TRANSNATIONAL LAW AND BORDERS
IN THE KOREAN PENINSULA AND BEYOND

by
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Abstract

This dissertation analyzes the ways in which internal, national, and international borders are embedded, constructed, and reinforced in the legal frameworks, enforcement patterns, and discursive practices on the Korean peninsula and beyond. Through a series of focused case studies on particular border sites, this dissertation reveals the ways in which law, as material reality, ideology, metaphor, and technology, enables and disables the movement of persons, things, and symbols across borders. The case studies begin with those borders constructed within and between two Koreas and then move outward to those that limit the movement of people beyond the Korean peninsula.

The first case study analyzes North Korea’s efforts to regulate internal migrations through systems of residence registration, labor allocation, and travel certificates as part of its centrally planned economy. The dissertation then turns to the attempt to relocate a capital city in South Korea and the ways in which laws and practices, including written and customary constitutions, act as gatekeepers in Pyongyang and Seoul. The following chapter analyses the gendered construction of the “Socialist Big Family” in North Korea, paying particular attention to the manner in which borders are constructed to contain the female body. The dissertation then moves to an analysis of the law making it a criminal offence in North Korea to cross the national border, and draws on the legal response to the practices of East German border guards in using firearms to prevent the movement of people across the Berlin Wall. Further, in an attempt to understand the refugee border, the dissertation examines asylum cases on illegal exit from other countries in the U.S. to consider the possibility for North Korean asylum seekers. It assesses the work of Canada’s Immigration and Refugee Board in determining North Korean refugee claims from 1990 to 2011. In the
final case study, I apply a gendered analysis of the definition of refugee in international law to the restrictions on the right to leave North Korea. To conclude, legal relations between and within borders are mutually exclusive as well as interconnected, and daily border-crossings challenge the existing legal structure for transnational justice.
Preface

A version of Chapter Eight has been published in Veronica P. Fynn, ed., *Documenting the Undocumented: Redefining Refugee Status* (Boca Raton, FL: BrownWalker Press, 2010).
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1. Introduction

1.1. Mapping Two Koreas: 38th Parallel in Geopolitics and Everyday Life

The 38th parallel divides the Korean peninsula into two states within one nation. It was drawn for the five years of the UN trusteeship over the Korean peninsula at the Moscow Conference after the World War II. The Soviet Union administered the North above the 38th parallel. The US Army military governed the South below the parallel from September 8, 1945 to August 15, 1948. In May 1947, North Korea refused to allow the United Nations (UN) temporary Commission of Korea to conduct a plebiscite and monitor the election for a

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2 In Merriam-Webster’s encyclopedia, the nation-state is defined as “a form of political organization under which a relatively homogeneous people inhabits a sovereign state.” “Nation-state,” online: Merriam-Webster <http://www.merriam-webster.com/dictionary/nation-state>.
legitimate government in the Korean peninsula. The plebiscite proceeded in South Korea and in May 1948, Syngman Rhee became president. The Republic of Korea was formally established on August 15, 1948. On August 12, 1948, the US declared that the South Korean government was “the Korean government.” The United Nations General Assembly also recognized in Resolution 195 that the South Korean government was a legitimate government in the Korean peninsula. On December 12, 1948, the General Assembly adopted the United Nations Resolution 195 on Korea:

[T]here has been established a lawful government (the Government of the Republic of Korea), having effective control and jurisdiction over that part of Korea where the (UN) Temporary Commission was able to observe and consult and in which the great majority of the people of all Korea reside; that this Government is based on elections which were a valid expression of the free will of the electorate of that part of Korea and which were observed by the Temporary Commission; and that this is the only such Government in Korea.

The resolution also recommended “occupying powers should withdraw their occupation forces from Korea as early as practicable.”

On June 25, 1950, North Korea crossed the 38th parallel and invaded South Korea. Figure 1 shows a procession of refugees (p’inanmin 避難民) fleeing warfare during the Korean War. The UN Security Council, by a vote of 7-1, announced a resolution on the

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5 “Modern Korean History Portal,” supra note 3.
6 Ibid.
8 “Modern Korean History Portal,” supra note 3.
10 Ibid. at 26.
same day, and determined that “the action, ['the armed attack on Republic of North Korea by forces from North Korea'], constitutes a breach of peace.”\textsuperscript{11} The Security Council urged the North Korean government to withdraw the armed forces to 38\textsuperscript{th} parallel and cease the hostiles.\textsuperscript{12} On June 27, 1950, the Security Council stated in resolution 83 that South Korea faced a situation where military actions were necessary to resume international peace and security, and recommended that the UN member states furnish assistance to repel the armed attack by North Korea.\textsuperscript{13} Finally, resolution 84 recommended:

all Members providing military forces and other assistance pursuant to the aforesaid Security Council resolutions make such forces and other assistance available to a united command under the United States of America.\textsuperscript{14}

The Korean War was the first time that the Security Council authorized member states to send their troops outside their territories under the United Nations flag.\textsuperscript{15} Three resolutions were adopted in accordance to article 1(1) of the Charter.\textsuperscript{16} Eric Yong-Joong Lee suggests that by resolution 84 the UN’s military intervention was possible “indirectly” through the recommendations of the Security Council.\textsuperscript{17} The legal issue was whether the UN’s military intervention in the Korean War was legitimate and necessary to maintain

\textsuperscript{12} Ibid.
\textsuperscript{13} 83 SC Res., 474\textsuperscript{rd} Mtg, UN Doc. S/1511 (1950) 5.
\textsuperscript{14} 84 SC Res., 476\textsuperscript{rd} Mtg, UN Doc. S/1588 (1950) 6.
\textsuperscript{15} Eric Yong-Joong Lee, \textit{Legal Issues of Inter-Korean Economic Cooperation under the Armistice System} (Leiden, NLD: Brill Academic Publishers, 2002) at 20; On July 5, 1950, in the resolution 84 the Security Council “authorizes the united command at its discretion to use the United Nations flag in the course of operations against North Korean forces concurrently with the flags of the various nations participating.” 84 SC Res., 476\textsuperscript{rd} Mtg, UN Doc. S/1588 (1950) 5.
\textsuperscript{16} Article 1 of the Charter states that the purposes of the United Nation is “[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.” \textit{Charter of the United Nation}, 26 June 1945, Can. T.S. 1945 No. 7.
\textsuperscript{17} Supra note 15 at 20.
international peace and security under articles 1 and 51 of the Charter. The Soviet Union, which regarded the Korean War as a civil war, criticized the military assistance as illegitimate intervention in domestic jurisdiction that violated article 2(7) of the Charter.

Also, the Soviet Union asserted that the three resolutions on the Korean War were “null and void” in a violation of article 27(3) of the Charter on the basis of the absence of a representative of the USSR as a permanent member in voting at meetings.

The Korean War ended on July 27, 1953 when a US-led United Nation’s coalition, North Korea, and the People’s Republic of China signed the Korean War Armistice without a peace treaty. South Korea was not a party to the Armistice. The demarcation line was established near the original 38th parallel, with the Korean Demilitarized Zone as a buffer zone along the 38th parallel.

According to article 1(1) of the 1953 Korean War Armistice:

[a] military demarcation line shall be fixed and both sides shall withdraw two (2) kilometers from this line so as to establish a demilitarized zone between the opposing forces. A demilitarized zone shall be established as a buffer zone to prevent the occurrence of incidents which might lead to a resumption of hostilities.

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18 Supra note 15 at 20; Article 51 of the Charter is as follows: “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.” Charter of the United Nation, 26 June 1945, Can. T.S. 1945 No. 7.

19 Article 2(7) of the Charter lays out that “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

20 Article 27(3) requires “an affirmative vote of nine members including concurring votes of the permanent members” to make decisions of the Security Council; Eric Yong-Joong Lee, supra note 15 at 21-22.

21 The preamble indicates that “(t)he undersigned, the Commander-in-Chief, United Nations Command, on the one hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, on the other hand […]” James E. Hoare, Appendix A Korean Armistice Agreement 27 July 1953, Historical Dictionary of Democratic People’s Republic of Korea (Plymouth, UK: The Scarecrow Press, Inc, 2012) at 411.

22 Ibid.

23 Ibid. at 411.
The armistice consists of a Military Demarcation Line and Demilitarized Zone (article I), Concrete Arrangements for Cease-Fire and Armistice (article II), Arrangement Relating to Prisoners of War (article III), Recommendations to the Governments Concerned on Both Sides (article IV), and Miscellaneous provisions (article V). The Preamble of the 1953 Korean War Armistice, which ended the Korean War, states that the armistice was made “with the objective of establishing an armistice which will insure a complete cessation of hostilities and of all acts of armed force in Korea until a final peaceful settlement is achieved […].”\textsuperscript{24} The 1953 Korean War Armistice was not a peace treaty; it enabled a temporary pause in the fighting.\textsuperscript{25}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{Panmunjom.png}
\caption{Panmunjeom (Joint Security Area between North and South Korea)}
\end{figure}

\begin{center}
(© 2006 Luke Hutchison, by permission)
\end{center}

\textsuperscript{24} Ibid.
\textsuperscript{25} Seongho Je, 정전협정체제에 관한 연구: 기능 정상화 및 실효성 확보 방안 [A Study on the Korean Armistice Regime] (Seoul: Korea Research Institute for Strategy, 2002).
*Panmunjeom* in Figure 2 is the Joint Security Area on the DMZ where the 1953 Korean Armistice Agreement was signed, and has been under the control of the United Nations Command while it is located in *Paju, Gyeonggi* province.²⁶

The geopolitical confrontation between capitalist and socialist blocs has played a critical role in the division of the Korean peninsula. Nak-Chung Paik suggests reading the division as a “text [...] against the larger background text of the world-system.”²⁷ But the reality cannot be simply reduced into a situation between “two ‘normal’ states”²⁸ because of the specific ways in which North and South Korea engage in the world system.²⁹ The two Koreas are not simply two distinct constituents of the world-system³⁰ nor “a self-enclosed system.”³¹ Paik argues that the division system is “a subunit of the world system, a local manifestation of the latter’s operation at a particular conjunction of its history.”³²

Paik explores the division system as an analytical and conceptual tool to understand the reality of the divided Korea in question.³³ Since the Armistice of 1953, the DMZ along the 38th parallel has formed a division system. The DMZ has manifested the physical demarcation of the country, and shaped the people’s experience on the landscape of the divided country. The landscape takes part in structuring people’s lives, and produces symbolic meanings of power and politics.³⁴ Paik suggests that the DMZ “signifies a social

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³⁰ *Supra* note 27 at xvii.
reality that to a considerable extent has taken root, for better or worse, in the everyday lives of the people living under that system.\textsuperscript{35} The division system is “an unstable structure,” persistently rooted in the daily lives of people, that constructs meanings in the Korean peninsula.\textsuperscript{36} Bruce Cumings calls Nak-Chung Paik the first scholar to picture the “symbiotic relationship” between North and South Korea which perpetuates the division rather than leading to unification.\textsuperscript{37} Cumings also perceives a division system as “two divided states within one nation, two highly organized but separate systems engaged every day in maintaining the status quo and enhancing their own status.”\textsuperscript{38} Beyond ideological geopolitics, the division system self-reproduces itself with complex layers of power, which generate opposition to harden the division in the Korean peninsula.\textsuperscript{39}

The DMZ remains in place. Norman J.G. Pounds, a political geographer, classifies it as “a superimposed boundary,”\textsuperscript{40} which he defines as a border that was drawn through a settled area but that disregards the existing cultural and ethnic features of the area.\textsuperscript{41} The 38\textsuperscript{th} parallel is often perceived as a boundary imposed by external force without regard for ethnicity, family, kinship, and language so that it reminds people of a collective trauma as a crucial part of national history and identity. This reflects Anssi Passi’s phrase that borders are “pools of emotions, fears and memories.”\textsuperscript{42} State laws and practices around the DMZ reveal that the Korean peninsula as a nation/state has remained incomplete, unstable, and contradictory since the partition of the Korean peninsula. The existence of the DMZ is

\textsuperscript{35} Supra note 29 at 5.
\textsuperscript{36} Ibid. at 3; ibid. at 17.
\textsuperscript{37} Ibid.
\textsuperscript{39} Supra note 29 at 5-7.
\textsuperscript{41} Ibid. at 63.
\textsuperscript{42} Corey Johnson, Reece Jones, Anssi Paasi, Louise Amoore, Alison Mountz, Mark Salter, and Chris Rumford, “Interventions on Rethinking ‘the Border’ in Border Studies” (2000) 30 Political Geography 61 at 62.
embedded in the Constitution and other related laws. The border, which divided Korea into
two, recurs in an on-going national history and appears everywhere in daily life in the Korean
peninsula.

1.2. Law and Borders in the Korean Peninsula and Beyond

Borders are set up to define the places that are safe and unsafe, to distinguish
us from them. A border is a dividing line, a narrow strip along a steep edge. A
borderland is a vague and undetermined place created by the emotional
residue of an unnatural boundary. It is in a constant state of transition. 43

Legal and Personal Identities”

Margaret E. Montoya describes a border as “a boundary in the sense of being an edge,
a limit, or a defining line,” although a border and a boundary do not always have the same
meaning. 44 Gloria Anzaldúa also suggests that “[b]orders are set up to define the places that
are safe and unsafe, to distinguish us from them. A border is a dividing line, a narrow strip
along a steep edge.” 45 Borders do not simply form a physical and neutral divide but also
produce historical, political, social, legal and psychic space where power relations between
those inside and those outside the borders are engaged in asymmetrical ways. They
encompass “borders of and within identities, borders of power relations, and borders within

43 Margaret E. Montoya, “Border/ed Identities: Narrative and the Social Construction of Legal and Personal
Identities” in Austin Sarat, Marianne Constable, David Engel, Valerie Hans, and Susan Lawrence, eds.,
Crossing Boundaries: Traditions and Transformations in Law and Society Research (Evanston: Northwestern
44 Ibid at 132.
45 Gloria Anzaldúa, “Preface,” Borderlands, La Frontera: The New Mestiza (San Francisco: Aunt Lute Books,
1987) at 3.
and outside the nation-state.”46 Law interacts with borders in constructing categorical identities, such as residents, citizens, refugees and stateless people. For example, laws governing exit and entry, immigration and refugee status, nationality, military service, and national security, regulate migrations in direct and indirect ways, and contribute to producing identities, though not always in consistent ways.

This dissertation analyzes the ways in which internal, national, and international borders are embedded, constructed, and reinforced in the legal frameworks, enforcement patterns, and discursive practices on the Korean peninsula and beyond. The study covers an inter-nation/state border (the DMZ between North and South Korea); intra-state borders between capital cities (Pyongyang and Seoul) and the provinces; and inter-state borders between North Korea and other countries. Through a series of focused case studies on particular border sites, this dissertation reveals the ways in which law, as material reality, ideology, metaphor, and technology, enables and disables the movement of persons, things, and symbols across borders. The case studies begin with those borders constructed within and between two Koreas and then move outward to those that limit the movement of people beyond the Korean peninsula. The first case study analyzes North Korea’s efforts to regulate internal migrations through systems of residence registration, labor allocation, and travel certificates as part of its centrally planned economy. It then turns to the attempt to relocate a capital city in South Korea and the ways in which laws and practices, including written and customary constitutions, act as gatekeepers in Pyongyang and Seoul. The following chapter analyses the gendered construction of the “Socialist Big Family” in North Korea, paying particular attention to the manner in which borders are constructed to contain

the female body. The dissertation then moves to an analysis of the law making it a criminal offence in North Korea to cross the national border, and draws on the legal response to the practices of East German border guards in using firearms to prevent the movement of people across the Berlin Wall. Further, in an attempt to understand the refugee border, the dissertation examines asylum cases on illegal exit from other countries in the U.S. to consider the possibility for North Korean asylum seekers. It also assesses the work of Canada’s Immigration and Refugee Board in determining North Korean refugee claims from 1990 to 2011. In the final case study, I apply a gendered analysis of the definition of refugee in international law to the restrictions on the right to leave North Korea. I argue that legal relations between and within borders are mutually exclusive as well as interconnected, and daily border-crossings challenge the existing legal structure for transnational justice on the Korean peninsula and beyond.

1.3. Law, Border, and Society: Performance of the Border

The performance of the border is evidence of discursive practices of power, which operate to demarcate, separate, and divide. “Borders are everywhere.” Anssi Passi describes this notion as referring to “discursive/emotional landscape of social power” and “technical landscapes of control and surveillance.” For Passi, the discursive landscape of borders is frequently associated with national practices, through national flags and anniversaries, for nation-building. The capital city as a miniature of the nation-state reinforces national practices, and the DMZ acts as a historical monument, which recalls national memories that

47 Supra note 42 at 63
48 Ibid.
the two Koreas emerged from one nation. A border is performative beyond time and space. A border is triggered from the past to the present, and from the inside to the frontier, or vice versa. The discursive and institutional power of the border is embedded in the everyday lives. The DMZ daily performs with discursive practices related to security, and demarcates and separates the association of identities as ‘us’ and ‘them’ in the Korean peninsula. The division reveals incomplete, contradictory, and “untidy” experience. Mark Salter illustrates that when we cross the border, we present “an always-incomplete story of identity and our passage” to the state authority.\textsuperscript{50} Border is a text and a context.

Border expresses itself through narratives: ‘border narratives.’ Sharon Pickering explains that how the “border is narrated” refers to “how we can understand everyday deployments of ideologies of state and migration,” and “how we routinely inscribe borders with the meaning that serve to reinforce particular border imaginations, especially the practices of border policing.”\textsuperscript{51} Law is one of the narratives through which a border expresses itself. This plays a critical role in constructing the relationship between borders and identities. The dissertation analyzes the association between borders and identity through legal narratives. Metaphoric boundaries fall into the scope of the dissertation. They are not simply located at frontiers but also placed in the symbolic and political spectrum to preserve dichotomous relations between the insider and the outer, within and without, and above and below.

\textsuperscript{50} \textit{Supra} note 42 at 66.
A border as a space also engages in power relations. A border interacts with society, and forms the boundaries of the space, which is socially and politically constructed. Chapter Three draws in a scholarly literature to argue that law, space, and society are interrelated. It is problematic to ignore “spatiality of social life and the politicized nature of space.”

Space is political and ideological. It is a product literally filled with ideologies. Henri Lefebvre suggests that space is not separable from ideology and politics. He states that “[s]pace is not a scientific object removed from ideology or politics; it has always been political and strategic.” Critical geographers have challenged the idea that space is an immutable and fixed place. Space has been shaped and molded from historical and natural element, but this has been a political process.

Border crossing, (re)locating and transferring destabilize and challenge existing power relations. Chapter Three deals with the relocation of the Capital in the Constitutional Court in South Korea. It finds the boundaries of capital cities, Pyongyang and Seoul, in the pre-modern and modern hierarchy between the nation’s capital and the hinterland in legal narratives, and analyzes the constitutionalization of the location of capital cities at the intersection between national identity and space. National history and custom is an instrument in legal narratives which produce and reproduce internal boundary of the Capital as a symbol of nation. The Kyŏngguk Taejŏn, the first legal code that was enacted in 1484 plays a significant role in the legal reasoning before the constitutional court in the contemporary society. The chapter suggests that the spatial relationship between identity and a capital city shapes norms in the past, present and future.

53 Henri Lefebvre, “Reflections on the Politics on Space” (1976) 8:2 Antipode at 43.
Chapter Four discusses the mythic boundaries between the private and public, and the inside and outside. The chapter travels a gate and a frontier where women’s bodies are bipolarized as pure or impure by the pollution ritual during the Chosŏn dynasty. It explores the principle between the inner and outer which was designed to avoid contact between men and women, and how the bipolarity is performed in the form of violence to pregnancy at the frontiers of North Korea. The spatial boundaries, which interplay with gender norms, are expanded to sovereignty’s border practices.

Borders are self-evidently articulated by the sovereign’s control and surveillance over “populations, territories, political economy, and belonging, and culture.”54 Mark Salter argues that the sovereign performs itself through “policies, actions and customs,” and it is the “‘stylized repetition of acts’ of sovereignty” borrowing Judith Butler’s notion that gender is “an identity instituted through a stylized repetition.”55 State control and surveillance are stretched to the frontier where the use of extra-legal forces is justified as an exception as well as the inside of the nation-state such as the Capital. Further, the dissertation reveals that the sovereign’s patriarchal gaze governs the performance of the border. It disciplines detained bodies at frontier, and leaves marks on the bodies through extra-legal torture. The frontier is the triangle of the sovereignty-discipline-government nexus and a crucial apparatus of security.56

Passi argues that the idea, ‘borders are everywhere,’ includes the border as a technique of surveillance and control. Laws, border guards, and gatekeepers reinforce the border and boundary by policing movements. This is not limited to national boundaries, but

54 Supra note 42.
includes internal borders as introduced in Chapter Two. Restricting the movement of persons and things within, into or out of a place reinforces the exclusion and inclusion of the space. The next section further discusses the relationship between borders and law as a technology.

1.4. Borders and Law as a Technology

Law is a bordering technology. “Law defines national borders; it delineates the consequences for the peoples within them.”\(^{57}\) This dissertation explores the relationship between law as a technology and borders. It considers internal borders as well as national borders, both of which are drawn by the technology of law and regulations.\(^{58}\) In modern society, population is the object of government and technologies are developed to police, manage and secure the population in the art of the government.\(^{59}\) A visa or a passport is the modern product to screen immigrants at the port of entry.\(^{60}\) Since World War I, these government regulations have been implemented, while in the nineteenth century they were applied only occasionally in the United States and Europe.\(^{61}\) From the beginning of the twentieth century, territories were “firmly and fully” divided up between states along the borderlines, and people began to carry passports and visas to travel.\(^{62}\)

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\(^{58}\) *Ibid* at 1.


\(^{61}\) Paul Minderhoud, “Regulation of Migration: Introduction,” *ibid.* at 8.

“[T]he technologization of borders” has increased to operate the border enforcement and management. US President George W. Bush signed a bill to build 1,800 watchtowers with high-tech sensors along the 5,000 miles of US border with Mexico and Canada. The current US-Mexico border is 3,200 kilometers (2,000 miles). Each watchtower will have cameras, which could zoom in on suspicious movements and send live video to border agents with computers. Bodily movement will be screened during the day and night. The technologies have been developed to capture movement with regulations. Border fences are symbols of a fear of unstoppable migration that threatens national securities of sovereign states.

Figure 3 The Chinese-Korean Border Fence along Yalu River in Dandong in China

(© 2006 Jeongyoung Lee, by permission)

66 Supra note 64.  
It is reported that China has set up barbed wire entanglements (with 2.5m of height and 20km of length) on the Chinese border side to prevent from having massive exodus from North Korea with a plan to establish a refugee camp in Dandung, a border city facing North Korea (Figure 3). In Figure 3, North Korean soldiers seen through the barbered wire are standing guard in Uiju-gun, Pyeonganbuk-do in North Korea, and Chinese soldiers have built the wire fence along narrow and shallow river in Dondong.

In Chapter Five, I review the East German Border Guard case, and compare the use of the firearm for border enforcement in North Korea to the East German case in terms of domestic laws and institutional practices such as the instructions for border guards. Legislation such as the Border Act in East Germany was designed to increase border control and surveillance. For example, it lays out in the Border Act that the firearms could be used to prevent flights in serious cases. The socialist states had limited travel abroad, while the Western European States weigh more the individual’s freedom to travel. It is the criminal law that applies to North Korean citizens without a travel permit, but the immigration law is triggered once they enter another country. Criminal law requires due process, but ‘illegal’ migrants are not entitled to the due process.

Law functions as one of the technologies, which draw borders and boundaries. The dissertation encounters ‘socialist’ internal borders, which are formulated in the North Korean context. Chapter Two reflects that internal borders are associated with the socialist scheme,

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and law acts as a means of the internal passport system under the centrally planned economy in North Korea. The system of residence registration is a technique of governmentality to police internal borders and put population migration under state surveillance. As shown in Figure 4, North Korean guards keep watch and control access at checkpoints. The signpost in the left photo refers to a checkpoint between two districts, *Geumcheon-gun* and *Pyeongsan-gun* in North Korea.

