean]

and for detailed legislation to make the entire treaty-making process more cooperatively and transparently.

Several bills to enact a law to refine treaty-making procedures have been proposed. Some efforts to enact a general law on treaty-making procedures have been made, but have not yet delivered results. Instead, a special law on commercial treaties was enacted in 2012, the *Act on the Conclusion Procedure and Implementation of Commercial Treaties***.** The purpose of this Act is to: "enhance transparency in the procedures for concluding commercial treaties and to promote efficient commercial negotiations with citizens' understanding and participation" (Art. 1); to define the term "commercial treaty" to make it clear that such treaties are subject to the consent of the National Assembly under Article 60(1) of the Constitution (Art. 2); to let the Government formulate and report a plan before entering into commercial negotiations (Art. 6); to make the Government hold public hearings before formulating a plan (Art. 7); to make sure the Government proceeds with commercial negotiations according to the plan (Art. 10); and to release the relevant information concerning the procedures for concluding and implementing commercial treaties on the request of the citizens or the National Assembly (Art. 4).[10]

4. Does the implementation of international law in domestic law create any theoretical or practical problems? Is there any debate in your country about how international law is absorbed into domestic law?

Some of these issues have been discussed earlier. For another case which highlights the sharp conflict in interpretation and implementation of treaties, it is useful to look at the *Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan of 1965* (*1965 Korea-Japan Claims Agreement*) and the *Japan-South Korea 'Comfort Women' Agreement of 2015*. In August 1945, Korea was liberated from Japanese 36-year colonial rule, but individual remedies for forced labour and sexual enslavement during World War II remained unresolved. In line with the *San Francisco Peace Treaty of 1951* dealing with World War II reparations, the South Korean and Japanese governments concluded a *Treaty on Basic Relations between Japan and the Republic of Korea*, and the *1965 Korea-Japan Claims Agreement* followed. Under the latter Agreement, both parties agreed on the final settlement for claims between individuals and the both States, on condition that the Japanese Government would give $800m in grants and loans to the South Korean government and in return, South Korea would renounce individual claims against Japan. This Agreement was approved by the National Assembly on 14 August 1965 and took effect from 8 December 1965. However, while the then Korean Government agreed the treaty, the victims of wartime crime rejecting the agreement, persistently claimed compensations for their damages and sincere apologies for war crimes against humanity. The claimants have failed again and again at home and abroad courts on the grounds of the *1965 Korea-Japan Claims Agreement***.** The Japanese Government has adamantly argued that any claims raised by victims were completely and finally settled according to the interpretation of the 1965 Agreement.

In 2011, the Constitutional Court of Korea handed down an impressive ruling that the Korean Government's inaction to initiate dispute settlement procedures to clarify the meaning of 'claims' in the *1965 Korea-Japan Claims Agreement* infringed the comfort women victims' fundamental human rights and is therefore unconstitutional.[11] Although this ruling could not force the Japanese Government to do something, it pushed the Korean Government to renew its diplomatic efforts. As a consequence, in 2015,

[10] For the text of the Act, see https://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=45483&type=part&key=21
[11] Constitutional Court Decision No. 2006 Hun-Ma 788, 30 Aug. 2011.

the Korean and Japanese Governments announced that both governments had agreed that the 'comfort women' issue was to be resolved finally and irreversibly by concluding the *Japan-South Korea 'Comfort Women' Agreement of 2015*. Under this Agreement, the Korean Government would establish a foundation to provide support for individuals and its funds would be contributed by the Japanese Government at a time through its budget. Most 'comfort women' victims, civil society and the opposition parties fiercely criticised the Agreement and its implementation. As a consequence, in 2018 the next President delivered a speech that the foundation would be dissolved in response to the victims' demands.