![Figure 4 Checkpoints on the Road in North Korea (September 7, 2006)](image)

(© 2006 Luke Hutchison, by permission)

Law is a technology not only to govern immigration but also to regulate emigration. It is required for citizens to have a state permit such as travel certificates and passports to leave the country in North Korea. Law criminalizes those who cross a border without state permits. The dissertation explores law as a mapping technique through the relationships between internal migration and administrative laws and between emigration and criminal law, and the intersection between international refugee law and international human rights law.
1.5. Law as Culture and Metaphor

Lawrence Rosen suggests in *Law as Culture: An Invitation* that “to consider law, one cannot fail to see it as part of culture.”[^71] After describing law in the cultural sphere,[^72] he explains that “even where specialization is intense, law does not exist in isolation. To understand how a culture is put together and operates, therefore, one cannot fail to consider law.”[^73] Sally Engle Merry also asserts “[l]aw is embedded in social structure and culture and cannot be understood in isolation.”[^74] Further, Naomi Mezey puts an emphasis on “law as culture” to elaborate that “law and culture are mutually constituted, and legal and cultural meanings are produced precisely at the intersection of the two domains, which are themselves only fictionally distinct.”[^75]

Law and culture are not separated. This dissertation positions law and practice as a cultural site where social relations are embedded, and the web of symbols and meanings in law are played out producing legal and cultural meanings with latent contradictions and inconsistencies. It employs the role of metaphor in law to read and interpret discursive and institutional border practices within or without legal boundaries. Metaphors are the critical mechanism by which one may hold together and unite diverse domains into “a manageable whole.”[^76] Rosen calls this role of metaphor as “a unifying agent.”[^77] Invoking the work of

[^74]: Sally Engle Merry, “Anthropology and the Study of Alternative Dispute Resolution” (1984: June) 34:2 Journal of Legal Education 277, 278.
[^76]: Law is one of the domains. Metaphors “connect what we think we know with what we are trying to grasp, and thus unite, under each potent symbol, those diverse domains that must seem to cohere if life is to be rendered comprehensible.” Lawrence Rosen, *supra* note 71 at 9.
[^77]: *Ibid.* at 10
Clifford Geertz who proposes envisaging “law as a species of social imagination,”\textsuperscript{78} Rosen argues that law as imagination offers to comprehend the world, and present “a window into the large culture.”\textsuperscript{79} The metaphor of family serves as “a unifying agent” to interpret the law and practices in North Korea.

This dissertation focuses on the role of the ‘socialist big family’ metaphor that is inscribed in law, and explores the relationship between the metaphor and border practices at frontiers. Naomi Mezey states that “law’s power is discursive and productive as well as coercive. Law participates in production of meanings within the shared semiotic system of a culture, but it is also a product of that culture and the practices that reproduce it.”\textsuperscript{80} In North Korea, law takes part in producing meanings of a ‘socialist big family’ as a metaphor of the nation/state, and the metaphor is reproduced in border practices with discursive, productive and coercive power of law. Family law is the site at an intersection between the private and public. The dissertation suggests that the metaphor of a ‘socialist big family’ is a critical mechanism of political power which employs gender in a way of policing boundaries of nation/state beyond the dichotomy between the private and public.\textsuperscript{81} In addition, Chapter Three engages in the fictional image of Pyongyang as a revolutionary and sacred place, and in the historical invention of Seoul as a capital city.

\begin{footnotes}
\footnotetext[78]{Clifford Geertz, \textit{Local Knowledge: Further Essays in Interpretative Anthropology} (United States of America: Basic Books, 1983) at 232.}
\footnotetext[79]{\textit{Supra} note 77 at 12.}
\footnotetext[80]{\textit{Supra} note 75 at 47.}
\footnotetext[81]{Gender relations in a family have been employed as an engine for the rapid industrial development in East Asian countries.}
\end{footnotes}
1.6. From Transnational Law to Transnational Justice

Transnational Law

Philip Jessup used the term transnational law in a series of lectures at Yale Law School in 1956. Jessup claims that transnational law “includes all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.”

Transnational law covers interactions between individuals, corporations, and other types of groups as players, which reflects that states are not only players in international law. As an example, Jessup considers a transnational situation in which a stateless person or a private citizen whose passport or travel document is in dispute at frontiers. He views that both domestic and international law would be part of transnational law as far as it has transcending effects.

Based on Jessup’s definition, David Szabolowski describes that while international law does not pierce national boundaries in a classical foundation, transnational law is “legal regimes which operate across national border or which regulate actions and events that transcend national borders.”

Transnational law often represents “law’s extension beyond the boundaries of nation-states.” Roger Cotterrell explains that it is frequently described as:

extensions of jurisdiction across nation-state boundaries so that people, corporation, public or private agencies, and organizations are addressed or

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82 Philip C. Jessup, Transnational Law I (New Haven, CT: Yale University Press, 1956) at 2
83 Ibid at 3.
84 Ibid.
87 Ibid. at 4.
88 Supra note 85 at 500.
directly affected by regulation originating outside the territorial jurisdiction of
the nation-state in which they are situated, or interpreted or validated by
authorities external to it.\textsuperscript{89}

It refers to the expanded jurisdiction beyond nation-state territories where the
regulations emanated from outside the nation-state have influences. For some scholars,
transnational law is disparate legal relations or a separate regime (or a legal field) from
national and international law so that regulations are not fully taken in nation-state laws or
international law.\textsuperscript{90} In other approaches it aims to be a universal or uniform ‘world law’
across territorial borders or be pluralist to the extent that different laws and multiple legal
systems are recognized.\textsuperscript{91}

From a methodological perspective, Peer Zumbansen proposes the term
“transnational legal pluralism” as a replacement of transnational law beyond Jessup’s idea
rather than framing it in a distinctive legal field.\textsuperscript{92} Transnational legal pluralism focuses on
“actors, norms and processes as the building blocks of a methodology of transnational law.”\textsuperscript{93}
Zumbansen argues that transnational law is intrinsically interdisciplinary because it questions:

the nature of legal regulation of problems, which have long been extending
beyond the confines of jurisdiction – both ‘inside’ and ‘outside’ of the nation
state – and which have always been at the heart of the socio-legal orientation of
the legal pluralist inquiry into the myriad context, forms and dynamics of norm
creation.\textsuperscript{94}

\textsuperscript{89} Ibid. at 501.
\textsuperscript{90} Ibid.
\textsuperscript{91} Ibid. at 501.
\textsuperscript{92} Peer Zumbansen, “Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal
\textsuperscript{93} Ibid. at 308.
Economy at 55; Craig M. Scott, “‘Transnational Law’ as Proto-Concept: Three Concepts” (2009) 10 Germa
Research in Law & Political Economy at 56.
Zumbansen analyzes transnational law as “a methodological project” through which we recognize that law and non-law as well as the national and the global are not divisible.\textsuperscript{95} It is necessary to invite the issues of the legal pluralism that have been inquired by the law and society scholarship. Legal pluralism addresses the “interactions and hierarchies among distinctive legal fields” in complicated situations, for example the relationship between law and custom.\textsuperscript{96} Transnational law engages in the relationships between the private and public, between law and non-laws, and between law and the state or society.\textsuperscript{97} It asks about “what is considered to be law.”\textsuperscript{98} Diverse sources of law are contested for the recognition in the boundaries between “hard and soft law, official and unofficial law, public and private norms.”\textsuperscript{99}

This dissertation understands that transnational law embraces domestic law and international law that transcend local and global borders, and the boundaries between law and non-law and the private and public, and so on, so long as they influence, regulate or interrupt people, things, or symbols that are not no longer confined to the nation-states. It reveals the tension embedded in dichotomies between the internal and international, law and non-laws, and the private and public. With a focus on crossing borders and boundaries, the dissertation addresses the issues of inseparability between internal and international, the public and private, the state and market, and the economic and politics in terms of governance and surveillance in the cases of North Korea, and touches upon the competition and

\textsuperscript{95} Zumbansen, \textit{ibid.} at 45.
\textsuperscript{96} Sally Engle Merry, “New Legal Realism and Ethnography of Transnational Law” (2006) 31:4 Law & Social Inquiry 975 at 976.
\textsuperscript{98} \textit{Ibid.} at 3.
\textsuperscript{99} \textit{Supra note} 92 at 308.
accommodation between law and non-laws (e.g. customary law) in the case of capital cities, and between different laws and legal systems in transitional justice. It inquires into the temporal, spatial and conceptual constructions of the boundaries between home and street, capital city and the rest, inside and frontier, and home and host country, and examines the interplay between law and practices and the dichotomies. My study on law and borders is situated in the scope of transnational law “as a way of questioning and re-constructing the project of law between places and spaces.”

In a response to transnationalism, Sally Engle Merry argues that new methodologies in new legal realism are called upon, which conducts “transnational and multi-sited ethnography research that tracks the flows of people, ideas, laws, and institutions across national boundaries and examines particular nodes and sites within the field of transnational circulation.” George E. Marcus introduces “tracking strategies” in the multi-sited spaces for ethnographic research by following the people, the thing, the metaphor, “the plot, story or allegory,” “the life or biography,” and the conflict. Although my research is not based on ethnography, I conducted transnational multi-sited research that tracks the borders and boundaries of people, laws, customs, ideologies, symbols, and bodies. The sites that I visited are the DMZ, checkpoints, capital cities, the Berlin Wall, detention centers, and a port of entry. By following legality and illegality of departure and arrival as different nodes, the dissertation interprets, examines, and analyzes emigration and immigration of North Koreans within the realm of criminal law, immigration law, and international law.

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100 Legal realism examines how law is practiced in daily life. *Supra* note 96 at 975.
Zumbansen explains that the notion of transnational law is potentially relevant to international human rights law, comparative constitutional law, commercial law, and administrative law at the global level, and so on. Transnational law fills up the distinctions between different regulatory regimes and encompasses border-crossing interactions of law and regulations. It addresses the points of contact in between criminal law and emigration, and refugee law and immigration, and administrative law and internal migration, and the intersection between international human rights law and international refugee law. Transnational law is at the point, which internal and international migrations intersect. For example, *hukou* is a “local citizenship” that sets up internal borders. This household registration permit gives the status of permanent resident and guarantees minimum welfare benefits, medical treatment, and education. The localized practices together with nationality law in China create stateless children born to a Chinese or Korean Chinese father and an undocumented Korean mother. This reveals how an internal border practice helps to construct a transnational law. I uses a term a transnational legal border to emphasize a border or boundary by which the subject is legally situated and bounded in transnational context. North Korean migrants have faced transnational legal borders including international law, domestic law (including criminal law and immigration and refugee law), and localized legal practices such as *hukou* in China. I suggest that transnational law is constructed at the intersections between national laws, between national and international law, and between laws and practices, and extend to cover interactions between agents

104 Supra note 97.
including individuals, organizations and officials who engage in the processes of legal interpretations and practices beyond national borders.

The refugee determination processes also produce the interactions between national laws, between international law and national law, or between interpretations and practices, and the transnational space invites agents from governmental, international non-governmental and international organizations. Chapter Seven investigates the impact of interactions between the Korean embassy and the Canada Immigration and Refugee Board for the Responses to Information Requests in order to clarify whether North Koreans are automatically awarded South Korean citizenship in the South Korean laws and practices, which was critical for interpretations of international refugee law in refugee determination processes in Canada. Chapter Six considers whether case law in the U.S. recognizes the existence of internal borders as a ground for persecution, and argues that punishment for illegal departure has to be understood as persecution, which falls under the scope of the refugee definition in international law.

**Interpretations of International Law at Frontiers**

Transnational law opens a door for alternative interpretations, and prevents state-centered approaches in international law. Because international law is founded on the framework of the nation-state it is difficult to penetrate national boundaries. For example, the Montevideo Convention on Rights and Duties of States of 1933 sets out the modern concept of statehood in international law. Article 1 of the Convention provides that “[t]he state as a person of international law should possess the following qualification: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into
relations with other States.”

Dianne Otto suggests that the supremacy of the modern-nation state overrules citizens’ prior relations with family, religion, or community because the definition does not include the notion of family, religion or community. Statehood in international law is based on a fiction of social-contract theory, and considers member states “autonomous, self-interested, sovereign units in a relationship of formal equality with each other.”

Hilary Charlesworth and Christine Chinkin explore how statehood in international law is constructed in the individualized and autonomous notion of ‘male’ paradigm. Feminist scholars in international law have raised questions about the terms of security, order, conflict, and state in international law, and insisted that these were the gendered and sexed concepts of international law. Also, they are concerned about the objectivity and impartiality of international law, and trigger feminist methodologies to contest existing norms of international law. One claim is that gender must be incorporated in the legal code that would reflect women’s experiences. The other claim is that existing legal concepts must be reinterpreted in gender sensitive ways to avoid reinforcing a binary category between male and female. For example, Audrey Macklin suggests to reinterpret a definition of refugee rather than the addition of gender to the Refugee Convention. She argues that the addition of gender will reduce “every persecution of women” into “persecution on grounds of gender” and disregard other grounds of persecution like political opinion.

109 Ibid. at 342.
feminist methodology in many disciplines have transformed “from simply adding women into existing schemes of knowledge into more fundamental reconstructions of the concepts, methods and theories of the disciplines.” This also challenges the boundaries of international law.

In Chapter Eight, I use gender as an interpretive category to explore the necessity for national security or public order according to the principle of proportionality. I attempt to reinterpret a definition of the rights to movement in the International Covenant on Civil and Political Rights (ICCPR), and reconstruct the concepts of “national security” and “public order” in article 12 of ICCPR in a gender-sensitive manner. For the interpretation of forced abortion and rape within the context of social order and national security, I investigate that women, who attempt to cross a national border without a permit, are considered as a threat to security and order. The impact of restrictions of movement on women in North Korea suggests another dimension of interpretation not previously considered. Transnational law encompasses gender-sensitive interpretations in international law to fend off the state-centered framework based on the individualized and autonomous ‘male’ model.

Transnational Justice

The dissertation takes a concept of transnational justice that is more comprehensive than the notion of human rights to emphasize interconnection and interrelation of the variety of contexts of justice across the borders and boundaries, which are constituted in the internal, national, and international level. Human rights are often limited to basic and

fundamental rights within the political and legal realm, while transnational justice considers historical, economic, and political justice more than legally established justice.\footnote{Ibid. at 15-16.} Human rights are a part of transnational justice.\footnote{Ibid. at 16.} For the notion of transnational justice, Rainer Forst addresses “a situation of multiple domination” in diverse local and global contexts.\footnote{Rainer Forst, “A Critical Theory of Transnational Justice,” 32: ½ Metaphilosophy (Oxford, UK: Blackwell Publisher Ltd, 2001) at 166.} For example, global structures or power relations could form or support domination and exploitation in the local context. “A concept of justice addresses such situations of multiple domination at various levels.”\footnote{Ibid.} Therefore, Forst argues that “the various contexts of justice – local, national, international, and global – are connected through the kind of injustice they produce, and a theory of justice must not remain blind to this interconnectedness.”\footnote{Ibid. at 167.}

This dissertation asserts that borders and boundaries operating at the micro as well as macro levels (re)produce injustice in the different contexts in the Korean peninsula and beyond. The division system in Korea is embedded in the institutional and discursive practices of ‘bordering,’ and it influences the everyday lives of people. Transnational laws police the borders and boundaries between the internal, national, and international, between the private and public, and between the Capital and the rest. Injustice is produced in the processes of ‘othering’ from the multiple layers of demarcation, separation, and disconnection. Separation and demarcation create a systematic order and classification,\footnote{Douglas, supra note at 35.} and the ‘danger’ (or pollution’) belief as a border guard polices the boundaries between us and them, and the inner and outer. The division system is (re)produced along the physical, political, and ideological DMZ; the symbolic divide between the inner and the outer
demarcates the female body on frontiers; the spatial boundaries between capital cities and the rest constructs “us” and “others” around the special heart of the nation; the conceptual and legal disconnection between internal and international migrations categorizes internally displaced persons and refugees, and citizens and non-citizens; and the limited categories of a refugee definition in the Refugee Convention produce “others” so that it requires re-interpretation of the definition to include gender-based persecution.

Russell King and Ronald Skeldon emphasize the importance of an integrated approach to internal and international migration. They argue that the difference between internal and international migration gets more and more obscure because of “multiple, complex and fragmented” journeys of migrants. In many cases, internal, international, and return migrations are combined. Nevertheless, internal migration is not considered in international law. An internally displaced person (IDP) is not entitled to refugee status and protection in international law. Moreover, domestic laws on illegal exit or internal passport regimes in socialist countries are often disregarded in refugee status determination processes. The right to seek asylum cannot be guaranteed without the right to leave one’s own country. As a result, an understanding of the manner in which internal borders limit and constrain the movement of people is essential, particularly in the case of North Korea, if the goal is to treat those who claim refugee status justly. This dissertation analyzes the restrictions of internal and international migration as well as the boundaries between South and North Korea.

Understanding the relationships between domestic and international legal regimes are also critical to understanding how borders operate to constrain people. The potential claim

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122 Ibid.
123 Ibid.
that North Koreans have to nationality in South Korea has been an important component in
determining the refugee status of North Koreans in the U.S. and Canada. As the dissertation
reveals in chapter 7, the interaction between a South Korean official from the Korean
embassy in Canada and the Immigration and Refugee Board (IRB) clarified the legal
relationship between the South Korean Constitution (article 3) and other related laws
regarding North Koreans’ nationality in South Korea, and this had a major impact on the
success of North Korean refugee claims in Canada. The North Korean Human Rights Act in
the U.S. also recognizes the issue of the South Korean nationality of North Koreans, and the
Board of Immigration Appeals has recently limited the claims of North Koreans who have
firmly resettled in South Korea. Thus, the relationships and interactions between legal
regimes are important elements to know how justice is (re)constructed in border regimes.

In addition, there have existed different normative orderings along the divided lines.
For example, International Covenants are also divided into Civil and Political Rights and
Economic, Social and Cultural Rights. The two documents were split as a result of the Cold
War. The socialist bloc put an emphasis on the economic and social rights, the positive
rights from the government, while the capitalist West prioritizes the civil and political rights,
which are negative rights against the government. The socialist legal system weighs state
interests against individuals’ rights while the liberal one is based on individuals’ rights.
Transitional justice in West and East Germany has recognized the difference between them
after unification. Nevertheless, civil and political rights and economic, social, and cultural

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<https://www.govtrack.us/congress/bills/108/hr4011#overview>; North Korean Human Rights Act of 2004,
125 Bertrand M. Patenaude, “Regional Perspectives on Human Rights: The USSR and Russia, Part One-The
USSR” (2012) Spice Digest, online: Standford University
<http://spice.stanford.edu/docs/regional_perspectives_on_human_rights_the_ussr_and_russia_part_one>.
rights are interrelated and indivisible. Daniel J Whelan discusses freedom of movement as an example of interdependence: “[F]reedom of movement (a civil right) is a necessary precondition for the exercise of other civil rights (such as freedom of assembly), political rights (e.g., the right to vote), economic rights (the right to work, for example) […]”\textsuperscript{126} A North Korean’s right to seek asylum and freedom of movement are placed in a different spectrum of rights and duties. Also, their rights to seek asylum are closely connected to the right to leave one’s own country, and reproductive rights are tied to mobility rights as addressed in Chapter Four and Five. Thus, it is important to recognize that the rights are ‘indivisible, interdependent and interrelated’ in transnational law.

Transnational law has policed the multiple layers of borders and boundaries, and produced diverse contexts of injustice in and beyond the Korean peninsula. One of the historical encounters of injustice was the division system between North and South Korea under the influence of the Cold War after an independence from Japan. But people, things, and values have moved around the country and crossed national borders. They challenge and destabilize the dichotomies, which are enacted, implemented, and enforced by transnational law and practices. For transnational justice it is critical to realize interconnectness, interdependence, and interrelationship between internal and international, private and public, center and frontier, and home and host country beyond the borders and boundaries of the Two Koreas. I argue that transnational law and practices have produced diverse situations of injustice as well as the processes of ‘othering,’ and reinforced the multiple layers of borders in and beyond the Korean peninsula. In order to understand “a situation of multiple domination” in transnational settings beyond two Koreas, it is critical to understand the

connections between border regimes, the relationships between legal regimes, and the interdependence of rights and duties. Without considering them, justice is incomplete in transnational law.

1.7. Research Method

The literature about North Korea has been limited since it closed its door to the outside world. The accessible sources include government publications and reports which are based on the testimonies of North Korean migrants. In summer 2009, when I visited in Seoul with the support from AKS Korean Studies Grant, I collected legal codes, books, and theses from the Information Center on North Korea under the Ministry of Unification and from libraries at Ewha Womans University. For a special collection of literature I was not allowed to check out or copy them at the Informational Center so I read them at the Center and transcribed certain passages. The central library at Ewha Womans University also has a small special collection. I could read them in a collection room and copy a limited number of pages with identification information. I also visited a library at the National Human Rights Commission of Korea, and downloaded their reports on human rights in North Korea from the website. I read books by South Korean scholars about laws and society including urban cities and architecture in North Korea, essays of the North Korean former detainees and prisoners, and the NGOs’ reports. I received newsletters and information about North Korea from Good Friends: Center for Peace, Human Rights and Refugee, by mail and email. Although most of the legal codes are available on the website of the Informational Center it took a long time to access the updated information. But when the Ninth Amendment to the Criminal Law of the Democratic People’s Republic of Korea was not accessible to the
public, an attorney at Kim and Chang in Seoul sent me his notes with specific provisions that showed the changes from 2005 to 2007 in September 2010.

Furthermore, I gathered articles from the electronic Korean databases, DBPIA and KISS, to which the Asian Library at the University of British Columbia (UBC) subscribes, and received North Korean articles from the National Assembly Library in South Korea with a librarian’s support at UBC. I downloaded reports and articles on the website of the Korea Institute for National Unification, which annually published the White Paper on North Korean Human Rights. In particular Kumsoon Lee’s publications at the institute were helpful in understanding the topics of border-crossings and freedom of movement, which are directly related to my research topic. In spring 2010 when I was an exchange student at Harvard University, a fellow from Germany, offered me sources and articles as well as advice regarding the East German Border Guard case.

I collected court decisions from Canada and the U.S. about illegal departure for refugee status. In addition, I visited the federal court registrar in Vancouver to gather legal documents and exhibits from a hearing for a North Korean case, *Kim v. Canada* (2010) F.C.J. 870. I used materials about the internal passport system in the former Soviet Union and China, while I stayed as a visiting researcher at the University of California Berkeley School of Law in 2012. I examined cases in the U.S. and Canada after taking and auditing immigration law in the U.S. and Canada.

I use and analyze the North Korean constitution, criminal law, railroad law, labor law, family law, and administrative punishment law. I relate legal codes and matters of enforcement to the social structure of North Korea. Testimonies, which were collected by the NGOs and research centers, and North Korean migrants’ essays are important sources for
my thesis. The reports represent and produce the reality of North Korea. I carefully weigh social and political contexts in North Korea with the testimonies. A feminist perspective is crucial to reading and interpreting the testimonies. For example, forced abortions in the North Korean detention centers are gender-based violations that occur as a result of crossing the national border without permits. I consider the testimonies from witnesses and victims as legitimate voices to explain gender relations and reveal the truth of punitive practices to reinforce the national border. In addition, I read literature regarding urban planning and laws in North Korea and the articles covering interrelation between space, law, and society, which provides an insight that law is relational and, law produces space.

McCune-Reischauer Romanization is used for transliterating Korean nouns, and I follow Romanization for transliterating the names of places and people.

1.8. Chapter Arrangement

The existing scholarly work has not paid attention to the connections between internal and international migration, and the construction of internal borders in the socialist system. Chapter Two, “The Internal Passport Regime in North Korea,” reveals how restrictions on internal migrations are constructed within the socialist framework of a centrally planned economy, and normalized by a registration system with identity certificates, labor, housing and land policies, and railroad law.

In Chapter Three, “The Nation’s Capital as a Constitutional Space: Seoul and Pyongyang,” I explore how the location of capital cities, Pyongyang and Seoul, has been (re)constructed and reinforced as constitutional space in a written or unwritten form, and
analyze how the capital spaces are filled with “invented traditions”

in legal and political narratives. The 2004 Constitutional Court decision of South Korea (2004Hun-Ma554, 566) holds that Seoul is a capital city in the Republic of Korea and the relocation of a capital is unconstitutional, while the North Korean Constitution expressly states that Pyongyang is the nation’s capital.

Chapter Four tracks the detained Chosŏn body by examining gendered punitive practices at frontiers, and uses the metaphoric relationship between the Inner (nae) and Outer (oe) in search for purity which interprets border practices. This Chapter explores the illegality of emigration in relation to the socialist big family. The nation is understood as “the socialist big family,” which has been built on a blood tie between the parent leader, the mother party, and the masses. When the nation is identified with the family it facilitates the construction of national loyalty.

The conduct of border crossing is read as a breach of a filial duty and loyalty to a unified family more than an individual’s violation of law. It also means to disobey the fatherly order. Tortured bodies and souls in detention camps are the marks of sovereign and patriarchal power. A technique that punishes women emigrants is associated with reproduction as a duty to the nation. Gender relations, which define women as reproducers of the nation, are reflected in emigration controls. This illegitimizes pregnancy outside a socialist big family and perceives the fetus of “illegitimate” conception as a contaminated part of a woman, an enemy of the nation and family. I analyze how the relationship between female detainee and fetus is perceived in the context of national security.

Chapter Five analyzes border control in North Korea. It includes an examination of the legal codes that define a right to leave and a right to life and its applicability to the use of firearms by North Korean border guards. I explore the social/political context that reinforces the illegality of unauthorized emigration. In the past, in East Germany, many of those who sought to flee to West Germany were killed by East German border guards. After the unification of Germany, the border guards and their superiors were convicted and sentenced to imprisonment for intentional homicide in the Regional Court. The Federal Supreme Court and the European Court of Human Rights upheld their conviction. I distinguish the practices in North Korea from the East German case in terms of the relationship between institutional instructions given to border guards and the domestic law. I analyze the connection between emigration and criminal law, in the context of national security, and the proportionality between the right to leave and the necessity of use of the firearms in the name of national security. While the dissertation uses the rationale of the proportionality as an analytical tool, it reveals the limits and conundrums of the proportionality in different societal contexts. Lastly, I draw on the legal norms of transitional and transnational justice from the East German case.

From Chapter Six the dissertation touches upon North Korean refugee claims in the U.S., and examines cases on illegal departure for refugee status for suggestions regarding North Korean refugee cases in the U.S. Existing scholarly work in South Korea suggests that refugee status should be given to North Koreans who flee to other countries but would be subject to punishment upon repatriation according to the North Korean criminal law and practices. Elim Chan and Andreas Schloenhardt argue that the sanctions on illegal departure under articles 47 and 117 of the North Korean Criminal Code satisfy a well-founded fear of
persecution based on an imputed political opinion, which meets the definition of refugee. They also consider illegal departure on a basis of refugee sur place. The literature supports that punishment toward North Korean returnees based on illegal departure may amount to persecution under international refugee law. But it has not shown how this argument is practiced for refugee claims in domestic contexts, and whether similar claims have been made in courts and if so, whether previous cases are applicable to North Korean asylum seekers. In this chapter, I analyze the cases in the United States, that considered illegal departure or exit from Cuba, China and Yugoslavia in determination of refugee status, and attempt to find a connection between restrictions on illegal departure and persecution for refugee status and apply the nexus to North Korean cases. I also look at how punishment for illegal departure amounts to persecution, which is one of the elements of refugee definition.

Chapter Seven discusses the relationship between surrogate protection in Canada and potential nationality in South Korea in the case of North Korean asylum seekers. In Canada, 175 North Koreans were admitted as refugees from 2000 to 2011. The total number is still low compared to the UK or Germany, but Canada is admitting increasing numbers of North Korean asylum seekers, from seven in 2008, to 66 in 2009. In the U.S., the number has decreased from 38 in 2008 to 18 in 2009. What brought this recent change about in Canada? How does the Immigration and Refugee Board in Canada (IRB) make increasingly favorable decisions about North Korean asylum seekers? Are they associated to South Korean laws and procedures regarding admissions of North Koreans? Or is it related to interpretation of a refugee definition in Canadian law or international law? What are the possibilities of having South Korean citizenship handled in case law or IRB decisions? This chapter explores what

factors in the refugee determination processes could lead to a rise in positive decisions for North Korean claimants, after offering detailed data on the changing number of North Korean refugees in Canada. It takes into account country information, legal interpretation in international law and Canadian law, case law in Canada, and South Korean laws and procedures.

In Chapter Eight, I focus on women’s rights to leave a country. International law allows restrictions on the right to freedom of movement, only when they “are necessary to protect national security, public order […].” Once these requirements are satisfied, the restrictions must be “consistent with the other rights recognized in the present covenant” according to article 12(3) of the International Covenant on Civil and Political Rights (ICCPR). The Human Rights Committee and Hurst Hannum interpret the principle of non-discrimination or equality as “the other rights recognized in the present covenant.”130 This principle applies to discrimination on the grounds of race, religion, gender, political opinion, and so on. In particular, the Human Rights Committee in General Comment No. 27 indicates that women are often kept away from freedom to move and to leave the country because they need men’s consent or escort.131 It also suggests that these measures amount to a violation of article 12 of the ICCPR.132

In this chapter, I also consider the principle of non-discrimination in relation to the restrictions on the rights to freedom of movement in North Korea and endeavor to find a nexus between the restrictions on women’s rights to freedom of movement and the grounds

132 Ibid.
for refugee status, “race, religion, nationality, membership in a particular social group, or political opinion,” as defined in the 1951 Convention relating to the Status of Refugees. I explore how discriminatory restrictions on the rights to freedom of movement can interplay with the definition of refugee in international law.

The dissertation unwraps the layers of territorial, legal, symbolic, and political borders in the exit and entry, and re-connects the legal relations within and between the borders of the Korean peninsula and beyond. Chapters Two, Three, and Four are about internal borders that are embedded, constructed, and reinforced by laws as a technology, metaphor, and ideology. Chapters Five and Six, and Chapters Four and Eight are involved in the relationship between the right to leave and refugee status. In response to unauthorized flight in North Korea in Chapter Five, Chapter Six examines whether punishment for illegal departure from North Korea constitute persecution to be eligible for refugee status. The re-interpretation of international law in Chapter Eight is associated with gender-based persecution on frontiers in Chapter Four. It concludes that discriminatory practices over women’s right to leave a country amount to persecution in the definition of refugee. Chapter Seven focuses on the actual refugee cases of North Koreans in Canada, and demonstrates that North Korean’s legal status in South Korea plays a pivotal role in the refugee determination process.

In practice, borders reluctantly respond to one another. It is not difficult to find that international borders are closed even when the national border treats border-crossers in discriminatory and inhumane ways. Only exceptional cases are admitted as refugees. Nevertheless, people, goods, culture, language, ideology, history and law engage in connecting borders and boundaries by breaching, crossing and (re)drawing them and
conversing beyond them, and contest the (re)production of borders and boundaries, which are often exclusionary and discriminatory. The transnational legal relations between and within borders are mutually exclusive as well as interconnected. The dissertation argues that daily border-crossings challenge and fracture the existing legal structure and practices in transnational context, and contribute to establishing transnational justice, although there exist multiple layers of fences and barriers at the entry and exit of the Korean peninsula and beyond.
2. Policing Internal Borders: “Internal Passport Regime” in North Korea

2.1. Introduction

Systems of residence registration have commonly existed in socialist countries, but the forms are different and the variations are a function of different historical contexts. It is a technique of governmentality to police internal borders and enable state surveillance over migrant populations. The dissertation explores socialist internal borders, which are formulated in North Korea. These borders are associated with the socialist scheme that has not received scholarly attention. *Propiska* in the former Soviet Union is translated into “registration” or “registration permit.” It literally means a seal affixed to the internal passport by the militia, and this seal guarantees a citizen’s legal entitlement to live within a certain administrative boundary. Mervyn Matthews uses the phrase “internal passport regime” to describe state control of internal migrations in Russia and the USSR. This internal passport regime was established by decree in December 27, 1932. Every resident over the age of sixteen in a town or an urban area was required to have “a civil passport,” and it was considered the only document for identification.

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136 Ibid at 27.
137 Ibid at 27; supra note 134 at 202.
138 Ibid at 27.
In China, the household registration system, *hukou* (戸口), was established in Chinese cities in 1951, and expanded to rural areas in 1955. It became a permanent system in 1958. Machael R. Dutton argues that *hukou* is a practice of surveillance over population based on personal files and records. Dutton suggests that *hukou* and *prospiska*, as techniques of governmentality, aimed to centralize national planning, and to facilitate the monitoring and control of the population.

There is no information about whether and to what degree North Korea adopted the system of internal passports from Soviet Union, but it is clear that the North Korea’s Constitution and early laws were drafted under the influence of the Soviet Union, and the judicial system of the Soviet Union became a model of the North Korean legal system. Chapter Five provides the legislative history of the North Korean Constitution under the influence of the 1936 Constitution of the Soviet Union during the trusteeship of the Soviet Union.

This chapter suggests that the system of residence registration in North Korea enabled the government to police internal borders and control migration within the state. I first provide the historical context of the family registration system in the Korean peninsula during the colonial period before Korea was independent of Japan. The chapter then explores the internal passport regime with identity cards in North Korea, and how the system is associated with a centralized economic plan, including food rations, housing, work, and

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139 In Chinese society, there was a traditional system of household registration called *baojia* (保甲). Michael Robert Dutton, *Policing and Punishment in China* (Cambridge; New York: Cambridge University Press, 1992) at 64.
residence. I argue that the North Korean state arranges and disciplines the population as ‘public’ people (Gongmin 公民, literally a citizen) in the workplace, as part of a socialist economic order that places mobility rights as a secondary priority to centralized economic planning.

2.2. The System of Registration as a Technique of ‘Governmentality’

**Governmentality**

Michel Foucault introduces Guillaume La Perriere’s definition that government is “the right disposition of things, arranged so as to lead to a convenient end.”

Government has to dispose things in a right manner to ensure that wealth is produced, that people have a means of subsistence, etc. He distinguishes government from sovereignty. The end of the good sovereign is “the common welfare and the salvation of all,” and these goals are accomplished when the subjects conform to the laws, fulfill their work, engage in the trade, and abide by the order, which holds to the divine laws of the sovereign or God. In the framework of sovereignty, the law is an essential instrument. Laws are employed as one of the tactics to dispose and arrange things in a certain way.

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143 Things refer to “men in their relations, their links, their imbrication with those other things which are wealth, resources, means of subsistence, the territory with its specific qualities, climate, irrigation, fertility, etc.; men in their relation to that other kind of things, customs, habits, ways of acting and thinking, etc.; lastly, men in their relation to that other kind of things, accidents and misfortunes such as famine, epidemic, death, etc.” Michel Foucault, “Governmentality” in Graham Burchell & Colin Gordon & Peter Miller, eds., *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991) at 93

144 Ibid. at 95.

145 Ibid. at 94.

146 Ibid. at 94-95.

147 Ibid. at 95.

148 Ibid. at 95.
The traditional instruments of sovereignty, such as law, decrees, and regulations, were not flexible enough, argued Foucault, to respond to the growth of population and wealth in the eighteenth century. Governments needed to adopt multiple tactics rather than simply relying on the law, and they turned to instruments of rule “outside of the juridical framework of sovereignty.” State government was no longer defined by the territory, but by the population with its volume and density. The population was constituted as the object of government with emergence of a new range of government technologies “to police, survey, and secure the welfare” of the population. Sovereign power did not disappear, but it was now accompanied by disciplinary power and by techniques of government that relied less on the law and more on managing people.

Foucault used “governmentality” to describe as an “art of government,” or “a mentality of government” about “how to think about governing.” It includes the way to govern people and the way people govern themselves through the “organized practices (mentalities, rationalities, and techniques).” Governmentality is also described as “[a]ny more or less calculated and rational activity, undertaken by a multiplicity of authorities and agencies, employing a variety of techniques and forms of knowledge […].”

Until the eighteenth century, the art of government was about governing the state as the head of a family runs his family, including taking care of the family and managing its affairs.

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149 Ibid. at 98.
150 Ibid. at 99.
151 Ibid. at 104.
152 Michel Foucault, “‘On Governmentality’” (Autumn 1979) 6 Ideology and Consciousness, at 5-21 [translated by R. Braidotti], cited in Michael R. Dutton, supra note 141 at 17, n. 33.
154 Ibid. at 16.
155 Foucault’s notion of governmentality further expanded to include disciplinary power – which works as social control through self-regulation – while sovereign power is mostly exercised through the judiciary and the executive. Supra note 143.
156 Supra note 153 at 11.
In the sixteenth century the art of government was established by introducing the government of family, called ‘economy,’ into the political realm. Foucault suggests that:

[t]o govern a state will therefore mean to apply economy to set up an economy at the level of the entire state, which means exercising towards its inhabitants, and the wealth and behavior of each and all, a form of surveillance and control as attentive as that of the head of a family over his household and his goods.

In the eighteenth century, the art of government based on the model of family could no longer manage the increasing population. Governments turned to statistics to quantify specific aspects of population, such as birth and death rates, and levels of disease, etc. The “family” became a unit of the population instead of the model of government. In doing so, it became an essential instrument in the art of government. The interests of government in a family as a household arise from its focus on individuals within the family. It legitimizes state intervention and management of family events, including births and deaths. Foucault’s discussion is often in conjunction with liberal governmentality, but there is a room for other forms of governmentality such as colonial, authoritarian or socialist governmentality. Before I investigate the nature of governmentality in North Korea, I provide a brief overview of socialist governmentality in China and the USSR, both of which have influenced developments in North Korea.

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157 Supra note 143 at 92.
158 Ibid. at 92.
159 Ibid. at 92.
160 Statistics “gradually reveal that population has its own regularities, its own rate of deaths and diseases, its cycles of scarcity, etc.; statistics shows also that the domain of population involves a range of intrinsic, aggregate effects, phenomena that are irreducible to those of the family, such as epidemics, endemic levels of mortality, ascending spirals of labour and wealth; lastly it shows that, through its shifts, customs, activities, etc., population has specific economic effects: statistics, by making it possible to quantify these specific phenomena of population, also show that this specificity is irreducible to the dimension of the family.” Ibid. at 99.
161 Ibid. at 100.
162 Ibid. at 94.
163 Ibid. at 94.
164 Mitchell Dean writes about authoritarian governmentality. Supra note 153.
‘Socialist’ Governmentality

**Propiska in Russia**

The socialist system of registration in Russia was ostensibly designed for the protection of laborers’ rights and “the socialist construction.”

Lenin instituted a “work book” as part of a break from a regime in Tzarist Russia, which restricted migration depending on class-based passports, and he described the role of the work book as follows:

> Every worker has a work-book. This book does not degrade him, although at present it is undoubtedly a document of capitalist wage-slavery, certifying that the workman belongs to some parasite. The Soviets will introduce work-books *for the rich* and *then* gradually for the whole population (in a peasant country work-books will probably not be needed for a long time for the overwhelming majority of the peasants). The work-book will cease to be the badge of the ‘common herd’, a document of the ‘lower’ orders, a certificate of wage-slavery. It will become a document certifying that in the new society there are not longer any ‘workmen’, nor, on the other hand, are there any longer men *who do not work*. [emphasis original]

In December 1917, registration was a minor part of a single decree to nationalize the banks, but in the following year, a new law brought in compulsory labour for the conscription of the bourgeoisie.

It would be integrated within a labour code that required “all able-bodied” citizens between the ages of 16 and 50 to have labour books. The intent of the work book and labour code was to enable a general labour policy based on “order, discipline and centralized planning.”

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165 Dutton, *supra* note 141 at 197.
166 V. I. Lenin, 26 *Collected Works* (Moscow: Progress Publishers, 1966) at 109-10, cited *ibid* at 196.
167 “General Principles of the Compulsory Labour” (Central Executive Committee, 31 October 1918), *The Origins of Forced Labor in the Soviet State*, at 63-64, cited in *ibid* at 197.
169 *Supra* note 141 at 197.
mining industries from leaving their work places without official authorizations in an attempt to reduce the high percentage of labour abandonment. In June, all residents of Petrograd and Moscow had work books and other cities were to follow. By 1919, the labour books had become a technique to discipline workers by affixing labour to a specific location and place for centralized planned production. Although compulsory labour was removed in 1921, labour discipline was tightened by the 1923 legislation for the establishment of the citizens’ identity certificate, and the 1925 legislation to set up the residency certificate. In December 1937, the decree of the Central Executive Committee of the Council of the People’s Commissars set up the passport system. Ann C. Helgeson describes the more elaborate passport system as follows:

The introduction of the system in 1933 was justified on the grounds of improving population statistics and ridding the towns of loafers and parasites. All urban residents were required to have a resident permit (propiska) stamped in their passports. A change of residence required a change of residence permits, and in this way some control was introduced into the “spontaneous” mass migration of the times. Penalties for living in urban areas without a propiska were stiff. Rural residents were not issued passports and could not get a permanent residence permit without a passport. Rural-urban migration was thus limited to organized forms under which peasants could get temporary residence permits.

The internal passport regime deeply influenced people’s daily lives in the Soviet Union, according to Mervyn Matthews, it became an apparatus for political, social and

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171 Ibid. at 198.
172 Ibid. at 198.
173 Ibid. at 199.
175 Ibid. at 47-8.
176 Supra note 135 at iv.
economic control. It operated by controlling the movement of people. Despite strong centralized control over internal migration, the number of people leaving for cities steadily increased after Stalin’s regime. Propiska was formally put to an end in 1991 when the Soviet Union fell, and the Russian Constitutional Court invalidated five attempts to revive of a form of propiska. In 1993 the Russian Constitution recognized the right to freedom of movement: “Everyone who is lawfully staying on the territory of the Russian Federation shall have the right to freedom of movement and choose [sic] the place to stay and residence” (article 27(1)).

Hukou in China

Machael R. Dutton explains hukou (戸口) as a technique of governmentality to police population that was built upon, but did not necessarily correspond to the baojia (保甲) system, the old register in China. Hukou is not a simple historical repetition of the old register, but a technique of governmentality to monitor population in modern society, while acknowledging that baojia is historical evidence of registration system. The difference lies in the construction of “the subject as a ‘collectivity’” in China, which is not same as a

177 Ibid. at 27.
181 Baojia was a household system during the imperial era but it was revived in 1911-1949. K. Sophia Woodman, supra note 105 at x.
182 Literally, hukou (戸口) means household and mouth (a word for measurement for persons. It is frequently used as a household registration system in short. Ibid. at x.
Dutton explains that the transformation brought about “the collective I” through the collective labour production process: “[t]hrough this form of collectivity in giving, the ‘we’ of the group affirmed each individual’s subjectivity.”

Dutton argues that the passage from baojia to hukou transformed a family-based patriarchal model into a system of population registration, “a register of work-based household,” in a centralized socialist economic planning. This transition from baojia to hukou did not mean that the state was no longer interested in the family. However, the family structure had changed corresponding to “the mode of production.” Family was reshaped as a work unit instead of being the ethical foundation. While governmentality in socialist China decentered “the ethical ordering of the family” as a governing model that reinforced both family and state in the past, it validated state intervention for welfare. It enabled a transformation from a family-based patriarchal model into a work-based population registration in a centralized socialist economic planning.

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185 *Supra* note 134 at 195; *Supra* note 134 at 189.
Internal Passport System in China and the Soviet Union

The purpose of the internal passport system in the Soviet Union is found in the Soviet passport statute of 1940: “strengthen the passport regime, public order and state security.”\(^{191}\) This statute expanded an existing passport regime to other parts of the territory.\(^{192}\) A 1974 Passport Statute was introduced with the following clause: “to promote the fulfillment of citizens’ duties before state and society, … ensure a proper count of population movement, and strengthen socialist law and order.”\(^ {193}\)

The 1932 Decree in the Soviet Union required a “civil passport,” an identity document, to include eight entries: “names, date and place of birth; nationality; social status; place of permanent residence and employment; names of certain dependents; and a listing of the documents on the basis of which the passport was issued.”\(^ {194}\) In the entry of nationality “Soviet ethnic group” was recorded, and the meanings of social status included “worker, employee, pensioner, student, dependent, etc.”\(^ {195}\) Moreover, article 4 of the 1974 statute made new entries such as marriage and divorce by registrars, military service, residence by “the militia or local village soviet,” alimony obligations, and blood type.\(^ {196}\) Passports were initially valid for three years, but in July 1935, the validity period of passports became five years while the persons who were subject to military service had one year of the period of validity.\(^ {197}\) In October, 1953, the period of validity changed according to ages: five years for

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\(^{191}\) Supra note 135 at 30.  
\(^{192}\) Ibid. at 30.  
\(^{193}\) Ibid. at 33.  
\(^{194}\) Ibid. at 27-28.  
\(^{195}\) Ibid. at 39-40 n 2.  
\(^{196}\) Ibid. at 44.  
\(^{197}\) Ibid. at 29.
the ages of 16 to 20 years, ten years for the ages of 20 to 40 years, and an indefinite period of time after then.\(^{198}\)

Criminalization of passport infringement followed. On July 1, 1934 the RSFSR\(^{199}\) Criminal Code contained a new provision (192-a) that imposed a sentence of up to six months’ hard labor for a secondary infringement of passport laws and up to two years’ hard labor for repetition of the offense.\(^{200}\) In the 1953 statute, a person who turned down registration had to leave the community within three days.\(^{201}\) Moscow had pursued its own strict regulations as had other big cities such as Leningrad and the republican capital cities in order to control population.\(^{202}\) In 1935, the Soviet Union adopted a transit permit system as part of the Master Plan of Moscow to maintain a population of five million.\(^{203}\) This Plan was not successful in keeping the population under control. In April 1958, the regulations allowed the Ministry of the Interior of the Russian Federation and Moscow City to seek and banish the people who “‘avoided socially useful work,’ whose behavior was ‘unworthy’, and who ‘infringed the rules of the socialist community.’”\(^{204}\) In 1971 the Soviet Union changed the ceiling of the population in Moscow to eight million.\(^{205}\) On June 25, 1964 and April 27, 1972 Moscow passed independent residence statutes to raise a barrier to enter the capital.\(^{206}\)

According to Mervyn Matthews, it is not known how many people were convicted of violating propiska regulations, but a provincial journal reveals “one million prosecutions a

\(^{198}\) *Ibid.* at 32.

\(^{199}\) It is short of the Russian Soviet Federative Socialist Republic (1917 -1991).

\(^{200}\) *Supra* note 135 at 29

\(^{201}\) *Ibid.* at 32.


\(^{204}\) The two important legislations were the Ukaz of the Presidium of the USSR Supreme Soviet of the 4th May, 1961 and the Decree of the Plenum of the USSR Supreme Soviet Court of the 12 September, 1991. *Supra* note 135 at 40 n. 13.


\(^{206}\) *Ibid.* at 32
year” as of 1988. He also says that Moscow had four hundred official records for minor violations in a militia station in the first half of 1990: loss of passport, failure to bring up to date photographs, and 119 cases in which people refused to leave as ordered. These infringements of propiska regulations were based on article 198 of the RSFSR Criminal Code which inscribed:

[m]alicious violation of passport rules in localities where special rules have been introduced for residence of propiska, if the infringement involved residence without a passport or propiska, or if the person concerned had already been twice subject to administrative fines – is punished by deprivation of freedom for up to one year, or corrective labour for the same period, or a fine of up to fifty roubles.

In the Soviet Union, the Ministry of Internal Affairs as part of a police department had authority over the registration system. Under the Ministry there existed the Chief of Administration of Places of Confinement that handled cases of criminal detention, and the militia that had policing power over the registration system. The militia was an institution having overall responsibility for the registration work. Where there was no militia station in rural areas, the local soviet managed the task. In China, the police department (gonganju) within the Ministry of Public Security (gonganbu) takes a charge of the household registration system, and has “the household registration police” in the local police

207 Ibid. at 47.
208 Ibid. at 47.
209 Ibid. at 47, n. 9.
212 Mervyn Matthews, supra note 135 at 66.
213 Ibid. at 66; Soviet refers to “council that was the primary unit of government in the Union of Soviet Socialist Republics and that officially performed both legislative and executive functions at the all-union, republic, province, city, district, and village levels,” Encyclopedia Britannica, “Soviet,” online: Encyclopedia Britannica Inc. <http://www.britannica.com/EBchecked/topic/557092/soviet>.
stations (paichusuo).\textsuperscript{214} Besides the registration work, the household registration police has played a role of policing and maintaining public order.\textsuperscript{215}

The Soviet Union had a dual procedure of de-registration (Vypiska) and registration (Prospiska).\textsuperscript{216} The de-registration slip required extremely detailed information.\textsuperscript{217} A transfer of hukou in China once required a permit both from the authorities in the former place of the hukou, and the authorities in a new place to which the hukou would be transferred.\textsuperscript{218} People could live and work only where their hukou was.\textsuperscript{219} Transfer of hukou was only allowed in the limited circumstances, for instance allocation of a job in another region, marriage, and family reunion.\textsuperscript{220} The 1958 regulations in China controlled movement as follows:

\[\text{[t]o move from a rural area to a city, one must hold an employment certificate from an urban employment department, or be enrolled in a university, or have been granted permission by the authorities of urban household registration in the place of designation, and must then apply to migrate by going through the out-migration formalities in the place of origin.}\textsuperscript{221}\]

It is most difficult for a person with an agricultural hukou to move to a city.\textsuperscript{222} The system has divided into agricultural and non-agricultural hukou. Instead, China has a policy of temporary registration, which allows people with hukou in a different region of origin to

\begin{thebibliography}{99}
\bibitem{214} Supra note 134 at 209; In Vietnam, the Ministry of Public Security (MPS) is responsible for strict household registration (ho khau), which has been loosened up. Austl., Commonwealth, Refugee Review Tribunal, \textit{RRT Research Response} [Country: Vietnam] (Research Response Number: VNM17306) (10 May 2005).
\bibitem{215} It was 1955 when China began to have the household registration police. Dutton, \textit{ibid} at 209.
\bibitem{216} Supra note 135 at 60-61.
\bibitem{217} \textit{Ibid}. at 60.
\bibitem{218} Delia Davin, \textit{Internal Migration in Contemporary China} (New York: St. Martin’s Press, 1999) at 5.
\bibitem{219} \textit{Ibid}. at 5.
\bibitem{220} \textit{Ibid}.
\bibitem{222} \textit{Ibid}. at 6.
\end{thebibliography}
stay and work in urban areas; these temporary migrants are called the “floating population.” However, they are not as fully entitled to the legal status as an urban *hukou* is. They have poor access to education, medical services, and housing. It is particularly difficult to move to Beijing, Shanghai, and the other big cities. This has formed “a spatial hierarchy” in China. Delia Davin explains that “[t]he *hukou* came to be a both a marker and a source of social status.”