As for the cases related to forced labour, regarding the interpretation of the *1965 Korea-Japan Claims Agreement* and its implementation, more intense conflicts are ongoing diplomatically as well as inside of Korea. As with the 'comfort women' case, the Japanese Government have argued that any individual claims have been completely settled due to the 1965 Agreement, and therefore Japanese companies involved in forced labour have no obligation to compensate. Recently, the Supreme Court of Korea handed down a decision[12] confirming a previous decision from 2012[13] that found that the plaintiffs' right to be compensated for their wartime forced labour and unpaid work had not been extinguished despite Article 2 of the 1965 Agreement, and thus, that Japanese private companies should compensate the plaintiffs. The Japanese Government has argued that the decision is a violation of international law and requested the Korean Government to take measures against it. Nevertheless, the Korean court has proceeded with the execution of provisional attachments on Japanese companies' property which is located in South Korea.

These cases show that the implementation of international law can become extremely complicated when there are conflicts in the interpretation of mutually concluded treaties and international agreements between two governments, especially between differing judicial interpretations of both countries, between the government and the civil society, between the former government and the future government, and further between international agreement itself and *jus cogens*. It demonstrates that not only the government and the parliament, but also the judiciary and civil society, are important actors in the implementation of international law in domestic law nowadays.

5. Are there any other aspects of the experience of your country with the entry into international arrangements and their implementation and activation, which might throw light on the issues raised by this theme?

Because of South Korea's unique situation as a divided country, South Korea is sometimes involved in making "inter-governmental agreements", that are not technically classed as treaties or international agreements. As a divided country, South and North Korea are considered to be independent sovereign states in terms of international law, but the two governments do not treat each other as foreign countries. Article 3 of the South Korean Constitution implies that the South Korean Constitution reaches the entire Korean peninsula including North Korea, by providing that "the territory of the Republic of Korea [South Korea] shall consist of the Korean peninsula and its adjacent islands" – though this is not the actual case. Since both governments have now agreed upon the state of division, the fundamental relations between South and North Korea are defined in the *Development of Inter-*

[12] Supreme Court Decision No. 2013 Da 61381, 30 Oct. 2018; Supreme Court Decision No. 2013 Da 67587, 29 Nov. 2018; Supreme Court Decision No.2015 Da 45420, 29 Nov. 2018. On the overview of the first landmark decision, see the news report at http://www.koreaherald.com/view.php?ud=20181030000606

[13] Supreme Court Decision No. 2009 Da 68620, 24 May 2012; Supreme Court Decision No. 2009 Da 22549, 24 May 2012.

Korean Relations Act, which states that "(1) Inter-Korean relations are not relations between nations, but special relations established temporarily in the course of pursuing unification. (2) Inter-Korean trade shall not be regarded as international trade, but as intranational trade."[14] Accordingly, all agreements concluded between the two Koreas are called "South-North Korean agreements", not treaties.

Practically, important South-North Korean agreements (eg. *Inter-Korean Basic Agreement in 1991*, *June 15th South-North Joint Declaration in 2000*, and *October 4th Joint Declaration in 2007*) had not received approval from the National Assembly, and thus the Constitutional Court[15] and Supreme Court[16] refused to give them "treaty-like" binding effect and instead identified them as 'gentlemen's agreements'. However, since the *Development of Inter-Korean Relations Act* was enacted in 2005, the South-North Korean agreements have been given binding effect. The Act specified a treaty-like procedure for conclusion and ratification of agreements. The Act also specified[17] the National Assembly's power to consent to certain kinds of agreements.

There is a notable case on the controversies regarding the choice of procedure to effectuate the inter-Korean agreements, namely, *the Panmunjom Declaration for Peace, Prosperity and Reunification of the Korean Peninsula (Panmunjom Declaration)*, which included a joint commitment to defuse the acute military tensions and conflicts and to build a permanent and stable peace regime on the Korean peninsula[18] agreed in April 2018. It was controversial whether *the Panmunjom Declaration* needed to get consent from the National Assembly or not. Despite many opposite opinions, the Government insisted *the Panmunjom Declaration* should get the National Assembly's consent, according to Article 21 of the *Development of Inter-Korean Relations Act*, to enhance the binding effect of the declaration and to provide a sustainable legal basis for implementation in the future. The Government's approach reflected lessons learned from past failures to implement Declarations agreed in 2000 and 2007. As a consequence, the Government submitted the bill of ratification to the National Assembly in September 2018, but it was not passed and was then discarded when the term of the National Assembly expired in 2020.