The information above provides how the socialist art of government was historically developed in the Soviet Union and China, how the internal passport system worked with a purpose of security and how the system ended up with problems such as restrictions on internal migration and spatial hierarchy. This gives a hint of how the socialist system of internal passports is operated in North Korea. The chapter turns to the historical contexts from the colonial governmentality to socialist grovenmentality in the Korean Peninsula before I explore the North Korean system.

### 2.3. From Colonial Governmentality to Socialist Governmentality

**Colonial Governmentality in the Korean Peninsula**

In his analysis of China, Michael R. Dutton emphasizes that the prior household registration system, *baojia*, had undergone a transformation into the *hukou* (戸口) system. Similarly, in the Korean peninsula the *Chosŏn* dynasty (1392-1910) maintained a registration

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228 *Supra* note 134 at 190.
system that influenced the one which followed. In Chosŏn Korea there was household (hogu 户口) census, “hojok (戸籍 literally a house document)” system, along with land survey mainly for taxation.229 Jeong-Seon Lee explains that the system was created to keep records and store information in an association with “the bureaucratisation of government” that Confucianism recommended.230

The Chosŏn dynasty used hojok, the register, in accordance with “the principle of household survey” to accumulate taxation.231 It enacted the so-called “the principle of household survey (hoguchosa gyuch’ik)” in 1896, which was designed to collect accurate information on each household (戸) such as its occupants in a house.232 Chulwoo Lee suggests that its operation was not as extensive as it was planned. The survey was often omitted or could not keep track of change in household,233 and it also caused a problem of collecting taxation.234 During the Chosŏn period, bureaucratic control over population was not as tight as it would be under Japanese colonial rule.235 In 1906, the total of population was 5.8 million in the Chosŏn Korea as a result of the principle of household survey.236 But Japan’s temporary survey established a population of 9.9 million in 1906-07, and the

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229 Jeong-Seon Lee, “한국 근대 ‘戸籍制度’의 변천: ‘民籍法’의 법제적 특징을 중심으로” [The Transition of the Family Registry System in Modern Korea], 55 韓國史論 at 279.
231 Supra note 229 at 283.
232 Ibid. at 283; Ibid. at 285.
234 Chulwoo Lee, supra note 230 at 395
235 Ibid.
*minjŏksilsa*, a countrywide household survey found that it was 13 million in 1909-10. In 1944, Japan counted 25 million in its final survey of the population.

In 1908, the Japanese resident-general of Korea (*chosŏn t’onggambu*) gave the task of surveying the population to the police when he realized that “the principle of household survey” did not reflect the reality. The Police Affairs Division (*kyŏngmuguk*) in the Japanese resident-general of Korea set up the Department of Census Register (*minjŏkkwa*) where mostly Japanese worked in charge of household census. *Minjŏ* (民籍) literally means the people’s document. In 1909, *Minjŏkpŏp* (民籍法), the Law of Census Register, was enacted a year before the Japan-Korea Annexation Treaty, and “the principle of household survey” was abolished. Under the *Minjŏkpŏp* the permanent residence (*ponjŏk* 本籍) was registered under the name of a family rather than a household. *Ponjŏk* refers to an ancestor’s permanent home for successive generation. For example, under the household survey, parents and children were recorded in a separate *hojŏk*, if they did not live together. But, in accordance with *minjŏkpŏp*, they were registered on the same page of a family register. This was the main difference between the principle of household survey and *minjŏkpŏp*. *Minjŏkpŏp* included new components for registration such as marriage, divorce, and adoption, the founding of a family and the establishment of a branch family.

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238 Chulwoo Lee and Ho Taeg Lee, “한인의 분류, 경계 확정 및 소속 판정의 정치와 행정,” 민족 공동체의 현실과 전망: 분단, 디아스포라, 정체성의 사회사 (2009) at 173. online: <http://tongil.snu.ac.kr/pdf/090910/11%20한인의%20분류,%20경계%20확정%20및%20소속%20판정의%20정치와%20행정-%E9%85%A8%E0%B0%9F%E9%9F%B3%E9%9F%B3.pdf>.

239 Jeong-Seon Lee, * supra* note 229 at 297.


244 *Ibid.* at 291.
Minjŏkpŏp was centered on an abstract notion of a family (家), and therefore allowed a separation between an actual residence and a family’s permanent residence (ponjŏk) as the family (ie) register was in Japan.\(^{245}\) In fact, ponjŏk and address were not divided.\(^{246}\) The household registration system in Japan disconnected address from ponjŏk.\(^{247}\) There was no system to report a change of address until 1913 when the Principle of Lodging and Residence (宿泊及居住規則), enacted in 1911, finally applied to Koreans.

The Decree of Chosŏn Temporary Residence (Chosŏn’Giryuryŏng 朝鮮寄留令), enacted on October 15, 1942, was designed to gather information on people’s movement.\(^{248}\) Information on temporary residence (kiryu) shall be entered it by a report or an official authority in the Register of Kiryu (article 1(2)). Kiryuja refers to temporary residents.

Article 1 (1) of Chosŏn’Giryuryŏng defines kiryuja as a person who chooses address and residence in order to dwell in a place other than permanent domicile (ponjŏk) for longer than 90 days. A person who did not have permanent domicile or clear permanent domicile, or a person who did not have Japanese nationality was equivalent to kiryuja.

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\(^{246}\) Jeong-Seon Lee, supra note 229 at 298.

\(^{247}\) Ibid. at 297.

The Decree of Chosŏn Temporary Residence included information on actual residence while minjŏkpŏp was the family registration system following the paternalistic lineage. Minjŏkpŏp was abolished and replaced by the Decree of Chosŏn hojŏk (Chosŏn hojŏngnyŏng) on December 18, 1922. Hyunah Yang points out that the family register system became more modern and efficient with detailed rules in the Decree of Chosŏn hojŏk. She further argues that the family system of patrilineality connected between the Emperor in Japan and the colonial population in Korea, and acts as “an apparatus for ruling and surveillance through the family register.” A household register together with the land

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249 National Archives of Korea, 조선총독부 기록물, online: <http://theme.archives.go.kr/next/government/viewGovernmentArchives.do?id=0001564763#설명>.
250 Minjŏkpŏp was repealed on December 18, 1923 by Chosŏn hojŏngnyŏng. online: Ministry of Government Legislation <http://www.law.go.kr/LSW/LsInfoP.do?lsiSeq=65165#0000>.
252 Yang, supra note 245 at 53.
survey were permanently settled and constantly updated, and it was compulsory that every household report to the authority deaths, births, and marriage.\textsuperscript{253}

The modern art of government is closely connected to the colonial rule (1910-1945) in the Korean peninsula. Chulwoo Lee links the establishment of the population survey under the colonial rule to Foucault’s notion ‘governmentality.’

The Japanese term for population censuses was ‘surveys of national strength’ (\textit{kokysei chosa}), which implies the constitution of the population as the ultimate target of government and a conception that demography, territory, and material resources are to be observed, accounted for, and acted on as a totality, the phenomenon that Foucault terms ‘governmentality.’\textsuperscript{254}

Lee emphasizes that the colonial population was disciplined through schools, factories, and hospitals under “systematic behavior control, close surveillance, instruction informed by professional knowledge, and complex arrangements of observation and registration.”\textsuperscript{255} During the colonial period, the record of population was re-arranged according to the blood lineage of family and supplemented with by the registration system that tracks change of address. Through these registration systems, the colonial apparatus of security enabled surveillance over the colonial subject in a daily basis in the Korean peninsula.

\textsuperscript{253} The first land survey was “the Cadastral Survey of 1912-18.” Chulwoo Lee, \textit{supra} note 233 at 38.

\textsuperscript{254} \textit{Ibid.} at 38.

\textsuperscript{255} \textit{Ibid.} at 13.
Internal Passport in Socialist Chosŏn

After independence from Japan, North Korea removed the system of family registration including the old register (hojŏk) while South Korea maintained the head-of-family (hoju) registration system which was invented by Japan, together with hojŏk, until 2008 after the Constitutional Court made a decision that the hoju system is incompatible with the Constitution. Nevertheless, it is important to note that the police force is responsible for the registration in both colonial Korea and North Korea. For example, article 1 of Minjŏkpŏp, the Law of Census Register, states that the police station shall keep the Register of Minjŏk. Similarly, article 4 of the Act of Gongmin Registration lays out that Gongmin is required to file an application form of registration with an institution of the People’s Safety. Charles Armstrong argues that although the Japanese security structure in colonial Korea was apparently eliminated, it was replaced in North Korea by a similar organization that mimicked the techniques of social control in colonial Korea. Similarly, duties of the police to guide and correct people were almost identical under colonial and post-colonial regimes.

North Korea established ‘socialist’ governmentality that enabled the state to screen internal migration in the scheme of centrally planned economy, and made a ‘new’ resident registration system with an identity certificate. The internal passport regime is deeply associated with the work-based structure in the socialist economic frame. Just as hukou is based on the work unit, the construction of an internal passport regime in North Korea is

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256 Chosŏn (朝鮮) is short for North Korea’s official name, Chosŏnminjujuŭinmin’gongwaguk (朝鮮民主主義人民共和國).
257 Yongwoo Lee, “민적 (民籍)에 읽힌 사연들” (May 16, 2011), online: 외동읍사투리 daum café <http://cafe.daum.net/woedonginseoul/58XT/188?docid=DdfF58XT18820110510002702>..
258 Charles Armstrong, supra note 142 at 698.
259 Ibid. at 710.
centered around production building on a work unit. This system provides a basis for “state-based welfarist intervention,” including food rations, housing, and jobs. Family is still an important segment as a social and political unit that nurtures “the material and spiritual civilization of socialism.” As a technique of governmentality, the internal passport system enables a degree of surveillance that enables the government to run the programmes from labour policies to migration policies under a centrally planned economy. The internal passport system plays a role of policing and surveillance as an apparatus of security.

2.4. Registration, Management and the Certificate of Identity in North Korea

Gongmin (公 people) refers to a person who has a nationality with rights and duties according to the Socialist Constitution. It literally means ‘public’ people and translates to citizen. The Nationality Law defines Gongmin as Chosön people and their children, who possessed a Chosön nationality before establishment of the Democratic People’s Republic of Korea (the DPRK), and had not abandoned the nationality (article 2(1)), and Gongmin from other countries or stateless persons who acquired nationality of the DPRK. A certificate of Gongmin is proof of being a Gongmin. The official identity documents are regulated under the Act of Gongmin Registration and the Act of Capital Pyongyang Management.

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260 Dutton, supra note 190 at 192.
261 Jingrao, supra note 187.
262 Myeong-bong Jang, 조선민주주의인민공화국 법전(대중용): 조선법전 법률용어 풀이 (Seoul: Daehoon.com Press, 2005) at 41 [translated by author].
264 Supra note 262 at 91.
265 The Act of Gongmin Registration of the Democratic People’s Republic of Korea, adopted 26 Nov. 1997 (Juche 86) by the Supreme People’s Assembly, amended twice (last amended 24 Jul. 2000), online: Information
The Purpose of the Act

The Act of *Gongmin* Registration regulates administrative procedures and methods for *Gongmin* to register information of birth, residence, and de-registration. Article 1 describes the Act’s objective:

The Act of *Gongmin* Registration of the Democratic People’s Republic of Korea promotes protection of *Gongmin*’s rights and interests by establishing a strict system and order in complete control of registration.  

The Act of *Gongmin* Registration was adopted by the *Decision (Kyŏlchŏng)* of the Standing Committee of the Supreme People’s Assembly on November 26, 1997 (*Juche* 86). The Act was last amended on July 24, 2000. On November 19, 1998 the Act was amended and supplemented in the legislative mode of the *Decree* (No. 1676) by the Presidium of the Supreme People’s Assembly.

When the Act of *Gongmin* Registration was enacted in 1997, laws were adopted and amended solely by the *Decision* of the Presidium of the Supreme People’s Assembly. The Presidium of the Supreme People’s Assembly had not been able to issue the *Decree* since the 1972 Constitution gave the authority to issue the *Decree* to the Central People’s...
Committee. On September 5, 1998 when the Socialist Constitution was amended, the Central People’s Committee was abolished, and the Presidium of the Supreme People’s Assembly resumed its authority to issue the Decree because it regained the position it held in the 1948 People’s Democracy Constitution.

Decision (Kyŏlchŏng), Decree (Chŏngnyŏng), and Ordinance (Pŏmnyŏng) are different kinds of legislative forms. In general, Wook Yoo explains that the Ordinance and the Decree are used as a legislative mode when “law” is adopted, while the Decision is a way to amend regulations (Kyujŏng) by the Presidium of the Supreme People’s Assembly or the Cabinet.

The Certificate of Gongmin

Although the Act of Gongmin Registration has recently been made, the origin of a registration status dates back to 1946. In 1946, the North Chosun Provisional People’s
Committee enacted the Decision of the Certificate of Gongmin (No. 57).\textsuperscript{275} The Decision states that a person who resides in North Korea and is older than 18 years shall be awarded the Certificate of Gongmin; persons younger than 18 years of age shall be recorded in the Gongmin Certificate of his or her parents or guardian.\textsuperscript{276} The Gongmin’s Certificate in the Figure 6 was issued on December 11, 1948, and expired on December 10, 1953.

![The Certificate of Gongmin in 1948](© 2010 Chang-hyeon Jung, by permission)

The People’s Assemblies in provinces (do, 도, 道), cities (si, 시, 市), and counties (gun, 군, 郡) were in charge of this registration.\textsuperscript{278} The red seal on the right page in the Figure 6 indicates that it was issued by the Interior Department of the Pyongyang Special

\textsuperscript{275} Ibid. at 362.  
\textsuperscript{276} Ibid. at 44.  
\textsuperscript{278} The People’s Assemblies in provinces, cities and counties focused on Gongmin registrations, while the judicial institution was responsible for administrative affairs on hojeok. In 1947, all the administrative affairs of hojeok were transferred to the People’s Committee in provinces and cities. Ibid. at at 362- 363.  

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City. In 1955, the Regulation of the Registration of Gongmin’s Status was enacted by No. 28 of the Cabinet Decision.\textsuperscript{279}

Currently, the Act of Gongmin Registration stipulates the procedures for registering birth, residence and moving (article 2).\textsuperscript{280} This registration system makes it possible to screen population movement. In order to acquire an identity document, Gongmin submit an application form for the Certificate of Gongmin and the Pyongyang Citizen’s Certificate within fifteen days of the date when they turn 17 years of age to an institution for People’s Safety where Gongmin resides (article 10). Within fifteen days of receipt, the institution of People’s Safety are required to issue a birth certificate, the Certificate of Gongmin, and the Pyongyang Citizen’s Certificate (article 11).

\begin{verbatim}
Name
Sex Male
Ethnicity Chōsun people
Date of Birth 1965 Jan. 7
Place of Birth Pyongyang

The Democratic People’s Republic of Korea
Year (1984), Month, Day

Old Certificate of Gongmin
(The Photo on the Top in the Figure 7)

New Certificate of Gongmin
(The Photo on the Bottom in the Figure 7)
\end{verbatim}

\textsuperscript{279} Supra note at 274 at 363.
\textsuperscript{280} According to article 9, “[t]he birth shall be registered within fifteen days of the date of birth. For this occasion, application form of birth registration shall be submitted to agency of people’s safety. In the registration form for the birth certificate, name, sex, date and place of birth, place of residence, ethnicity, and such other information shall be entered.” Supra note 265.
Article 10 states that Certificates of Gongmin, Pyongyang citizenship and a birth certificate require one to enter name, sex, date and place of birth, place of residence, ethnicity, and such other information in the registration form. In 1999, the Certificate of Gongmin was changed from a pocket notebook to a plastic card shown in Figure 7. The Certificate of Gongmin includes information such as names, sex, ethnicity, and date and place of birth. The person concerned wrote “Chŏsun people” in the entry of ethnicity. The red stamp at the bottom of the certificate is the seal of the People’s Safety Ministry.

In 2005, the North Korean government re-issued the Certificate of *Gongmin*, and in 2011 it was reported that the government was replacing the certificates again in order to add information about employment and to computerize the system.

**The Pyongyang Citizen’s Certificate**

Residents in Pyongyang have been awarded the Pyongyang citizen’s certificate instead of the Certificate of *Gongmin* since 1997. The movement of population in and out of Pyongyang is strictly controlled. The Act of Capital Pyongyang Management (the CPM) suggests that the city government should manage the population of Pyongyang. Through this registration system people in Pyongyang are given a resident status. Residents over 17 years old in Pyongyang are given a certificate of Pyongyang citizenship (article 30 of the CPM; article 7 of the Act of *Gongmin Registration*). A *Gongmin*, who wants to live in Pyongyang, has to register as a resident (article 28 of the CPM).

The Act of *Gongmin Registration* (article 10, article 11, article 12, and article 13) is applied to the procedure to be a citizen in Pyongyang. Name, sex, date and place of birth, place of residence, ethnicity, and such other information shall be entered in the registration.

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285 Supra note 265.

286 Article 28 continues to state that the Cabinet decides on procedures and methods of the registration of residence. *Ibid.*
form (article 10 of the CPM). Upon review the institution of People’s Safety has to issue the Pyongyang Citizen’s Certificate within fifteen days of receipt (article 11 of the CPM).

2.5. The System of Registration: A Residence Permit

*Gongmin* is obligated to register his or her residence at an institution of People’s Safety in the place of residence (article 4 of the Act of *Gongmin* Registration). In case of living abroad, a diplomatic agency is in charge of the registration work (article 3). The application form for registration has to be filled with information such as name, sex, date and place of birth, and place of residence (article 4).

The People’s Safety Ministry (*Inminboansŏng*)\(^{287}\) is responsible for the *Gongmin*’s registration in addition to the resident registration according to article 18:

The People’s Safety Ministry undertakes unified instructions for the *Gongmin* registration task. The People’s Safety Ministry sets the instructional system straight and instructs normally the *Gongmin* registration task in complete control.\(^{288}\)

In the name of the People’s Safety Ministry, an institution of People’s Safety where *Gongmin* resides issues a birth certificate, the Certificate of *Gongmin*, and the Pyongyang Citizen’s Certificate (article 8).\(^{289}\) The role of these registration authorities in North Korea including the Soviet Union, Vietnam and China is associated with policing citizens in the name of maintenance of public order and security, and screening people’s movement.

\(^{287}\) The name of the People’s Safety Ministry has been changed to the People’s Safety Agency since 2010. Kyu Chang Lee, “The People’s Safety Enforcement Law (Formerly the Social Safety Enforcement Law) and Stronger Control of North Korean Citizens,” No. CO 11-31, Korea Institute for National Unification (15 November 2011) at 1 online: KINU <http://www.kinu.or.kr/2011/1115/co11-31.pdf>.

\(^{288}\) The Act of *Gongmin* Registration, *supra* note 265.

\(^{289}\) The People’s Safety Ministry (*Inminboansŏng*) is the current People’s Safety Agency (*Inminboanbu*).
The administrative divisions in North Korea are organized into one directly governed city (chikhalsi), which is Pyongyang, and two special cities (t'ūkyōlsī), Rasŏn (Rajin-Sŏnbong) and Nampo. In addition, there are nine provinces: Gangwon-do, Yanggang-do, Jagang-do, Pyeongannam-do, Pyeonganbuk-do, Hwanghaenam-do, Hwanghaebuk-do, Hamgyeongnam-do, Hamgyeongbuk-do, and three special administrative regions: Gaeseong, Geumgangsan, and Sinuiju. Each province (do) and city (si) has a resident registration office as a division in the Provincial Bureau of People’s Safety (Toboan’guk) and the City Bureau of People’s Safety (Siboansŏ). There is a central Resident Registration Bureau within the People’s Safety Ministry.

Gongmin are required to file an application form of registration with an institution of the People’s Safety (article 4). In dong (동), the smallest unit of a city in the administrative divisions, and ri (리), the smallest unit of a country and an agricultural work unit, a police station (punjuso) is where people submit applications for registration.

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290 According to the Ministry of Unification in South Korea, Administrative divisions were lastly re-organized in 2011. “北, 김정일 금고 38호실 부활...평양 축소 (종합2보)” Yonhap News (February 14 2011), online: Yonhap News Agency <http://www.yonhapnews.co.kr/bulletin/2011/02/14/0200000000AKR20110214158500043.HTML>.

291 Information Centre on North Korea explains that there has been a discrepancy between sources, which cause confusion, because North Korea has not officially announced the administrative divisions. In 1945 when Korea was independent of Japan, there were six provinces, nine si and 89 gun, and 810 eup·myoen. In September 1946 Pyongyang si was separated from Pyeongannam-do, and became a special cities (T’ūkyōlsī). In December 1952 it was reorganized into a directly governed city (Chikhalsi). The Ministry of Unification identified in 2009 that there were two Chikhalsi (Pyongyang and Rasŏn), nine provinces, 25 si and 147 provinces. Information Centre on North Korea, “북한개요 책자: 나. 행정구역” (2009), online: Information Centre on North Korea <http://unibook.unikorea.go.kr/?sub_num=51&recom=1&ord=2009&state=view&idx=70>; Information Centre on North Korea, “온라인 문의: 북한의 행정구역에 대해서 문의드립니다” (2009) online: Information Centre on North Korea <http://unibook.unikorea.go.kr/?cate=1&sub_num=57&pageNo=7&state=view&idx=4238>.

292 Inae Hyun, supra note 284 at 19.

293 According to article 115 of the 1948 Constitution Myoen and Ri were the local sovereign authority with people’s committee, but they were removed in article 115 of the 1972 Constitution. It is viewed that they lost local sovereignty without People’s Committee, and remained as an organization of administration and production. Ri functions as a production unit rather than an administrative unit. The head chair of the People’s Committee was changed from an elected post to an appointed one, which strengthens control over the local.
Punjuso in dong and ri is at the lowest level of the Agency of the People’s Safety.294 A lieutenant commander (Sojwa)295 or a lieutenant colonel (Chungjiwa) becomes the head of the police station, and in general the police station consists of ten or twenty agents (Tamdang Chidowón). A police station has a registrar of status in charge of registration.

The Act requires Gongmin to register in his or her place of residence.296 Administrative or criminal liability shall be imposed on a governmental agency, a state-owned enterprise, a worker in charge, and an individual Gongmin who leads to grave consequences to the Gongmin registration system according to the seriousness of circumstances. (article 19). Gongmin shall take care of a birth certificate, a certificate of Gongmin, and a certificate of Pyongyang citizenship in a cautious manner (Chŏngi),297 and shall not lose and damage them (article 12). They are not transferrable. Upon registration of the status in a certain area, an individual has access to food, housing, education, job, and health service.298


295 Sojwa is one of the lowest ranks in the North Korean military. Sojwa has two dictionary meanings as follows. First, it had referred to a lieutenant commander in Japan until the WWI. Second, Sojwa is one of the titles in the North Korean military ranks. “북한의 소좌계급은 어떤 직책인가?,” Nate Jisik, online: Nate <http://ask.nate.com/qna/view.html?q=10415950>; “북한군의 계급체계,” Parkmungak, online: Naver Encyclopedia <http://terms.naverg.com/entry.nhn?cid=505&docId=68714&categoriId=505>.

296 The Act of Gongmin Registration, adopted 26 Nov. 1998 (Juche 86) by the Supreme People’s Assembly, amended two times (last amended 24 Jul. 2000) [translated by author].


298 Kumsoon Lee, 북한주민의 거주·이동 실태 및 변화전망 (Seoul: Korea Institute for National Unification, 2007).
**Transfer of Residence: De-registration and Re-registration**

Transfer of residence requires people to undergo the complex administrative processes of moving in and out of each local authority. Article 14 of the Act of *Gongmin* Registration requires that *Gongmin* who desire to move residence to another region shall register the transfer in the former place of residence and the place of destination respectively. Both “de-registration” at the place of current residence and registration at the new place of residence are required.²⁹⁹ Helen-Louise Hunter argues that Kim Il-sung brought in the controlling instrument from the Soviet Union, which was used there to restrict the size of the population in Moscow.³⁰⁰

According to article 14 of the Act, name, sex, the date and place of birth, the place of residence, the place of destination, and such other information shall be entered in the de-registration form. Also, the person who has de-registered for leaving one’s place has to complete re-registration of residence within fifteen days of the registration date for leaving (article 15). Chol-hwan Kang suggests that if re-registration of residence does not take place within fifteen days, the person concerned can be subject to intensive surveillance and tracking of the People’s Safety Ministry or the National Security Agency (*Bowibu*).³⁰¹

Ilsu Kim,³⁰² and North Korean defectors, Heunggwang Kim and Chol-hwan Kang, explain that an employment confirmation from the workplace in the place of being

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²⁹⁹ Matthews, *supra* note 135 at 60.
³⁰² Ilsu Kim, “‘거주전이의 自由와 北韓의 國外脫出罪’” (1998) 2 Studies on North Korean Law 71 at 77.
transferred is needed to receive a certificate of de-registration. Kang describes an approval from the work place as an individual’s capacity to use personal connections. Heunggwang Kim explains:

In order to transfer the residence, there should be a job first. To migrate from Hamheung City (함흥시; 咸興市) to Cheongjin City (청진시; 清津市), a factory in Cheongjin City should accept me. With a confirmation document from the factory in Cheongjin City I will register to leave in Hamheung. After completing the process for leaving, you have to report it to an institution of People’s Safety in the area of relocation. It is a quite noisy process.

Once de-registration to move out is complete, an approval is needed from the Bureau of People’s Safety in provinces, cities, or districts (kuyŏk). While the Act does not require it, Ilsu Kim and Inae Hyun explain that one must have approval from a respective institution of People’s Safety before moving to other places. There are some differences in describing the details regarding procedural facts. For example, Ilsu Kim and Chol-hwan Kang mention an additional approval from a secretary of the Workers’ Party (a secretary of elementary party, Ch’oguaptang Pisŏ) before the Bureau of People’s Safety will make a decision. Without proper documents, an application for a certificate of de-registration can

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304 Chol-hwan Kang, ibid.
305 Heunggwang Kim, “거주이전의 자유(Freedom of Movement),” Free North Korea Radio, online: <http://www.fnradio.com/board.php?board=fnradio112&search=%B0%C5%C1%D6%C0%CC%C0%FC%C0%C7+%C0%DA%C0%AF&shwhere=subject&command=body&no=2481>.
306 Inae Hyun, supra note 284 at 20.
307 Supra note 302 at 77.
308 The “primary party organization ( первичная партийная организация)” or “party cell” ( партийная ячейка) are at the lowest level of the Party. “A party bureau ( партийное бюро, партбюро)” managed a cell and was led by “bureau secretary ( секретарь партбюро)” who were elected. Smaller party cells have secretaries as regular employees of the parallel factory, hospital, school, and so on. “Communist Party of the Soviet Union,” online: Wikipedia <http://en.wikipedia.org/wiki/Communist_Party_of_the_Soviet_Union>.
be rejected, although the Act of Gongmin Registration does not describe the scope of the official discretion.

2.6. Residence in Pyongyang

The North Korean government uses the registration system to screen population in Pyongyang. Article 1 of the Act of Capital Pyongyang Management (the CPM), enacted in 1998, states that Pyongyang is a sacred ground of revolution and the capital of North Korea.\(^{309}\) It is difficult to move to Pyongyang from other provinces, and this restriction has reinforced the unequal distribution of resources between Pyongyang and other regions.

The registration system has an administrative and political function, which makes population control possible in Pyongyang. The CPM suggests that the city government should manage the population of Pyongyang. This provides a legal basis for population control. For example, Jini Choi, a former resident in Pyongyang, explains that in the late 1990s Kim Jung Il planned to reduce the population from 1.7 million to 1 million.\(^{310}\) She was expelled from Pyongyang with her husband when her husband got an exile order.\(^{311}\)

To apply to be a residence of Pyongyang, an applicant must meet one of the criteria for residence. Jini Choi lists those who are eligible to move to Pyongyang: a single mother or single father having offspring who is able to support them in Pyongyang; a person who is transferred to an institution or state enterprise in Pyongyang; a woman in other provinces who marries a man in Pyongyang; or a graduate who is assigned to work in Pyongyang.\(^{312}\)

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\(^{309}\) Pyongyang is also inscribed as a capital city in article 172 of the North Korean Constitution.

\(^{310}\) Jini Choi, 국경을 세번 건넌 여자 (Seoul: Bookhouse, 2005).

\(^{311}\) Ibid. at 9.

\(^{312}\) Supra note 310 at 31, n. *.
Choi could move to Pyongyang together with her father and sister when her older brother, who lived in Pyongyang, invited them to Pyongyang.\textsuperscript{313} As for the procedure, article 29 of the CPM provides that \textit{Gongmin} who want to move from different regions to Pyongyang and from the suburbs to central areas even within Pyongyang are required to have a permit from the city authorities. Choi explains that people submit a form of registration to a resident registration office at the Social Safety Ministry in the place of residence.\textsuperscript{314} The Social Safety Agency (\textit{Sahoeanjŏnbu}) is one of the former names of the People’s Safety Agency (\textit{Inminboanbu}).\textsuperscript{315} This procedure is consistent with article 4 of the Act of \textit{Gongmin} Registration: \textit{Gongmin} are required to file an application form of registration with an institution of the People’s Safety. Department No. 5 at the Social Safety Ministry determines whether to approve residence with the documents, which passed through a resident registration office in Pyongyang.\textsuperscript{316} Then the Department No. 5 sends them with an approval number to a relevant institution under the Social Safety Ministry in the place where an applicant currently lives.\textsuperscript{317} This is a highly bureaucratic process. Choi describes her father’s frequent visits to a police station and a military safety bureau to check

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\item \textsuperscript{313} \textit{Ibid.} at 31.
\item \textsuperscript{314} \textit{Ibid.} at 31, n. *.
\item \textsuperscript{316} \textit{Supra} note 310.
\item \textsuperscript{317} \textit{Ibid.}
\end{itemize}
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for an approval number.\textsuperscript{318} He was able to apply for de-registration, once he had the number, which he received after a long delay.\textsuperscript{319}

Temporary resident cards are given to those who do not have the Pyongyang citizen certificate. But these are limited to university students from outside Pyongyang, to students from outside Pyongyang who go to the No. 1 Pyongyang middle school, to soldiers stationed in Pyongyang, and to state officials and workers for state enterprises.\textsuperscript{320} Temporary resident cards are valid during school years or during the period of service or work.\textsuperscript{321}

Despite the controls over population movement to Pyongyang, the population in Pyongyang is 3,255,288, which is 41.91 percent of the nation’s total as of 2008.\textsuperscript{322} Within Pyongyang the urban population is 2,823,414 and the rural population is 431,874.\textsuperscript{323} The density of population in Pyongyang is 2,051 persons per square kilometer, which is less than Sinpo city in Hamgyong (3,553) and Chungjin city (2,429).\textsuperscript{324}

Even with these hurdles, Pyongyang has the highest number of internal migrants from other regions, followed by Kangwon province.\textsuperscript{325} With the support of the United Nations Population Fund, the Central Bureau of Statistics in Pyongyang conducted the population survey for fifteen days from October 1, 2008.\textsuperscript{326} The DPR Korea 2008 Population Census

\begin{thebibliography}{99}
\bibitem{318} Ibid. at 34.
\bibitem{319} Jini Choi and her sister got a certificate to transfer to another school from the school they are enrolled in. \textit{Ibid.} at 35.
\bibitem{321} \textit{Ibid.}
\bibitem{323} \textit{Ibid.}
\bibitem{324} Chang-Mu Jung, \textit{supra} note 322 at 27.
\bibitem{325} \textit{Ibid.} at 28.
\bibitem{326} \textit{Ibid.} at 25.
\end{thebibliography}
National Report is known as the second official population census after the 1993 population census. It defines a migrant as someone “who changed residence from one province to another and is determined by asking the census where a person lived 5 years ago.” Throughout the country people are flowing out of the regions and into Pyongyang. For five years up to 2008, 57,068 people migrated into urban areas in Pyongyang, while 39,446 emigrated from urban areas in Pyongyang. Rural areas in Pyongyang received 9,430 immigrants and lost 9,022 emigrants during the years. In other words, the net number of urban immigrants in Pyongyang is 17,622: the net inflow of immigrants to rural areas in Pyongyang is 408. As a result, the urban population in Pyongyang increased for the 5-year period by 0.62 percent, and the Pyongyang rural population rose to 0.09 percent as of 2008. In all other cities and countries, the net inflow was negative growth: the national growth rate of net immigrants (immigrants - emigrants) is minus 0.88 percent (-124,400) in urban areas, and minus 1.27 percent (-116,632) in rural areas.

The numbers reveal that North Koreans are not mobile. 96.55 percent of the total population countrywide had not changed the province where they live for the last five years from September 30, 2003. Of different regions, Pyongyang has a relatively higher

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329 They refer to internal immigrants and emigrants.
330 This is calculated by the following formula: (the net number / urban population in Pyongyang) × 100. Here it is (17,622 / 2,823,414) × 100.
331 Supra note 322 at 28.
332 The formula is (20,893,131/21,639,820) × 100. Table 19 at 98; The survey question was as follows: “[i]n which province did ____ reside 5 years ago (30 September 2003)? (if different from current residence, enter name of province, county and whether it was up/gu/or a ri).” Central Bureau of Statistics, Modul 2 Person Information, supra note 328 at 270; Jung, ibid. at 27.
percentage of mobile population than other parts of the country: 8.57 percent\(^{333}\) of Pyongyang residents lived in a different county\(^{334}\) within Pyongyang compared to five years ago (on September 30, 2003) when the national average percentage was only 3.45.\(^{335}\) That is, 91.43 percent of the population had resided in the same county in Pyongyang.\(^{336}\) As shown in the data, Pyongyang is the city having the highest proportion of population who had moved to another address. The statistics do not distinguish inter-provincial migrations and intra-provincial migrations.

Women are more mobile than men. Female migrants amounted to 3.73 percent of the national population while the percentage of male migrants was 3.13 percent as of 2008.\(^{337}\) Out of the 8.57 percent of whom moved to the different county within Pyongyang, male migrants formed 7.65 percent, and female migrants constituted 9.40 percent.\(^{338}\) The higher percentage of female migrants is consistent with Ernest George Ravenstein’s “laws of migration”\(^{339}\) derived from 19\(^{th}\) century data of population movement in the U.K. One of his seven laws of migration is that “[f]emales are more migratory than males.” The DPR Korea 2008 Population Census does not suggest why more women have migrated than men, but marriage could be a significant factor of migration as 51.99 percent of the total population has a marital status.\(^{340}\) Nevertheless, marriage and the establishment of a branch family (귀족)

\(^{333}\) (259,143/3,022,561) \times 100 \text{ is } 8.57 \text{ percent. Table 19, ibid. at 102; Jung, ibid. at 27}  
\(^{334}\) A “county” means an administrative division consisting of ri, gu, dong and ju (county town): provinces are split into cities and counties. Central Bureau of Statistics, ibid. at 1.  
\(^{335}\) Ibid. at 27.  
\(^{336}\) Ibid. at 27.  
\(^{337}\) Ibid. at 27.  
\(^{338}\) Ibid. at 27.  
\(^{340}\) The number of married people is 12,027,930 out of 23,133,692. supra note 322 at 33.
have been legitimate reasons to change residence in North Korea. In her analysis of China, Delia Davin found that 30 percent of female migrants were marriage migrants, and 90 percent of marriage migrants were women based on the 1990 Census. As marriage migration has been a main cause of migration for women, and in fact the most of marriage migrants are women in China, it is equally important to analyze internal migration in North Korea. This reflects how the mobility law is gendered through marriage even within a State territory.

2.7. The Centrally Planned Economy

In 1923, A. Bogdanoff suggested that “production is consciously and systematically organized by society as a whole,” and that a statistical bureau should be placed at the center of labour organizations for “exact calculation” to distribute “labour power and instruments of labour.” He characterized the socialist society as “the homogeneous organization of the whole productive system, with the greatest mobility of its elements and groupings, and a highly developed mental equality of the workers as universally developed conscious producers.” This was the antithesis of “the anarchic unorganized distribution.” A. Bogdanoff claimed that in the “new self-sufficing society” there will be “consciously and systematically organized distribution” between production and

341 Useok Seo, 통일한국의 북한지역 주택정책에 관한 연구 [Housing Policy for the Northern Part in the Unified Korea] (Ph.D. Dissertation, University of Seoul, Urban Engineering, 1999) at 74
342 Supra note 218 at 28.
343 Ibid. at 28; Ibid. at 137.
345 Ibid. at 466.
346 Ibid. at 466.
347 Ibid. at 467.
348 Ibid. at 472-475.
consumption instead of “buying and selling” in the market.\footnote{\textit{Ibid.} at 472.} Distribution as an inevitable part of production needs “the supreme organizer,” the society as whole.\footnote{\textit{Ibid.} at 466-467.} “The society will distribute labour and also the product of that labour.”\footnote{\textit{Ibid.} at 467.}

This organized system of distribution between production and consumption represents the characteristics of national economy in North Korea. In socialist society this involves an analysis of how government control the labour force, rations, and housing in a “correct” way for the common welfare of people. The state as a principal organizer develops and manages the centralized master plan that is based on highly calculated process. Article 34 of the North Korean Constitution provides:

The distribution of labour force, which is supplemented by housing and food ration, is crucial to the central economic plan. It is related to the ‘socialist’ art of government regarding how to distribute things including labour. In practice, however, it is the people who bear the burden of the highly bureaucratic processes. North Korea is a socialist country where workplaces, organizations and state agencies are intertwined like an organism, as Chol-hwan Kang argues.\textsuperscript{353} In such a country, a change of residence requires a job to transfer and this makes it very cumbersome for people to move residence.\textsuperscript{354}

Restrictions on freedom of movement are part of a package of the centralized planned economy based on regulated calculation. Restrictions on freedom of movement are a precondition for ‘the duty to work’ in a centralized planned economy while freedom of movement is necessary for ‘the right to work’ in a market economy. From an individual right-based approach, the individual right to freedom of residence and travel conflicts with the centrally planned economy in North Korea. The control over mobility is constructed within the socialist framework of a registration system, and labor, housing policies, as well as food rationing system. In addition, the system of cooperative farms made it difficult to move people to other areas because every resident in rural areas belonged to a cooperative farm, after North Korea nationalized industries and farms and adopted a system of cooperative farms.\textsuperscript{355}

\textsuperscript{353} \textit{Supra} note 301.
\textsuperscript{354} \textit{Supra} note 301.
\textsuperscript{355} Hyeonsu Kim, \textit{북한의 도시계획에 관한 연구} [A Study on the Urban Planning of North Korea] (Ph.D. Dissertation, Seoul National University, 1994) at 56 [unpublished].
Job Assignments

Under centralized control, jobs are arranged and placed upon applications by a state authority. There is no notion of employment contract. Article 30 of the labor law states that state authorities, industries, and social cooperative corps shall put the right labor in the right place in accord with sex, age, physical constitution, desire, and skills for workers to exert creative wisdom and ability to the full. This corresponds to Bogdanoff’s argument that the production system has to be operated to ensure that “every member of society the possibility of the complete and universal development of his labour power […]” as the “principle of distribution.”

A centralized workforce plan determines job arrangements as directed by the party or administrative agencies. Jobs are allocated between categories of cadres and workers by the Department of Labor in the do · si · kun (ri) People’s Committee. Labor governmental agencies not only provide recruitment information but also have authority to dispatch labor force and supervise management of labor on a daily basis. In practice, the social status and the quality of the Party’s membership (Tangsŏng) are determining factors more than “their

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357 Article 70 of the North Korean Constitution also states that Gongmin, who has labor capacity, choose jobs according to hope and talent and is protected by stable job position and labor condition: the individual’s freedom of occupation is protected in article 15 of the South Korean Constitution.
358 Supra note 344 at 467.
359 Hanseung Seon, Mugi Mun, Munhui Yoon, Jongwon Lee, and Jinhwan Kim, 北한인력에 관한 법제·실태와 활용방안 (Seoul: Korean Labor Institute, 2004) at 41.
360 Information Center on North Korea, “(북한개요) 주민생활: 나. 직장생활,” Information on Unification and North Korea (2009), online: <http://munibook.unikorea.go.kr/?sub_name=information&cate=1&state=view&idx=137&page=8&ste=>.
wishes and skills” in allocation of the job.\textsuperscript{362} Moreover, a personal acquaintance and a bribe play an important role in changing a job.\textsuperscript{363}

It is difficult to change a job so that the first job is likely to be a life-time job.\textsuperscript{364} The transfer of the workplace is strictly restrained and discretionary.\textsuperscript{365} This restriction is framed in the Regulations on the Assignment of Labor Force, which was made by Cabinet Decision (No. 69) on November 2, 1986.\textsuperscript{366} The Regulations express that the objective for establishing the order of recruitment and mobility of labor force is to guarantee the organized and planned order of work management and reinforce the rule of labor.\textsuperscript{367}

Changing an occupation is a complex administrative process in which the state is directly and indirectly involved. The early Cabinet Decision (No. 27), made on January 31, 1950,\textsuperscript{368} reflects the complexity of the processes for a job transfer. The Cabinet Decision is titled “the Standard Regulations on the Internal Order of Work Regarding Workers and Clerks of Governmental Agencies, Social Organizations, Cooperative Institutions, and Other General Enterprises and Office Organs.” It is worthwhile visiting old regulations to know how the current system was founded, especially when it is difficult to access detailed information about existing internal rules in North Korea.

The Regulations are composed of the processes of recruitment and dismissal, the basic duty of the person in charge of the workplace and the worker, the use of working hours,

\textsuperscript{362} Ibid.
\textsuperscript{363} Ibid.
\textsuperscript{364} Ibid.
\textsuperscript{365} Supra note 359 at 41.
\textsuperscript{366} Supra note 356 at 30; Giseop Ri, supra note 361 at 111, cited in Manju Han, “제 10 장 북한 노동법의 비교,” 남북한 법제 비교 [Comparative Legal System between North and South Korea] (Chuncheon: Kangwon University Press, 2003) at 398.
\textsuperscript{367} Ibid.
\textsuperscript{368} Supra note 375 at 101.
and the reprimand. For example, in article 4 the person in charge of the workplace shall request the following documents to employ workers or clerks:

1. The Certificate of Gongmin or Birth Certificate
2. The Notebook on Work (Nodongsuch’op)

The person in charge of the workplace cannot hire those who do not submit these documents (article 4). To change occupation or retire from work, workers or clerks shall submit an oral or written proposal and receive assent from a person in charge of the workplace (article 7). In violation of the labor rule the administrative reprimand and punishment shall be imposed (article 20). The following administrative reprimands are imposed in accordance with the circumstances (article 21): 1. notice, 2. warning, 3. strict warning, 4. confinement or demotion, 5. discharge.

The Certificate to Suspend Food Rations

A person must also have a Certificate to Suspend Food Rations in order to receive food rations in the place of relocation. Upon an approval from a secretary of the Worker’s Party, it is possible to apply for the Certificate to Suspend Food Rations in the existing

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369 Ibid.
371 Supra note 369.
workplace. Once received, an individual may receive food ration coupons from the workplace by submitting the Certificate to a new workplace.

Similar procedures are found in the Regulation of National Food Ration, which was made by Cabinet Decision (No. 56) in March 1952. Article 5 of the Regulation mentions the Certificate to Suspend National Food Rations. It states that in case of changing the place of food distributions by a governmental transfer, it is possible to continue to distribute food rations by the Certificate to Suspend National Food Rations, issued by the person in charge in the former work place. When the Certificate is submitted, a memo indicating the last month of food rations in the former place of distribution has to be attached to the Certificate.

The procedure of food rations is laid out in the Chapter 4 of the Regulation. Article 14(1) states that the first-time applicant has to submit an application form for national food rations after correctly filling it out with relevant facts, and the registration book of residence and lodging to the Ri People’s Committee. After receiving a confirmation from a chairman of the Committee, the applicant submits it to the person in charge of the workplace or the person in charge of lodging in the areas that the Ri People’s Committee does not administer.

The Department of Food Administration (Yangjŏnggwa) is an agency in the Si · Kun · Kuyŏk People’s Committee, which accepts and reviews the applicant’s application form for national food rations and two application forms for registrations of ration recipients, which

374 Ibid.
375 Cheolsu Lee, 북한사회복지법 제 (Seoul: Nopikipi, 2005) at 201-220 [translated by author].
376 Ibid. at 201.
377 Ibid. Article 5: note 2 at 201.
378 Ibid. at 204.
379 Ibid.
are submitted by the person in charge in the workplace (article 14(3) and (4)). One application form for registrations of ration recipients shall be kept on file in the Department of Food Administration (article 14(4)). After examining applications, the Department registers them and arranges the data in the registration book of recipients of national food rations (article 14(4)). With a stamp of approval an applicant’s application will be returned to the person in charge in the workplace (article 14(4)). Daily NK, a newspaper in South Korea, includes photos of tickets for food rations on October 5, 2005.

The Assignment of Housing

Housing is also a means to limit internal migration because assignment of a public housing is a necessary administrative process to find a place of living. Housing is a public good owned by the state, which is different from the notion of housing as a commodity in the market economy. This corresponds to the centrally planned economies that consider housing as a “distribution good” more than a “community good” through “administrative-command system.” The legal codes establish this system by laying down how a house of dwelling is categorized and who manages them. According to article 10 of the Act of City Management a house of dwelling (Sallimjip) is one of the three categories of state-owned buildings, which is listed together with public building and production building.

380 Ibid. at 205.
Institution or the relevant agencies, or state enterprises is in charge of managing houses of dwelling and public buildings, while production buildings are managed by the state enterprises and corporations that are using them (article 10).

A state authority issues a permit for the use of a house. This is not the ownership of a house. Individuals must apply for a permit to use a house of dwelling from the Bureau of City Management under the People’s Committee in cities or provinces. Article 50 of the Civil Code sets out that “State builds houses of dwelling and protects the license to use a house of dwelling by law as it hands over the license to workers, office workers, and farmers [in cooperative farms].” The Act of City Management, enacted by the Supreme People’s Assembly in 2004, also sets forth as follows:

Local government institutions and the relevant agencies shall permit the use of houses of dwelling, and public buildings in consideration of the number of family, commuting distance, job characteristics, and square measure of buildings in need [of supply], etc.. State-owned houses of dwelling and public buildings cannot be used without permit of the use (article 11).

As a general procedure, the Bureau of City Management issues the Certificate of Housing Admission if a person applies for housing after registration of marriage. Once issued, the certificate has to be registered in an office in dong or a police station (Punjuso) before individuals may occupy a residence. Once the certificate is registered, a person is

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385 Supra note at 109; Ibid.
386 Supra note 383
388 Ibid. at 87.
entitled to remain in the residence so long as there is no order for migration or change of occupation.

In case of big factories and state enterprises, some build housing for their workers. Article 230 of Civil Law states that construction of houses of dwelling and facilities is funded by the state, and institutions, enterprises and organizations work together and divide the right of user under “the joint operation contract (Hyŏptongjagŏpkyeyak).” Parties in the joint operation contract are obliged to participate in collaborative work depending on the degree of participation in the work, and apportion the right to use the work product (article 231 of Civil Law). The contract shall be made and performed to meet the demand of construction within the realms of preparation and possibility (article 230), and be written and notarized (article 231).

Furthermore, Byeong-II Jang explains that an individual resident’s entitlement to use public housing is created by a contract between an individual resident and a state enterprise, but it requires an administrative procedure to have the certificate of housing admission. The process for move-in is as follows: (1) a manager or a secretary of the Worker’s Party in the workplace issues a letter of endorsement for move into a house to their workers; (2) the worker submits the letter to the Bureau of City Management under the People’s Committee in cities or provinces; (3) the Bureau of City Management issues the Certificate for Housing Admission; and (4) the worker submits the certificate to an office in dong or police station (punjuso).