While the parliamentary approval of the ratification bill was still pending at the National Assembly, the Government ratified the '*Joint Declaration in Pyeongyang on 19 September 2018'* and '*Military-related agreements'* to implement *the Panmunjom Declaration* – but without parliamentary approval. The Government was highly criticised for skipping the National Assembly's consent to ratification and it was argued the subsequent agreements were unconstitutional. However, the Government insisted that the *Development of Inter-Korean Relations Act* would be applied to those agreements and that they therefore did not need to get the National Assembly's consent.

As seen above, South Korea has experienced some very unique problems in implementing the Inter-Korean agreements. The fate of the Inter-Korean agreements is particularly unpredictable, when to date, most parliamentarians have opposed the proposed agreements, and when the new Government

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[14] Art. 3 paras 1 and 2 of the Act.

[15] Constitutional Court Decision No. 92 Hun-Ba 6, 16 Jan. 1997.

[16] Supreme Court No. 98 Du 14525, 23 Jul. 1999.

[17] Development of Inter-Korean Relations Act Article 21
(3) The National Assembly shall have a right to consent to the conclusion and ratification of South-North Korean agreements which place heavy financial burdens on the State or nationals, or South-North Korean agreements concerning legislative matters.

[18] The summit between Moon Jae-in, President of South Korea, and Kim Jong-un, Supreme Leader of North Korea was held on 28 April 2018 at the Joint Security Area, South Korea.

refused to implement agreements concluded by the predecessor. Such unpredictability and confusion have rendered the relations between the two Koreas unstable over time. Observing that, it seems necessary to set an institutional strategy to address such precarious status of the inter-governmental arrangements.

6. Conclusion

The Korean Constitution set requirements for certain treaties to obtain consent from the National Assembly, before ratification by the Government, in order to take effect. It aims to provide democratic control over the Government's decisions in relation to foreign relations over subject matters which will greatly impact the State and the nation. Demands for such democratic control have been increasing over time. The *Act on the Conclusion Procedure and Implementation of Commercial Treaties (2012)* is a product of such an expanding demand.

The historical and political context of South Korea has been of crucial importance in creating and implementing treaties and other forms of international arrangements. There are ongoing legal disputes concerning the interpretation and implementation of international treaties as well as the inter-Korean agreements. Domestic courts' interpretations of international treaties have led to inter-governmental conflict between the party States, i.e. Japan and South Korea. The inter-Korean agreements have also often become the cause of parliamentary disputes on how to effectuate those agreements in the southern half of the Korean Peninsula. Such problems sometimes get more complicated when the opposition members of the parliament stall the process of making and implementing such international arrangements under the pretext of democratic control.

Arguably, this means that, within the constitutional framework, proper domestic legislation is required more and more to ensure both a democratic and transparent process of making and implementing treaties, as well as to protect national interests and to show respect for international principles, inter alia *jus cogens*.

Biography: *Jeong-In Yun is Research Professor and leads the party democracy research department of Party Law Research Center at Korea University in Seoul, Korea. She teaches constitutional law and her research interests are constitutional amendment, democracy and representation, political parties, and constitutional education. She has been working on a 3-year project on pathologic problems of populist parties in Korea, and currently working on a 5-year project on constitutional design for a new democracy model, funded by National Research Foundation of Korea. She was granted a Laureate Visiting Fellowship in Constitutional Law at Melbourne Law School. Jeong-In participated in the Melbourne Forum 2020.*