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389 The contract of joint operations shall be in writing and be notarized.
390 Jang, supra note 387 at 90.
391 Ibid. at 87.
For people cohabiting with parents, relatives, or colleagues, or living in a bunkhouse the Bureau of City Management or the District Committee of the Party issues the Admission Card for Cohabitation (Tonggōsari Ipsajŭng). Jini Choi introduces the difficulty in living in her older brother’s house when her family moved to Pyongyang. Heunggwang Kim also describes his experience of living with others in Pyongyang due to shortage of housing, when he moved to Pyongyang for his job position.

There must be many people who constantly try to change their residence for personal reasons. I also in the past found a job in Pyongyang, but no housing of dwelling was available. […] So, while working for a certain period of time without home and residence, I stayed in a room, which was already occupied with many others. There was utterly no way to live like that. Then, I ended up giving up the job thinking that my original dwelling place would be better although it was located in a remote city.

Kim’s struggle to find a living place reflects shortage of housing that results in hurdles for internal migration, especially from other regions to Pyongyang. It was well-known that Pyongyang has a shortage of houses. Across the country, the housing supply rate was estimated at 55 - 63 percent as of 1995 and 77 - 83 percent as of 2006.

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392 Ibid. at 89.
394 Supra note 406 at 37.
395 Supra note 305.
398 Geunyong Kim, “북한의 주거실태와 주택투자 소요 추정” (Fall 2008) 57 Construction Economy 34 at 34.
Because of the shortage of housing, there are cases where a married couple has to live separately in bunkhouses for two or three years.\textsuperscript{399}

In the DPR Korea 2008 Population Census National Report, the annual supply rate of housing was 100 percent.\textsuperscript{400} The estimated data are simply based on the North Korean official statistics. Furthermore, the percentage of Households Sharing Dwelling Unit with Principal Occupants for in Pyongyang, who not primarily entitled to a house of dwelling, is 1.9 percent while the overall number across the country is 1 percent.\textsuperscript{401}

Housing is allotted only to a married man by the District office of Assignment.\textsuperscript{402} But there are special accommodations for single women. Jini Choi used to live in Wŏrhyang Single Women’s Residence in Pyongyang.\textsuperscript{403} The residence had 1500 residents whose jobs were workers, teachers, actors, athletes, and researchers.\textsuperscript{404} Five to six people shared a room with a meal plan, but once the Great Famine hit the daily lives during the late 1990’s, the residence could not provide the meals for residents.\textsuperscript{405}

It requires a complex administrative process to receive the Admission Card for Cohabitation (Tonggősari Ipsajǔng) and the Certificate of Housing Admission. Choi describes that she needed a father’s personal connection to gain the Admission Card for Cohabitation in Wŏrhyang Single Women’s Residence.\textsuperscript{406} What type of houses is assigned
depends on the social status or class, which is part of the political and societal mechanism for social control.

2.8. Conclusion

In this chapter, I offered background information about how the ‘modern’ registration system has established, worked and changed over time in colonial Korea, how an identity certificate and Pyongyang identity card operate in North Korea, and how mobility is closely linked to detailed and structured programmes under the centrally planned economy. The system of registration is based on calculations of what is needed to run the various programmes including labour and housing policies for the centrally planned economy, and is a technique of governmentality that justifies state intervention for welfare and put population under surveillance. An individual has been constructed as “the subject as a ‘collectivity,’” in other words, “collective I,” in this mode of production, and the police force plays a significant role in gathering and managing information. The internal passport system has been developed as a mechanism to police internal borders, disciplining people’s movement, and creating the (socialist) economic order as an apparatus of security.

This registration system under the socialist governmentality is associated with restrictions on mobility and construction of legal identity. The chapter reflects how law is a technique of the internal passport system under the centrally planned economy. Law reinforces internal borders, makes a distinction between Pyongyang and the rest, e.g. the Pyongyang identity, and governs and manages the population movement. International migration is even more difficult for North Koreans because of mandatory registration and a

\[ \text{Supra} \text{ note 183.} \]

\[ \text{Dutton, supra note 184.} \]
travel permit. It is important to understand how internal border-crossings take place before analyzing national border-crossings. Domestic law, which restrains internal migration, has transcending effects on the ‘illegal’ status of North Korean migrants in China and other countries as part of transnational law, and the case of North Korea provides evidence of the interaction between laws, which regulate internal and international migration. For example, China is obligated to cooperate with North Korea on preventing from illegal border-crossings of North Koreans in accordance with the “Agreement on Mutual Cooperation of the Work for National Security and Maintenance of Social Order in the Border Areas” between China and North Korea.\textsuperscript{409} China shall immediately pass over the list of the names of North Korean border crossers and relevant information to North Korea (article 4(2)). Also, the regulations on illegal departure in sending countries such as North Korea could be considered an important basis for refugee cases in receiving countries such as the U.S. or Canada. Chapter Five and Six further deal with these issues. The next chapter focuses on the boundaries of Pyongyang and Seoul as the capital cities, which have been historically invented and reinforced by law and practices, and analyzes how they has been fortified through the interplay with construction of national identity.

3. The Nation’s Capital as a Constitutional Space: Seoul and Pyongyang

3.1. Introduction

The nation-state is an ideal. It is seldom, if ever the case that “the borders of the nation and the borders of the state coincides, so every member of a nation is also a member of the same state, and every member of a state belongs to the same nation.” Korea is an example of two states imposed on one nation. Chapter two explored socialist internal borders in North Korea. This chapter focuses on the capital cities of the Korean peninsula, which act as miniatures of a nation-state, and on the symbolic and legal internal borders that demarcate them. The chapter reveals how the centre of the nation-state is surrounded by layers of internal borders, and it analyzes the relationship between the two Koreas through the constructions of two capital cities.

Law is one of the narratives through which a border expresses itself, and connects the relationship between the borders and national identity. A capital city is a symbolic site in which national identity and practices for nation-building processes interplay. This chapter analyzes how the locations of two capital cities -- Pyongyang and Seoul -- are positioned as a legal and social norm, and how national identity becomes instrumental in normalizing national capitals as fixed and permanent places. I look at the 2004 Constitutional Court decision of South Korea (2004Hun-Ma554, 566), which held that the relocation of a capital city was unconstitutional, and examine the North Korean Constitution and other related statutes, which named Pyongyang as the nation’s capital. Both Seoul and Pyongyang

413 Constitutional Court, 16-2(B) KCCR 1, 2004Hun-Ma554, 566(consolidated), Decided October 21, 2004 [Relocation of the Capital City Case].
have become normalized locations of the capital space through revisiting and inventing national history, and they construct a symbolic form of national identity through legal narratives. I argue that national identity shapes and constitutes a capital city, and the constitution fortifies a boundary of the nation through the construction of a capital city, a miniature of the nation.

The research questions that I raise in this chapter are as follows. What does it means to constitutionalize the location of a national capital either in the written form (Pyongyang) or in the unwritten form (Seoul) based on the custom? Why is it important to enforce the location of a national capital as a legal norm? How are the constitution, the location of a national capital, and national identity related? What are the symbolic meanings of a capital city and the representation of the space? This chapter assumes that the nation is a social and historical construction.414 Throughout this chapter I explore the nexus between a capital city and constitution. National identity has been placed at the intersection between a capital city and law.

On October 21, 2004, the South Korean Constitutional Court held that Seoul is the capital city in the Republic of Korea and that the relocation of the national capital is unconstitutional based on the “Customary Constitution,” which is unwritten but binding. Former president Roh Mu-Hyun had pledged to relocate the capital in the presidential election campaign to reduce the concentration and overpopulation of Seoul, and his administration proposed the Special Act on the Establishment of the New Administrative

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In December 2003, the National Assembly passed the Act, and in January 2004 it was promulgated. The legal case began in August 2004 when the South Korean government announced that the Yeongi-Gongju area would be the designated site for the capital city. Seoul City Council and a number of citizens filed a constitutional complaint on the ground that the Act was unconstitutional because violated the right to vote in a referendum for constitutional change and the right of taxpayers. In October 2004, the South Korean Constitutional Court held that Seoul is a capital city in the Republic of Korea, and the relocation of a national capital is unconstitutional because the Special Act violates the right to vote on national referendum, which is required for a formal constitutional revision process according to article 130 of the constitution.

3.3. The Nation’s Capital as a Constitutional Space and National Identity

Constitution and National Identity

Constitutions reflect national identities. They are commonly understood as a foundation and an origin of the nation. For example, the English constitution, which is unwritten, describes and reflects an existing nation through “practices, traditions and habits,” while the American constitution forms nation through the written text.

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417 They claimed the unconstitutionality of the Act in its entirety as the government sought to relocate the capital without the constitutional revision procedure.
419 Helen Irving explains that Australia’s Constitution used the model of unwritten constitutionalism and was influenced by the framers of the American Constitution. Helen Irving, “A Nation Built on Words: The
and South Korea are not exceptions. The preamble of the South Korean constitution, enacted on July 17, 1948, begins with the words: “[w]e, the people of Korea, proud of a resplendent history and traditions dating from time immemorial.”\(^{421}\) The North Korean Constitution expresses self-perception or identity through the idea of *Juche*. The preface, adopted in 1972 and revised in 1992, starts by saying that “[t]he Democratic People's Republic of Korea is a socialist fatherland of *Juche* which embodies the idea of and guidance by the great leader Comrade Kim Il Sung.”\(^{422}\) *Juche* is translated as “self-determination” or “autonomy as identity,” and “national, rather than individual or class, self-determination in politics, self-sufficiency in the economy, and self-defense in security.”\(^{423}\) Article 3 of the constitution defines the *Juche* idea as a “a world outlook centred on people, a revolutionary ideology for achieving the independence of the masses of people.” The nation is realized through the *Juche* idea which is filled with nationalistic inspiration. Although North Korea initially hesitated to use the words nationalism or nation because they were considered part of bourgeois ideology,\(^{424}\) by the mid-1980s North Korea officially used nationalist language.\(^{425}\) In 1992, the constitution was revised to remove all mention of Marxism and Leninism. North Korea began to use the phrase, “Our Own Socialism” in 1991.\(^{426}\)

National identity was woven into the construction of national capitals in the two constitutions. The Constitutional Court in South Korea defined the identity of a nation as “the characteristic nature of the nation, as the source of emotional unification of the nation,  

\(^{420}\) Ibid. at 212.  
^{421}\) See ibid.  
^{422} The North Korean Constitution, supra note 352.  
^{425} Ibid. at 89.  
^{426} Supra note 423 at 107; Shin, ibid. at 94.
which is formed by the composite expression of history, experience, culture, politics, economy, power structure and spiritual symbols, and so forth, of its people.” The majority of justices indicated that national identity is based on the nation which is formed and shared by “history, experience, culture, politics, economy, power structure and spiritual symbols.” A nation is “limited” and “sovereign” because it assumes a “finite” territorial boundary, and relies on a political authority. In comparison, North Korea includes “bloodline” in its definition of nation. This was added in 1973 into Stalin’s definition: “a historically constituted, stable community of people, formed on the basis of a common language, territory, economic life, and psychological make-up manifested in a common culture.”

While ethnicity is not listed in the definition of the South Korean Constitutional Court, both North and South Korea assume that there is a common nature of the nation which is fixed and immutable over time, and they see the nation as the “the source of emotional unification.”

**Constitutionalized Capitals in Modern Nation**

Eric Hobsbawm describes the notion of “nation” as “comparatively recent historical innovation” which is related to “nationalism, the nation-state, national symbols, histories and the rest.” Standard national language is an example of “innovative” and “deliberate” constructs of the modern nation. Flags, images, ceremonies and music are used in symbols

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427 Supra note 413.
429 Shin, *supra* note 424 at 89.
430 Shin, *ibid*, at 82.
431 Supra note 413.
and semi-ritual practices for the citizens’ membership. These are the invented symbols of the modern nation:

The National Flag, the National Anthem and the National Emblem are the three symbols through which an independent country proclaims its identity and sovereignty, and as such they command instantaneous respect and loyalty. In themselves they reflect the entire background, thought and culture of a nation.  

A national city is created in the modern arena. It could be considered an invention of the modern nation. Scott Campbell describes a nation’s capital as the concentrated power in one city resulting from the recent rise of the modern nation-state. In the two Koreas, the constitution was employed as a process to formalize the location of a capital. North and South Korea have constitutionalized the location of their capitals.

The North Korean Constitution states in article 172 that Pyongyang is the capital of the Democratic People's Republic of Korea. Article 172 follows provisions on a national flag (article 170) and a national anthem (article 171) which are part of Chapter VII Emblem, Flag, Anthem and Capital. In fact, Seoul was the capital city in the first North Korean constitution (article 103), which was enacted in 1948. Pyongyang was designated as the

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434 Ibid at 12.
437 Supra note 352.
capital city in the 1972 Constitution.\(^{439}\) The legal structure and content of constitutions in socialist countries are similar, and it is likely that North Kored adopted the legal model from the former Soviet Union. For example, the 1924 Constitution of USSR contained in article 72 that “the Capital of the USSR is Moscow” after article 71 on national flag under the Chapter XI Arms, Flag and Capital of the Union.\(^ {440}\) The 1936\(^ {441}\) and the 1977 Constitution of the Union of Soviet Socialist Republics maintained article 145 and article 172 respectively that “[t]he Capital of the Union of Soviet Socialist Republics is the city of Moscow.”\(^ {442}\) In East Germany as well, when the Constitution was enacted on October 7, 1949, article 2(2) set out that “Die Hauptstadt der Republik ist Berlin [The capital city of the Republic is Berlin].”\(^ {443}\) Also, the Chinese Constitution, which was adopted on December 4, 1982, has article 138 under the Chapter IV of the National Flag, the National Emblem and the Capital that “[t]he capital of the People's Republic of China is Beijing.”\(^ {444}\)

In South Korea, the location of the capital city is not written in the constitution. Instead, the Constitutional Court recognized the capital as part of the customary constitution and indicated that it could only be changed through a formal constitutional revision process


\(^{440}\) “The 1924 Constitution of the U.S.S.R.” (31 January 1924) online: Wikisource on Answers.com <http://www.answers.com/topic/1924-constitution-of-the-ussr>. Article 71 describes that [t]he flag of the State of the USSR shall be in red or vermillion cloth with the arms of the Union.”


\(^{444}\) Constitution of the People's Republic of China, *adopted* on 4 Dec. 1982, online <http://english.people.com.cn/constitution/constitution.html>; The relevant provisions are as follows: Article 136. The national flag of the People's Republic of China is a red flag with five stars. Article 137. The national emblem of the People's Republic of China is Tian'anmen in the centre illuminated by five stars and encircled by ears of grain and a cogwheel. Article 138. The capital of the People's Republic of China is Beijing.
including a national referendum. Article 130 (2) provides that “[t]he proposed amendments to the Constitution shall be submitted to a national referendum not later than thirty days after passage by the National Assembly, and shall be determined by more than one half of all votes cast by more than one half of voters eligible to vote in elections for members of the National Assembly.”\textsuperscript{445} As a result of the Constitutional Court decision, a constitutional legal norm obligates the executive as well as legislative branches to prevent the transfer of a national capital to another city without a referendum.

In the South Korean case, seven justices out of nine asked whether the location of a capital is a fundamental constitutional law matter. They drew a line between the national identity and the location of a capital city. National identity acted as a barometer that determines whether this issue fell within the constitutional matters which the Constitutional Court could review. The Court saw the location of a capital as a substantive constitutional matter expressing the identity of the nation because the nation’s capital was a place where the highest constitutional institutions, for example the National Assembly and the President, were located. The majority added the official national name, the official national language, the limits of the national borders, and the declaration of sovereignty into the list of the constitutional matters subject to the constitutional review.\textsuperscript{446}

\textsuperscript{445} Article 130 (1) The National Assembly shall decide upon the proposed amendments within sixty days of the public announcement, and passage by the National Assembly shall require the concurrent vote of two thirds or more of the total members of the National Assembly.

(2) The proposed amendments to the Constitution shall be submitted to a national referendum not later than thirty days after the passage by the National Assembly, and shall be determined by more than one half of all votes cast by more than one half of voters eligible to vote in elections for members of the National Assembly.

(3) When the proposed amendments to the Constitution receive the concurrence prescribed in paragraph (2), the amendments to the Constitution shall be finalized, and the President shall promulgate it without delay.


\textsuperscript{446} Historical roots of the Constitution come from “the Provisional Republic of Korea Government born of the March First Independence Movement of 1919” and the April Nineteenth Uprising of 1960.” The missions of the Constitution is “peaceful unification of our homeland” and the consolidation of national unity with […]
Justice Kim Yong Il in a concurring opinion linked the location of a capital city with the social cohesion of ethnic nation. He stated that the location of the capital proves the existence of a nation as a core element in determining a national identity. Following his reasoning, the fortification of a capital city is considered vital to the security of the entire nation, which regards the location of the capital as central to an existence of the nation. It is not a coincidence that the self-definition of a nation often relies on external and internal enemies. Justice Kim writes that even after unification, the location of the capital has great meaning in the process of unification. He concludes that Pyongyang and Seoul will be the central cities and candidates for the location of the capital of the unified Republic of Korea.

The only female Justice, Hyosook Joen, opposed the majority opinion. Her dissenting opinion was that the location of a capital is not a fundamental matter of the constitution. She stated that the fundamental purpose of the constitution is the realization of the liberty and rights of the citizens through the control and the rationalization of state power. For her, the location of a national capital was no more than a “tool” for realizing such a purpose. She pointed out that the Act was passed by the members of the national assembly from both the ruling party and the opposition party with overwhelming support. She argued that it was unreasonable to say that there is a legal conviction that Seoul was the capital. She continued that even though there was the customary constitutional law it did not have the


447 He agrees on the unconstitutionality of the statute but his basis is not article 130 but article 72. Because he believes that the relocation of the capital is a matter of national security and unification, he sees the statute is in violation of article 72. Article 72 provides “the President may submit important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny to a national referendum if he deems it necessary.”

448 Hobsbawm & Ranger, supra note 414 at 279.

450 This is an element of customary constitution, which will be further explained in the next section.
same force as the written constitution because the written constitution had supreme legal
force. Customary constitutional law only supplemented the written constitution. Also, not
all national symbols are regulated in the constitution. The Act on National Flag of the
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What are the social and historical facts behind constitutionalizing the location of
capital cities? This case addresses how national identity provided a linkage between a
constitutional norm and a location of a capital city, and how national symbols such as a
capital city comprised the substances of the national constitution.

Seungju Bang suggests that having a national capital in a different city would not lead
to a change in the national identity of the Republic of Korea because the new capital would
also be geographically bounded by national territories.\footnote{Seungju Bang “수도가 서울이라는 사실이 과연 관습헌법인가?” (2005) 6:1 Public Law Journal [공법학 연구] 153 at 161.} Following the reasoning of the
decision, only Seoul can provide the source and origin of national identity; Seoul is the only
place where national identity is realized and sustained. National identity is used as an
instrument to justify and legitimize the location of a capital city rather than a substantial
reason for the unconstitutionality. In other words, the Constitutional Court uses national
identity, which has been constructed from the historical context on the Korean peninsula, as a
justification to constitutionalize the nation’s capital. As a result, the status of Seoul as a
capital is not disputed because this space was prepolitical and assumed as part of the
formation of national identity.
National identity, the sense of belonging to a nation, is symbolically represented in a condensed way in one particular place: a capital city.\textsuperscript{453} The nation reveals its identity through a national space and the constitution,\textsuperscript{454} since nation is “an entity which would provide the sources of their identity.”\textsuperscript{4455} But the question should move further to a symbolic meaning of Seoul, its unilateral relation to the nation although a national identity is represented in wherever a capital city is located. The Constitutional Court decision views national identity as attached and embedded in Seoul, but not in other cities. This is connected to how Seoul has been re-invented for the representation of a national identity; in this sense Seoul is a gatekeeper to maintain the authority of national identity.

### 3.4. Constitutional Custom and Invented Traditions

The South Korean Constitutional Court held that Seoul is the capital on the basis of a constitutional custom that has traditionally existed as a norm even prior to the establishment of the written Constitution. The customary requires an element of a tradition. Constitutional custom consists of (1) existence of a certain practice about the fundamental constitutional law matter, (2) repetition and continuation of the practice, (3) maintenance of the practice

\begin{itemize}
  \item Anthony D. Smith explains that “[…]’national’ identity involves some sort of political community, however tenuous. A political community in turn implies at least some common institutions and a single code of rights and duties for all the members of the community. It also suggests a definite social space, a fairly well demarcated and bounded territory, with which the members identify and to which they feel they belong.” Anthony D. Smith, \textit{National Identity} (London and New York: Penguin, 1991) at 9.
  \item For example, Larry P. Arnn explains how America’s national identity is connected to the Constitution: “America’s character as a nation and as a people is fundamentally defined by the inextricable connection between our country’s Constitution and its ‘constitution,’ that combination of qualities, dispositions, habits and self-understanding, which constitutes our national identity,” Larry P. Arnn, “Constitution, Character and National Identity,” online: Hillsdale College <http://www.hillsdale.edu/images/userImages/bwilkins/Page_5994/hi_891.pdf>.
\end{itemize}
(maintainability), and (4) unequivocal and clear content of the practice (unequivocalness). The Court concluded that the fact that Seoul is a capital city amounts to a continuing practice which has been traditionally formed in the nation (continuance). Such a practice has never been interrupted (maintainability). The practice was clear to the extent that no citizens would hold a different opinion over it (unequivocalness). There has been national consensus over a long period of time (national consensus). They view this as a self-evident and presupposed norm in the Constitution despite the absence of an expressed constitutional provision.

The third requirement, repetition and continuation, is an essential part of a tradition. Eric Hobsbawm argued that the nature of traditions is “invariance.” Customary law, on the other hand, is flexible in substance up to a certain point where is limited by precedent. He suggested that “[t]he past, real or invented [traditions] […] imposes fixed (normally formalized) practices, such as repetition.” Furthermore, tradition is connected with custom, and the death of custom eventually changes the tradition. The Court held that the fact that Seoul is a capital city has been traditionally established in the nation without interruption, which satisfies the elements, repetition and continuation, and maintenance of the practice.

The Court noted that Seoul has been a capital for over six hundred years, since King Taejo Lee Seong Gye established the Chŏsun dynasty in 1392 AD, and chose Hanseong, the old name of Seoul, as a capital. The Forest Wall was built as the boundaries of Hanseong to protect it from invasion, as shown in Figure 8. The status of Hanseong was reflected in the Kyŏngguk Taejŏn (經國大典), which was the first code of the laws in the Chŏsun dynasty and was completed during the period of King Seongjong. The Constitutional Court makes a

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456 Supra note 413.
457 Supra note 414 at 2.
458 Ibid.
connection to Kyŏngguk Taejŏn, which was used from the year 1486 during the Chŏsun dynasty.

Figure 8 Seoul Seonggwak (Fortress Wall)
(© 2013 Sung Ju Beth Lee, by permission)

Designation: Historic Site No. 10 / Period: 1396 (5th year of King Taejo’s reign)
Location: Hyehwa-dong, Jongno-gu, Seoul

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Moreover, the Court found that Seoul has been maintained as a capital even during the colonial period since Seoul remained to function as the center of the administration. The justices also emphasized that Seoul is the place where thirty three representatives gathered and declared the independence from Japan, on March 1, 1919. Even after independence from Japan, Seoul was the Special Metropolitan City and the “capital of Chôsun” in article 2 of U.S. Military Order No.106, which was issued by the U.S. Military government regime in 1946. In doing so, the Court was drawing connections between Seoul during the Chôsun dynasty and the present city. The element of continuation and repetition is found on the commonality of the physical space between Hanseung and Seoul. There is also assumption that Hanseung and Seoul share the symbolic meaning as the center of the nation.

The Court disregarded the fact that Seoul has been built in the form of a contemporary national capital in the modern nation while Hanseong was structured for the King’s governing role over the rest of the country in a centralized way. In order to prove continuation with the past the Court refers to the old materials, and revives its symbolic meaning from the monarchy and applies it in the contemporary nation’s capital despite the contextual difference. By taking reference to the past the national status of Seoul is institutionalized and formalized through a legal process.

In this case, national history plays an important role in constructing the modern nation’s capital. Eric Hobsbawm argues that “appropriate and, in general, fairly recent symbols or suitably tailored discourse such as national history” are related to the subjective components of the modern nation.459 He also says that without taking a look at the invention

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of traditions, “national phenomenon” cannot be properly explained. Invention of traditions refers to “a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past.” These invented traditions usually try to set up “continuity with a suitable historic past.” The South Korean Constitutional Court uses a uniform and unified narrative -- the history of Seoul -- which meets the requirements of the customary constitution. It revives a collective memory from the past, invents the continuity, and legitimizes permanent existence of Seoul as a capital city. Consequently, Seoul, as the capital, is an invented truth which the nation creates and constructs establishing continuity with the past.

3.5. The Spatial Heart of the Nation, History, and Invented Traditions

Both North and South Korea use national history to establish the cohesion of ethnic nation and to legitimize the authority of a capital city where the legislative, judicial, and executive branches are located. Hobsbawm argues that “[a]ll invented traditions, so far as possible, use history as a legitimator of action and cement of group cohesion.” He introduces the types of invented traditions. The types that are used for Seoul and Pyongyang are “those establishing or symbolizing social cohesion or the membership of groups, real or artificial communities” and “those establishing or legitimizing institutions, status or relations

460 Ibid. at 14.
461 Ibid. at 1.
462 Ibid. at 1.
463 Ibid. at 12.
of authority."\textsuperscript{464} Hobsbawm also insists that in many cases political institutions and ideological movements have invented the continuity of history by making a past “by semi-fiction” or “by forgery.”\textsuperscript{465}

North Korea has used archeology and national history to show that Pyongyang is a place of the ethnic Korean origin so that it is destined to be a capital city. It reflects ethnic nationalism in North Korea, which is “the epistemological basis for the development of juch’e ideology.”\textsuperscript{466} National history also links Pyongyang to the old capital of \textit{Goguryo} Kingdom and Kim Il Sung’s birth place, \textit{Mankyongdae}, which is located in Pyongyang (Figure 9).

![Figure 9 Kim Il Sung’s birth-house](© 2008 Mendee Jargalsaikhan, by permission)

Furthermore, Pyongyang is described in North Korea to have been a heart of revolution since the beginning of the modern nation-state. Official literature depicts Pyongyang as a role

\textsuperscript{464} The last type of invented traditions is “c) those whose main purpose was socialization, the inculcation of beliefs, value systems and conventions of behavior,” \textit{ibid.} at 9.
\textsuperscript{465} \textit{Ibid.} at 7.
\textsuperscript{466} Shin, \textit{supra} note 430 at 230.
model for the rest of the country and an educational field for revolution. Article 1 of Act of
the Capital Pyongyang Management, adopted in November 1998, states that Pyongyang is a
sacred ground of revolution and a capital. These are the invented traditions establishing
the status of Pyongyang for national purpose. It applies to Seoul, as well. A deliberate
linkage between the status of Hanseong, drawn from Kyŏngguk Taejŏn, and the present
status of Seoul, reflected in the Customary Constitution, is an invented continuity which
makes up national history. These are the examples of how the nation’s capital turns out to be
a “fictional space manipulating time and place, and re-presenting facts and events.”
National history reproduces a mythical image of the capital city. Most of all, Pyongyang is
invented with mythical and fictional traditions. Christine M. Boyer explains the relationship
between history and the present representation of a place:

History fixes the past in a uniform manner; drawing upon its difference from the
present, it then reorganizes and resuscitates collective memories and popular
imagery, freezing them in stereotypical forms. Utilizing its distance from the
past, history sets up a fictional space manipulating time and place, and re-
presenting facts and events.

There has been a process of the creation of the new Pyongyang after a war. In the
reconstruction of Pyongyang, Kim Il Sung, the president from its founding in 1948 to his
death, emphasizes coexistence between traditional/national traits and contemporary mode. In
*Great Leader and Pyongyang*, January 1951, he directed that the important part in

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1998 (*Juche 87*) by the Supreme People’s Assembly, online: Information Center on North Korea <
http://unibook.unikorea.go.kr/?cate=1&sub_num=53&state=view&idx=81&sty=T&ste=%25C6%25F2%25BE%
%25E7%25BD%25C3%25B0%25FC%25B8%25AE%25B9%25FD> [translated by author].
468 M. Christine Boyer, *The City of Collective Memory: Its Historical Imagery and Architectural
reconstructing a destroyed city was to fit in a convenient, contemporary and civilized life style for workers and be suitable to the Chōsun people’s life emotion. Also, Kim Il Sung instructed that architecture should be filled with socialist content in a national/traditional form. Furthermore, article 11(9) of the Construction Law, adopted in December 1993 by the Supreme People’s Assembly and last amended in June 2002, requires that a construction plan shall combine national characteristics with modern ones to the extent that it shows solidity, non-repetition, and unity. National characteristics represent Juche idea which preserves a national identity. For example, a national library called Inmindaehaksúptang (Figure 10), which opened in the Kim Ilsung Plaza in Pyongyang in April 1982, symbolizes a national identity while it is located across from the Juche (self-sufficiency ideology) Tower.

Figure 10 Public Library (Inmindaehaksúptang) in Kim Il Sung Plaza
(© 2008 Mendee Jargalsaikhan, by permission)

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The design of the building, especially its roofs, reflects a national and traditional form. These kinds of monuments and education along with public ceremonies are part of invented traditions. North Korea attempted to embody national identity in the establishment of a modern nation state. Traditional characteristics have been used as part of a project to establish national identity.

In North and South Korea, the past becomes a source of a legal norm. “[T]he past is frequently cast as a privileged source of normative values.” In South Korea, national history plays an important role in establishing the location of a capital city as an irreversible and incontrovertible truth, which is legally binding as a constitutional custom. The Court held that even before the Republic of Korea was established until now the fact that Seoul is a capital has been perceived as a historical and traditional norm in a conscious or unconscious way. Seungjoo Bang disagrees, and distinguishes a fact from a legal norm. He argues that the past constitutes a fact, not a norm. Bang says that “Seoul is a capital” is simply a fact, and it has not been proven that the fact amounts to the formation of the customary constitution. He also asserts that it is not equivocal that there exists such a custom.

Unequivocalness is a requirement which is lacking to be the customary constitution in this case. He says that it is not clear whether opinio juris has been established: Opinio juris is the belief that certain custom is legally binding. The revisited, invented, and constructed past revives a fact as a legal norm. National history contributes to this invention of traditions which is Seoul and consequently the formation of the constitutional custom.

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472 *Supra* note 452 at 167.
474 *Ibid.* at 166.
I argue that North and South Korean governments have inconsistently used national history in order to normalize the capital space and construct capital cities by using a symbolic form of national identity through legal narratives. Pyongyang has been historicized by official narratives in which it is the origin of ethnic Koreans and Kim Il Sung’s (North Korea’s hero) birthplace as well as the location of the former capital in the Goguryo Kingdom. In South Korea, the 2004 Constitutional Court decision reproduced the symbolic meaning of a national identity and reinforced an exclusive boundary of the nation’s capital.

3.6. The Status of the Modern Capital and the City Identity

Scott Campbell explains the concentrated power in one city as a result of the recent rise of the modern nation-state: “the capital city is the spatial concentration of this modern national power in single, specific location. It reinforces the spatial division of labor between the governing (in the city) and the governed (in the hinterland).” At the top of the hierarchy among cities is the capital city. Both Seoul and Pyongyang evolved as a capital city in the modernization process in history. Great Leader and Pyongyang states that in 1951 Kim Il Sung gave guidelines for the creation of a new Pyongyang to the workers making construction plans:

We should build Pyongyang first after the war. Pyongyang is the democratic capital city of our fatherland and the center of politics, economy, and culture in the state. Pyongyang is where the Party Central Committee and the Republic government are located, and in here all lines and guidelines are set up to build the

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475 Supra note 436.
476 Ibid.
477 Seongsan Gang, Yunseog Seo and Hui-won Gang, supra note 470 at 12.
rich and powerful, and the autonomic and independent state and struggle for the achievement of a great undertaking for our people appears to be organizational order. Pyongyang is a city which has immemorial history, brilliant culture, and beautiful scenery. We should restore and construct the democratic capital, Pyongyang, more splendidly, beautifully, grandly, and contemporarily than before the war.\footnote{478}

Kim Il Sung also stated that the central area of the city should be correctly decided in order to restore the Pyongyang province to a contemporary city. He suggested that it would be good to set the Pyongyang city center in front of the People’s Committee of the Pyongyang city or at the eastern foot of Namsan (the name of mountain) where Inmindaehaksŭptang is currently located.\footnote{479}

Both Seoul and Pyongyang have the national institutions that administer the affairs of the nation as a whole. In “Monumental Europe: The National Years. On the Iconography of European Capital Cities,” Göran Therborn argues that “[c]apital cities, qua capitals, are manifestations of political power. They are invested with symbolic functions of representing the polity and the country/the people they are capitals of.”\footnote{480} The executive, legislative, and judicial buildings in capital cities provide geo-political power such as in Seoul and Pyongyang. Therborn says that a set of state buildings is one of the key components of a capital city.\footnote{481} In addition, the size of buildings and monuments demonstrates not only the power of the city but also the power of the entire nation.\footnote{482} In the rise of the modern nation-state, the primary function of city-state was to defend the city’s territorial boundary, but the

\footnote{478}{Ibid. at 12.} \footnote{479}{Ibid. at 12.} \footnote{480}{Göran Therborn, “Monumental Europe: The National Years. On the Iconography of European Capital Cities” (2002) 19:1 Housing, Theory, and Society 26 at 26.} \footnote{481}{Ibid. at 35.} \footnote{482}{“The size of buildings, monuments and streets not only demonstrated the specific size and wealth of the city, but also served as a proxy, suggesting the size and wealth of the nation as a whole,” Scott Campbell, supra note 475.}
role of a new capital city is to deal with administration related to preserve a national boundary.\textsuperscript{483} Campbell argues that the modern nation-state distinguished the city from the state, and it transformed from the city-state to the nation-state. The identity of citizens is also changed from the city-state to the nation-state context. From this point, citizens are first loyal to the state not to the city.\textsuperscript{484} Taylor explains that “the state rules and commands personal ‘citizen’ identity, the city has minimal political power and its ‘citizens’ having first loyalty to state not city.”\textsuperscript{485}

Pyongyang maintains and strengthens the identity of the city-state without excluding the identity of the nation-state. Pyongyang identity means a social status and a privilege in the North Korean society. During the economic crisis, living in Pyongyang ensured access to food. The legal framework contributes to this identity of Pyongyang. The city statute has shaped the identity of Pyongyang residents. The Act of Capital Pyongyang Management frames a registration system which manages movement of the population in and out of Pyongyang.\textsuperscript{486} Article 28 of the CPM lays out that a Gongmin who wants to live in Pyongyang, has to register as a resident, and article 30 states that a certificate of Pyongyang citizenship will be given to residents over 17 years old in Pyongyang. Article 29 further requires a permit from the city authorities to move from different regions to Pyongyang and from the suburbs to central areas even within Pyongyang. Pyongyang citizens could be expelled from Pyongyang for political reasons as Jini Choi, a former resident in Pyongyang, testifies her family’s exile from Pyongyang.\textsuperscript{487} It is also linked to Kim Jung Il’s population

\textsuperscript{483} Ibid.
\textsuperscript{485} Ibid.
\textsuperscript{486} Supra note 467
\textsuperscript{487} Jini Choi, 국경을 세번 건넌 여자 (Seoul: Bookhouse, 2005) at 9.
policy to reduce the population from 1.7 million to 1 million in the late 1990s when the
famine hit the country.\textsuperscript{488} This registration system works when the North Korean
government screens population. The exclusive boundary of Pyongyang has created the
privileged city identity. Pyongyang is officially regarded as the heart of North Korea.
Pyongyang has the status and authority of the modern nation-state capital. Also, it has the
most privileged identity in the hierarchy of the cities, which is supported by the quasi
Confucian-monarchy system. The nature of Pyongyang as a monarchic city is expressed in
the national song titled “Pyongyang is My Heart.”\textsuperscript{489}

Pyongyang is My Heart.

1. Always hugged so friendly
   Where our hope overflows,
   Pyongyang, where a hometown castle rises,
   shines all over the world
   My heart,
   Oh, Pyongyang is my heart

2. If I go alone to a lonely island on the far side of the sea
   I will go there with this mind.
   Say it, missing and say it, unforgetting
   Where the guidance shines from
   Oh, Pyongyang is my heart

3. My destiny is entrusted entirely,
   A star followed for my whole life
   Under this guidance
   Twinkling for a long long time
   Pyongyang is my heart.
   Oh, Pyongyang is my heart.

\textsuperscript{488} Ibid.
\textsuperscript{489} Du-il Kim, “평양은 나의 심장” [Pyongyang is My Heart], 조선노래대전집 [The Chosun Song Complete
Collection] (Pyongyang: Literature and Art Publisher, 2004) at 1056.
In essence, North Korea has created a privileged space which creates an exclusive boundary between “us” (the Pyongyang citizens) and “others” (the non-Pyongyang citizens) by normalizing a registration system under the Act of Capital Pyongyang Management, while South Korea has been unevenly developed as a result of the capitalist and state-centered modernization process, which raises an issue of spatial equality in Seoul.

3.7. Conclusion

A conventional idea of space sees it as absolute, objective and scientific. Space is also prepolitical and external. Critical geographers do not agree with a transcendental, asocial, and abstract concept of space. Instead, they emphasize the importance of local settings and multiplicity of spatial contexts. Critical geographers problematize removal of social relations from space and assumption that space is prepolitical. Henri Lefebvre challenged the neutral understanding of space as inseparable from ideology and politics. In his view, space is not a scientific object removed from ideology or politics; it has always been political and strategic. If space has an air of neutrality and indifference with regard to its contents and thus seems to be ‘purely’ formal, the epitome of rational abstraction, it is precisely because it has already been occupied and used, and has already been the focus of past processes […] Space has been shaped and moulded from historical and natural element, but this has been a political process. Space is political and ideological. It is a product literally filled with ideologies.

491 Ibid. at 43.
492 Henri Lefebvre, “Reflections on the Politics on Space” (1976) 8:2 Antipode at 43.
Thus, space interacts with society, and space is socially constructed. In reference to the literature I take a position that law and space in North Korea and South Korea are constructed by a political, historical and social context. Pyongyang and Seoul are not “empty,” “passive” or “prepolitical.” Pyongyang was re-constructed as an engine of socialist ideology, while Seoul was re-developed within a capitalist framework after the Korean War.

The goal of socialist construction was to abolish economic and social inequality and regional disparities: any classes or regions shall not be isolated from socialist urban planning. In 1848, the Manifesto of the Communist Party called for the “gradual abolition of all the distinction between town and country by a more equitable distribution of the populace over the country.” It also demanded the “abolition of property in land and application of all rents of land to public purposes.” The principle of equality in socialist ideology included not only economic and social equality but also spatial and geographical equality, which can be accomplished by economic development, life environment, and welfare. This is also expressed in East Central Europe. Between 1945 and 1948 there were two principles of socialist urbanization: egalitarianism and planned urbanization in East Central Europe. The principle of egalitarianism led to turning down shantytowns and constructing a number of state housing complexes, designed to provide the same space to

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493 Ibid. at 15, n. 5.
496 Ibid.
497 Kim, supra note 494 at 14.
each person and had socially mixed neighborhood with kindergarten places. In practice, housing shortages and poor infrastructure resulted in “inequalities under ‘egalitarian’ central bureaucratic distinction.” North Korea attempted to put into operation socialism in a development plan in which rural areas and urban cities should grow together in balance. It saw urban expansion as a capitalist problem, and assumed that without reducing the disparities the country could not overcome colonialism and capitalism. The North Korean Constitution considers it a state function to remove disparities between urban cities and rural areas, and class differences between workers and farmers (article 28).

In a similar way, article 123 (2) of the South Korean Constitution states that “[t]he State has the duty to foster regional economies to ensure the balanced development of all regions.” The centralized position of Seoul is not just a symbolic or geographic boundary, but also an economic, political and legal boundary. The former administration (former President Roh Mu-Hyun) attempted to challenge spatial inequality (uneven regional development) and a cultural and symbolic norm embedded in a capital city.

This chapter began with the case of relocation of a capital city in South Korea, analyzed the association between the boundaries of two capital cities and national identity, and explored the competition and accommodation between law and custom through legal narratives. In South Korea the unwritten “constitutional custom” rules that Seoul is the nation’s capital based on the 2004 Constitutional Court decision. The Constitutional Court introduced the concept of the Customary Constitution as a justification for the

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499 Ibid. at 110.
500 Ibid. at 110-111.
501 See supra note 494, at 55.
502 Ibid. at 56.
unconstitutionality of the *Special Act on the Establishment of the New Administrative Capital*. The 2004 Constitutional Court decision reproduced a symbolic meaning of national identity, and reinforced an exclusive boundary of the nation’s capital. The constitutional norm on the Korean peninsula has inscribed the capitals as fixed places and historical monuments with national identity in written and unwritten forms. Unlike South Korea, the North Korean Constitution has an express provision of the nation’s capital in article 172 while South Korea does not have it in the written Constitution.

The capital city represents and expresses a nation through legal narratives. Pyongyang and Seoul are filled with a symbolic meaning of national identity, which is embedded in the Constitution. Pyongyang is constructed as a mythical and historical place by linking it to the place of ethnic origin (where *Goguryeo*’s capital was located) and the birthplace of Kim Il’ Sung. An ethnic nationalism with the *Juche* ideology plays a role in this construction of space. This chapter argues that both Seoul and Pyongyang have selectively used national history in order to normalize a capital city as it was and as it is, and constructed the capital as a symbolic form of national identity through legal narratives as well as spatial narratives in city design.

In the end, I raise an issue of spatial equality as a substantive constitutional matter, which was disregarded in the 2004 Constitutional Court decision. The centrality of Pyongyang and Seoul is not just a symbolic or physical boundary but also an economic and political boundary, which results in spatial inequality and uneven regional development. In particular, Pyongyang has developed an exclusive and prerogative identity that draws a boundary between “us” and “others” in social and economic distributions. The capital cities reinforce the spatial divide between “the inner” (Pyongyang or Seoul) and “outer” (the
The spatial relationship is metaphorically explored through the old principle of the inner and the outer in Chapter Four, which deals with how border-crossings destabilize and displace the metaphorical, political and economic relationships between the private and public during the famine in North Korea.  

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504 Professor Steven Hugh Lee’s insightful comments provide a room for this idea during my final oral defense. It opens the possibility to show how the relative notion of the inner and outer can be expanded into physical, metaphorical, and economic borders and boundaries.
4. The *Chosŏn* Body as a Gate and Frontier of ‘the Socialist Big Family’ in North Korea

4.1. Introduction: Boundaries, Pollution, and Order

“Borders are everywhere.” Anssi Passi uses the notion to refer to discursive power, and technical control and surveillance of borders.\(^{506}\) The discursive and institutional power of the border is embedded in everyday life. Chapter Three dealt with the border between the inner (capital cities) and the outer (the rest) across two Koreas. This chapter analyzes the symbolic power of the boundary between the inner (the private, and understood as the sphere of women) and the outer (the public, and understood as the realm of men) beyond the national borders. Law and custom become ‘border narratives’ that serve to demarcate, separate, and police borders and boundaries. This chapter considers the way that gendered borders are embedded in the *Chosŏn* body as a gate and frontier through the device of a “socialist big family” (taegajŏng 大家庭) in North Korea. It focuses on the role of the metaphor of a socialist big family that is inscribed in laws, and explores the relationship between this metaphor and border practices at frontiers. Law and practices produce the meaning of a socialist big family as a metaphor of a state, and the metaphor is reproduced in border practices with discursive, productive and coercive power. I argue that (a) the metaphor of a socialist big family is a critical mechanism for political power which triggers gendered norms to police the boundaries between states and between the private and public, and (b) these dichotomies are manifested in the forms of violation of pregnant bodies on the frontiers.

This chapter discusses the boundaries between the private and public, and the inside and outside by examining narratives from old teachings, law, and extralegal practices.\footnote{The chapter deals with the principle of the inner and outer from the old teachings of Confucianism during the Chosŏn dynasty.} It visits bodies as a gate and a frontier where they are divided into two polarities: pure and impure. In \textit{Purity and Danger}, Mary Douglas suggests that the ideas of separation, purification, demarcation, and punishment for transgressions “impose system on an inherently untidy experience.”\footnote{Mary Douglas, \textit{Purity and Danger: an Analysis of Concepts of Pollution and Taboo} (London: Routledge & K. Paul, 1966) at 4.} The boundaries, which are formed by separating or demarcating, are not only physical but also symbolic. Order appears by dividing between “within and without, above and below, male and female, with and against.”\footnote{\textit{Ibid} at 4.}

The chapter discusses the spatial separation between the inner (\textit{nae} 내) and outer (\textit{oe} 외), which literally refers to the inside and the outside, and implies a man and a woman. The principle of the inner and outer (re)produces a spatialized norm in forms of dichotomy beyond time and space while altering dichotomies according to context and environment. This chapter reflects that “law’s power is discursive and productive as well as coercive. Law participates in production of meanings within the shared semiotic system of a culture, but it is also a product of that culture and the practices that reproduce it.”\footnote{Naomi Mezey, “Law as Culture” (2001) 13 Yale J.L. & Human. 35 at 47; Naomi Mezey emphasizes “law as culture” instead of “law and culture,” and draws on a theory of a constitutive theory of law. According to the theory, law and culture are intermingled with each other and it denies autonomy of law. While Mezey agrees with the idea, she claims that it is not impossible to distinguish law (or the power given to the law) and culture (or the way in which the power is exercised) (46-47).}
4.2. The State as a Socialist Big Family

In the Socialist Constitution and family law, the state is signified as a “socialist big family,” and family is understood to be the foundation of the country, namely, the cells that constitute the society. The family is a life-unit based foundation of society, and family stabilization is a state concern (article 3 of the Family law).\(^{511}\) The mission of family law is to reinforce and develop the socialist family and the family system to contribute to the formation of a peaceful and harmonious (和睦) socialist big family (article 1 of the Family Law). The preamble of the Constitution also declares:

> Regarding “The people are my God” as his maxim, Comrade Kim Il Sung always mixed with the people, devoted his whole life for them and turned the whole of society into a large family which is united in one mind by taking care of the people and leading them through his noble benevolent politics.\(^{512}\)

> The people are the children with the leader as father and the party as mother.\(^{513}\)

Charles K. Armstrong calls this “the parent-child relationship.”\(^{514}\) It resembles the

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relationship “between the Emperor as the parent and the subjects as his children” in Imperial Japan.\textsuperscript{515} The people practice loyalty and filial piety toward the parent Great Leader, the preserver of life.\textsuperscript{516} Filial piety resembles loyalty.\textsuperscript{517} The leader’s widespread “love and benevolence” are reflected by the people’s loyalty and dedication to Confucian values.\textsuperscript{518}

Bruce Cumings relates North Korea to corporatism with features such as “organic solidity; the family as metaphor and model […], and the fatherly role of the leader […]; the subsuming of the individual by family, collective, or state (all three in the DPRK).”\textsuperscript{519} Cumings also indicates that this resonates with Japanese fascism, which always considered the state “an extension of the family.” The imperial family was the principal family and the people constituted “the branch family.”\textsuperscript{520} Corporatism suggests a family metaphoric state, which is different from liberal theory that separates the political from other human behaviors.\textsuperscript{521} Charles K. Armstrong further argues that “familism” is a type of “political religion” in North Korea.\textsuperscript{522} Familism straddles the line between religion and politics, and this is embedded in law.

\textsuperscript{514} Armstrong, \textit{ibid.} at 391.
\textsuperscript{517} Namcheol Bu, “북한의 윤리적 전통윤리 정책: 가족법 윤리를 중심으로” (1993) 1 The Public Administration History 168 at 204-6.
\textsuperscript{519} Bruce Cumings explains traditional corporatism with hierarchy, organic connection and the family. Under the theme, the king is the father of the people, and ruler and ruled are connected by king’s “‘perfect love,’ paternal wisdom, and benevolence.” The king expresses “fatherly care” for his subjects, and the most important corporate body is the family, and then Church. “All members of body politics were interconnected […] to the whole.” \textit{ibid.} at 278; \textit{ibid.} at 284.
\textsuperscript{521} Cumings, \textit{ibid.} at 278.
\textsuperscript{522} \textit{Supra} note 513 at 384.
A theory of “social political organism” in North Korea supports the idea that the parent Great Leader, the mother party, and the masses are organically unified into a revolutionary big family on a basis of a blood relationship that is mediated by a political life. Physical life is given by parents, but political life is given by the Great Leader. Hence, the masses are required to practice loyalty and filial piety toward the parent Great Leader, the preserver of life: the person who keeps revolutionary faith will not betray his/her Great Leader, party, state in the face of any wind. A theory of social political organism is based on the dualism of physical life and political life, and puts more weight on political life than physical life according to Jong Seok Lee. Charles K. Armstrong argues that this religious component in the metaphors of family has contributed to the regime’s survival, and it could be analyzed as a political religion.

Familism in the public realm can be contrasted with liberalism. Liberalism is based on a divide between the public and the private. Carole Pateman notes that liberal thinker John Locke separates the family from the political and the paternal from political power. Liberal theory is associated with concepts of individual liberty, autonomy and choice; it

526 Ibid. at 220; ‘Any wind’ has a figurative meaning as any kinds of trials or hardships.
protects property rights and distinguishes between the state and individual and between the public and private.\textsuperscript{530} The so-called negative rights prevent the state from interfering with the individual, and protect the private domain.\textsuperscript{531}

It is important to recognize that paternal power is not symbolically or materially divorced from political power in North Korea, and the metaphor of family is both a source and product of political power. The art of governing by the paternalist state mixes the fatherly metaphor and a socialist welfare system. The leader’s fatherhood is reinforced by the fact that necessities for the family are provided by a socialist government. Under the socialist scheme, food is distributed by a rationing system, and housing is a public good. Education and medical care are free of charge. Family is not just a private institution but also a public institution as part of the circle of production and distribution. It represents an expansion of the public to the private realm. The state exercises political power over families and families reproduce political power. Family is a double-edged space where both resistance and oppression takes place. For example, in case of conflict between loyalty to the King and filial piety toward parents during the Chosŏn dynasty, filial piety took precedence over loyalty.\textsuperscript{532} But, in socialist Chosŏn loyalty toward the country (socialist big family) is prioritized over filial piety as Namcheol Pu suggests.\textsuperscript{533} In that sense, family is policing and policed. The socialist big family is public in a sense that political leaders supervise, guide and police cell families. The relationship between the state and people in North Korea is intertwined with a metaphor of family, and socialist big family is a metaphoric space that intersects the public and private.

\textsuperscript{531} Ibid. at 513-14.
\textsuperscript{532} Supra note 517.
\textsuperscript{533} Ibid. at 210.
4.3. Family Law between the Private and the Public

Carole Pateman criticizes liberal ideas about the dichotomy between the private and public, and argues that while John Locke stated that political power was justified by the consent of free and equal individuals, he excluded the hierarchy between a husband and a wife from the category of political power but included it in “non-political” forms of power.\(^{534}\) The universal and neutral public place was applied to only men.\(^{535}\) Women’s participation as “individuals” was kept from the public sphere. This is the divide between the *polis* (or public sphere) and the *oikos* (or private sphere).\(^{536}\) Liberal theory is associated with concepts of individual liberty, autonomy and choice and protects property rights, which distinguishes between the state and individual and between the public and private.\(^{537}\) These so-called negative rights prevent the state from interfering with the individual, and protect the private domain.\(^{538}\) Formal or symmetrical equality presumes that the state is neutral and the individuals are equal.

The law embodies “the separate sphere ideology” that assigns private sphere to women and public sphere to men.\(^{539}\) But this ideology is limited to describe the reality of women of colour and working-class women who have worked outside the home.\(^{540}\) Modern feminist theorists have also challenged the dichotomy and responded that these two realms

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\(^{534}\) *Supra* note 529 at 120-121.

\(^{535}\) *Ibid.* at 121.


\(^{538}\) *Ibid.* at 513-514.


\(^{540}\) *Ibid.*
are related in liberal-patriarchal society.\textsuperscript{541} Susan Boyd argues the private and public spheres are intertwined and interconnected although the dichotomy between home and work place seemingly points in an opposing direction.\textsuperscript{542} She explains that “the way the public sphere is organized […] relies on a particular way of organizing the private sphere”; for an example, men’s participation in public space assumes that someone else takes care of domestic work.\textsuperscript{543} Further, Pateman points out that the private sphere is at the center of civil society: for example, welfare state policies regulate and police family life, while there is a sexual division of labour in the workplace as well as unpaid domestic work in the private sphere.\textsuperscript{544}

The dichotomous framework between the public and private in liberal states does not correspond to the family/kin context in the same way in Korea. For example, Hyunah Yang argues that “[t]he family/kin in Korea is a space which is neither intimate and private, nor public in the sense that unrelated ‘individuals’ are free to make contracts.”\textsuperscript{545} In family law in the Western context, husband-wife and parents-children are made centralized while family law in South Korea is dedicated to kin relationships - although this has changed in a dynamic relationship between culture and family law.\textsuperscript{546} Yang calls this in-betweeness “third space.”\textsuperscript{547} Similarly, family law in North Korea has characteristics of public law\textsuperscript{548} that are engaged in regulating interrelations between state and citizens (formal equality) more than

\begin{footnotesize}
\textsuperscript{541} Pateman, supra note 529 at 121-122; supra note 529 at 132-133.
\textsuperscript{543} Ibid.
\textsuperscript{544} Pateman, supra note 529 at 131-134; Pateman argues that “[t]he separation between private and public is […] re-established as a division within civil society itself, within the world of men.” This is disregarded when liberalism separates civil society from domestic life. Ibid. at 122.
\textsuperscript{546} Ibid. at 7.
\textsuperscript{547} Ibid. at 8.
\end{footnotesize}
private law that involves interactions between private persons. It is also private law in a sense that it “regulates the private conduct of individuals, without direct involvement of the government.” North Korean laws are neither private nor public and neither premodern nor modern. They have been developed in their own contexts which straddle the legal borders between private and public and between premodern and modern. Equally important, the modern legal content and structure in laws are always under the surveillance of a socialist big family.

Law is a site in which the foundation of family and home can be examined, and the division between the private and public can be explored. Carol Smart argues that “the law itself reproduces, and perpetuates the most secure foundations of patriarchal relations, namely the family and gender divisions.” She claims that the family is an “ideological, cultural and economic domain.” Family law provides the definition of marriage and the basic requirements for marriage such as marriage registration, age, and monogamy. By examining the family law of North Korea we can see that even though the forms of family law follow the liberal model of the private family to some extent, patriarchal norms are still reproduced.

North Korea’s family law recognizes Gongmin’s right to “free” marriage based on monogamy (article 8). Article 18 lays out that a husband and a wife have equal rights in “home life” (kajôngaengwal). Article 9 of the family law sets the marriage age for men at

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550 Ibid.
552 Ibid. at 130.
18 years old and for women at 17. Consanguineous marriage is a violation of article 10 and polygamy is a violation of article 8, and consanguineous and polygamous marriages are void by article 13 of family law. These provisions reflect a liberal conception of law. Marriage is based on a liberal idea of marriage between two consenting individuals and family law guarantees the right to marriage.

In a further indication of a liberal orientation, the family law in North Korea uses the words, “free” or “choice.” Article 17 (Free Activities of Husband and Wife) provides a choice to a wife for public participation: It states that husbands and wives can choose a job according to their hopes and talents, and participate in social and political life [emphasis added]. Each spouse has a right to choose residence independently and separately from the other spouse. Furthermore, article 17 provides that a husband and a wife keep their own first and given name even after marriage. A husband and a wife do not have a legal obligation to live together. This guarantees a woman’s equal choice of residence at least on paper unlike the Chosŏn’s practice, which fixes a woman in a husband’s place of residence and subjugates a woman’s position through marriage. This legal text is also different from the South Korean family law, which specifies a legal duty of cohabitation. Nevertheless, the state should accommodate a change of a spouse’s job and residence where the other spouse has to move to another city. The role of the state is to accommodate and

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553 Supra note 511.
555 Ibid. at 114.
556 Ibid. at 114.
557 There are exceptions to the duty of cohabitation: for example, imprisonment, medical treatment, overseas study, work, and so on; In common law countries, before the introduction of no-fault divorce, desertion was one of the grounds for divorce.
558 Ilho Cho, 조선가족법 (Pyongyang: Education Book Press: 1958) at 108; Supra note 556 at 114.
correct inequality between family members through family law. In addition, the husband and the wife maintain his or her family name and given name after marriage, and they may choose a job based on “his or her wish and aptitude” and participate in the “socio-political life” according to article 17 of the family law.

On the other hand, the North Korean law gives special paternalist protection to the reproductive sphere, similarly to other socialist systems. Article 6 (the principle of children and mothers) under the chapter on the basis of family law emphasizes that special protection of children and mothers is a consistent policy of the Democratic People's Republic of Korea. The patriarchal relationship between state and individual is practiced in protecting motherhood. A state’s primary concern is to guarantee the conditions where a mother can raise and cultivate her children. Article 6 emphasizes the importance of mother’s circumstance in bringing up children and article 27 imposes a duty of cultivating children to the parents of children in neutral terms. This demonstrates how family in the law is gendered under the principle of formal equality while it gives special treatment to reproduction in a way to reinforce gender roles at home and in society. This framework provides the context in which the private/public dichotomy works.

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559 North Korea reports that both spouses have the equal rights in regards with “the ownership, acquisition, management, administration, enjoyment and disposition of property” (para. 246); According to article 66 of the Labour Law women are entitled to maternal leave before 60 days before and 90 days after delivery regardless of the length of work. Also, the Regulation on State Insurance and Social Security guarantees maternity subsidy amounting to 100 percent of the basic monthly salary during the leave (para. 66). Democratic People’s Republic of Korea, Consideration of reports submitted by States Parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/PRK/1 (2002).

560 Ibid. at para. 238.
4.4. Border Transitions from Home to Street

The relationship between the state and people is materially, symbolically, and legally intertwined with the metaphor of the state as a big family. The famine has destabilized the economic and symbolic foundations of home, which are tied to a paternal socialist state that provides food rations and public housing. The broken distribution system has weakened the relationship between state and people, and between a head of the family and other family members including women and children. The famine has revealed the unstable paternal association between the private and public.

Border Narrative: The Father’s Fragile Borders\textsuperscript{561} 

Hilary Charlesworth and Christine Chinkin explain that John Locke as a modern liberal scholar distinguishes “between reason and passion, knowledge and desire, mind and body. The first of each of these dualisms is associated with the ‘public’ sphere of rationality, order and political authority; the latter with the ‘private’ sphere of subjectivity and desire.”\textsuperscript{562} The dichotomous framework between the public and private in liberal states does not correspond to the notion of the socialist big family. Under the flag of a socialist big family, love lives in the realm of public politics beyond the public/private distinction. The Socialist Constitution expresses that the Great and Dear Leaders’ love is selfless beyond the bounds, and does not belong exclusively to the private sphere. The father’s love and benevolence are central to politics.


He is the father of the whole nation [and the socialist big family].
He is the one who raised us.

Our father gave his life to raise us.
His love overwhelms our hearts.

And oh our father General

Thank you very much,
Thank you very much. 563

The lyrics are taken from “Kkotchebi” [literally fluttering swallows], which is a term used to refer to North Korean street children, in a song recorded in a documentary film, “Crossing Heaven’s Border.” 564 The song begins with the first line: “[h]e is the father of the whole nation and the socialist big family.” The leader is represented as a father who gives life to children and raises children. Children’s narratives are most sensitive to the power structure as street kids in social hierarchy, who experienced the great famine immediately. 565

Our father Marshal Kim Jung-il.
Oh father, Oh father”

563한나라 대가정의 아버지래요.
우리들을 키워주시고
한평생 인신의뢰 꽃피는 사랑
가슴에 젖어옵니다.
아버지 장군님 고맙습니다.
고맙습니다.

In Taek Jung & Hark Joon Lee & Eunjung Lim, 천국의 국경을 넘다 [Crossing Heaven’s Border] (Seoul: Chosun Ilbo, 2008); BBC News, “Korea out of the North (1/3),” online: Youtube <http://www.youtube.com/watch?v=MuHidhPTU50&feature=related>.

564 Homeless children in streets (kkotchebi) have composed a high percentage of the internally displaced population. Ibid.

565 Street kids are exposed to malnutrition, violence, and discrimination at the intersections of age, class, and citizenship. They are “agents of knowers” who have struggled for food and home, living at the edge of the society. Thus, their narratives constitute knowledge. In Sandra Harding’s feminist standpoint theory, “agents as knowers” achieve a standpoint when they recognize their subordinate position at the intersections of social relations such as gender, race, class, and struggle for better conditions. Alison Wylie & Elizabeth Potter & Wenda K. Bauchspies, “Feminist Perspectives on Science” (Fall 2012) in Edward N. Azlta ed., Stanford Encyclopedia of Philosophy, online: Elizabeth Anderson <http://plato.stanford.edu/entries/feminist-science>.
[Children stop singing and start talking.]

Father? What kind of father is that? A crappy father
He can’t even feed porridge to his starving children.\textsuperscript{566}

\textit{Kkotchebi} who were featured in another documentary, “Shadows and Whispers,”
engaged in gossip in the middle of singing a song praising the father, Kim Jung-II. This was
about “a crappy father” who fails to provide for his children.\textsuperscript{567} These children were called
“veterans” who have crossed national borders back and forth. The metaphor of a socialist big
family could not be sustained both at home and in the streets, particularly since the famine.
These border narratives from \textit{Kkotchebi} reveal that the symbolic and material image of the
fatherly leader has been fractured and domination, which utilizes a family metaphor as a
political tool, has not been successful, thus validating the claim that the state’s “[i]deological
hold in North Korea was always incomplete.”\textsuperscript{568} The children most affected by the famine
live in ways that cross a series of borders, both political and social. They cross from North
Korea to China in search of food, but also cross the border of the home and the street. This
border crossing fractures the unity of the socialist big family.

\textsuperscript{566} 우리 아버지 김정일 원수님
아버지, 아버지 우리의 아버지
아버지, 우리는 아버지야.
죽도 하나 못먹이는 게 무슨 아버지야.
Library, 2000).
\textsuperscript{567} K. Sophia Woodman deals with the effect of “politics of gossip and talk” as part of resistance or critique in
her dissertation. K. Sophia Woodman, \textit{Local Citizenship and Socialized Governance Linking Citizens and The
State in Rural and Urban Tianjin, China} (Ph.D. Dissertation, University of British Columbia, 2011)
[unpublished].
\textsuperscript{568} Cheehyung Kim, “Total, Thus Broken: Chuche’e Sasang and North Korea’s Terrain of Subjectivity,” (Spring
From Home to Street

From the early 1990s to 1998, six hundred thousand to one million people died as a result of the famine in North Korea. Families separated to find a way to survive, and houses were abandoned in search of food. Food shortages led to the collapse of the family system to the extent that family members could not stay together. A legal marriage was not considered a stable option. The birth rate was estimated in 1997 at 0.75 children per woman, half the rate for 1980. Poverty hit the most vulnerable hardest, and the elderly and children were the first ones to starve to death. Newborn babies with nursing mothers as well as the elderly struggled to find food. Some elderly parents faced death as they gave up food for their offspring. A NGO report says that ninety percent of the elderly over the age of seventy and forty percent of the children under the age of ten died in 1997 to 1998. After 1998, there was a saying in North Korea that 2004 is the year when the wife (manura) of a landowner goes to the mountains while 2005 is the year when a millionaire merchant (paengman changsa) goes on a round of business trips (hengbang). Figuratively, this phrase describes the situations where everybody regardless of class represented as a “landowner’s wife” or a “millionaire merchant” had to look for plants to eat in the mountains,

570 Good Friends, ibid. at 35.
571 Good Friends, ibid. at 16.
574 Good Friends, 오늘의 북한, 북한의 내일 (Seoul: Jungto Press, 2006) at 169.
575 Good Friends, supra note 569 at 34.
576 Good Friends, supra note 573 at 32.
577 Ibid.
578 Supra note 574 at 15.
and sell household items in ‘illegal’ marketplaces.\textsuperscript{579} In fact, it was typical that mothers and grandmothers sought something edible in the mountains and on the plains to find sustenance for their families.\textsuperscript{580} Mobility became a fundamental issue for economic survival more than a matter of civil liberties.\textsuperscript{581}

Poverty has dramatically removes the spatial boundary between private and public sphere, home and street, and a homeland and a foreign land. \textit{Kkotchebi} in the streets constitute a high percentage of the homeless population. Women have left home to make a living in the markets, streets, and mountains since the food rations were cut. Home, which is considered a private sphere under the dichotomy between private and public, became a place not for protection but for threats to survival. Women have been re-placed as an emerging subject of marketplaces or displaced in streets for prostitution around railroad stations.\textsuperscript{582}

Catharine A. Mackinnon argues that “historically, women have had to leave home to get justice within it because it was his castle.”\textsuperscript{583} This suggests that ‘his’ home is a place of injustice for women. But, under the circumstances in North Korea, the question needs to be constructed differently: could women exercise their rights to leave home or home country to seek food justice? If so, could food justice be done outside the home? Since the failure of a rationing system crosses the boundary between the private and public sphere, the floating population of children and women has been exposed to violence in the street. Internal

\textsuperscript{579} \textit{Ibid.}
\textsuperscript{581} Good Friends, \textit{supra} note 569 at 49.
\textsuperscript{582} Women are the majority of merchants in the markets since they became the breadwinners of the family during the famine. They have played an important role in North Korea’s market economy. Hyeok Kwon, \textit{고난의 강행군}, \textit{supra} note 572.
migrants experience corruption, harassment, beating, and rape by the security forces. As women’s mobility increases, gender-based violence such as rape and sexual harassment occur while on the move. Street violence punishes children, women, and the elderly for moving away from an acceptable state of dependence.

At national borders, women’s rights to leave are further restrained by criminalizing emigration. There are reported cases in which pregnant women in detention have been forced to have abortions, and sentences are sometimes increased for female returnees who have entered marital relations in outside countries. Although North Korea imposes a penalty on unauthorized departure in general, border practices are gendered. This suggests that contact across the borders between home and street, and homeland and foreign land is considered dangerous, and the notion of contact is related to sexuality, involving legal or extralegal practices being exercised over bodies. The chapter will now turn to the Korean historical context to look into how contact beyond the private and public is deemed to be dangerous, and how separation or demarcation is central to the art of government in Chosŏn and socialist Chosŏn in order to maintain the order of a social hierarchy in family and the socialist big family. This is also an attempt to uncover an origin of the belief, which has entrenched a dichotomy between the private and public rather than seeking for the truth.

4.5. At Borders between the Inner and Outer

In 2000, North Korea submitted a national report to the Committee on the Elimination of All Forms of Discrimination against Women. In this report, North Korea claims that it has made a great effort to eliminate gender inequality since independence from Japan and thus stereotyped gender roles based on “outmoded customs” no longer remain prevalent in society. Nevertheless, it recognizes that “there still exist such customary discriminations as calling a man the outer householder and a woman the inner householder in a family, a man becoming the head of a family,” while it emphasizes that the discrimination is not merely based on custom or bias but also the country’s severe economic situations as a result of economic sanction and natural disasters. North Korea describes the principle of the inner and outer as a remnant of “customary discrimination” against women. I would like to link the principle of the inner and outer to understand border practices in North Korea.

It is critical to explore what the contact between a homeland and a strange land means through the semiotic relationships between the inner (nae 내) and the outer (oe 외). I use the terms, the inner and the outer, to emphasize the form of the dichotomy between the private and public in the Korean context. The spatial separation between the inner and outer, which literally refers to the inside and the outside, implies a woman and a man. The principle of the inner and outer (naeobŏp 내外法) is the source of the mythic origin in the Chosŏn dynasty, which was exported and transplanted from China. In fact, bipolarity including gender

586 Democratic People’s Republic of Korea, supra note 559 at para. 100
587 Ibid. at para. 101.
588 Ibid. at para. 102.
589 Ibid. at para. 101.
relation was not even important in early Chinese thought. Dorothy Ko argues that in seventeenth-century China, the terms inner and outer (or private and public) are “relative and relational,” and the inner/outer demarcation means they are not mutually exclusive, but construct and define each other in response to changing contexts. Lisa Raphals also suggests that “there were distinct modes of ‘inner’ and ‘outer’ activity and that the terms nei/wai were only secondarily applied to specific locations and the physical separation of men and women.” Thus, this chapter reads the principle of the inner and outer as a narrative or a story with performative force rather than the historical truth, which could be contested. It constructs the bipolar relationships between the inner and outer and women and men, which are recurrent in contemporary stories. It produces a spatialized norm in the structure of dichotomy beyond time and space by adjusting to different contexts. I argue that the dichotomous boundary between the inner and outer is operated by preventing and punishing contact between them, and dichotomies between male and female and between homeland and strange land are manifested in the form of violence at frontiers. The principle of the inner and outer is employed as a technique for the political mechanisms of creating and reinforcing social hierarchy, and a spatialized gender norm is crucial to maintaining the boundary between purity and danger.

Narrative from the Principle of the Inner and Outer

The principle of the inner and outer was a Confucian norm during the Chosŏn period. The message of naeoebŏp as law or customary law was that men and women should avoid “natural contact.”\(^{593}\) It provides what “contact” between women and men means in the Confucian society, and leads us to question why the Chosŏn dynasty was interested in spatial separation between women and men. Under the naeoebŏp, spatial separation between the inner (nae 内) and the outer (oe 外) is a gendered norm. The inner symbolizes women and the outer refers to men. The gendered mark of spatial separation remains in modern languages in Korean society. Anae or ansaram, a wife in Korean, means the inner person, and pakkassaram or pakkadyangban, a husband in Korean, denotes the outer person.\(^{594}\)

The following is a good example of the principle of the inner and the outer, which was excerpted from Sohak (小學), a compiled book of essential teachings in Confucianism written by Yujajing (劉子澄) under the guidance of Chuhŭi (朱熹) during the Song (宋) Dynasty in China. Myŏngnyun, Pubujibyŏl 夫婦之別 [The distinction between a husband and a wife] under chapter 66 states:

A man should not talk about what he does inside, and a woman should not talk about what she does outside. A man and a woman should not pass dishes to each other except in memorial service or in mourning. A woman uses the baskets when she passes [dishes] to each other. If there are no baskets, a man


and a woman sit down and put the dishes on the ground, and then a woman takes them. […]

The inner and outer should not use the same well or bath; should not use take a bath in the same bathroom; should not use the same bedding; should not borrow things from each other; and a man and a woman should not use the same clothes. […]

A man should not whistle when he goes inside and should not point the finger. A candle has to be carried with a man when he walks at night, and [a man] should not go out without a candle. When a woman goes out, she hides her face. […]

In the street a man goes to the right and a woman goes to the left.  

The gendered ideas of separation between men and women constructed the relationships between body and costume, and housing.  

The spatial dichotomy between the inner and the outer applied to architecture of housings for the upper classes. The house for yangban, the high class, was constructed to avoid contact between men and women, and discipline bodily movements through the patriarchal gaze. For example, sarangch’ae was a man’s place while anch’ae was a woman’s, with the latter located furthest from the entrance of a house. In this sense, naeoebŏp was a gendered teaching, in which a spatial dichotomy between nae and oe was inscribed.

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595 Baekhyo Seong (전통문화연구회), 小學 (Seoul: Dongbang Media Co, Ltd, 2001) [translated by author].
596 Kyung Mee Lee, supra note 593 at 105-117.
598 "한옥의 공간과 기능: 안채와 안방." online: Han Style: Korea the Sense <http://www.han-style.com/hanok/study/hanok_structure.jsp>.
The *Kyŏngguk Taejŏn*, the first legal code that was enacted in 1484 in Korea, reflects the principle of the inner and the outer.\(^{599}\) It contains a provision to prevent women and students of Confucianism from going to Buddhist temples.\(^{600}\) A punishment of 100 lashes (杖) was imposed for a violation.\(^{601}\) In particular, women from the *yangban* class were prohibited from playing out in the hills and valleys or at a bend in a river or holding religious ceremonies.\(^{602}\) The women who violated it were subject to 100 lashes.\(^{603}\) “Queens, princesses, female relatives of the royal family and brides of noble families” were required to use a palanquin to go outside following *Kyŏngguk Taejŏn*.\(^{604}\) If people outside the categories used palanquin, they could be punished with 80 lashes.\(^{605}\) It is noticeable that social status and gender intersected in the provisions of *Kyŏngguk Taejŏn* to create distance between men and women.

*Yangban* women should veil their faces with a long cloth when they travel outside their homes. Kyung-Mee Lee says that men also covered their faces with a fan, and veiling faces was commonly used in the late Chosŏn although it was not regulated.\(^{606}\) *Sohak*(小學), which was designed to teach children, says that women should not go out after the age of ten

\(^{599}\) *Supra* note 593 at 109.


\(^{601}\) *Ibid* at 108.

\(^{602}\) *경국대전* at 495-498, cited in *Ibid* at 263.

\(^{603}\) *Ibid* at 263.


\(^{605}\) *경국대전 권 4 刑典*, cited in Kim, *supra* note 597 at 52.

\(^{606}\) *Supra* note 593 at 114.
Jisoo Kim argues that the naeoebŏp was mainly applicable to yangban women instead of women in general. The principle of the inner and outer was used when yangban women were associated with sexual promiscuity. Young-sun Kim concludes that “the yangban class’s patriarchal interest in women’s sexuality also reflected the restriction of women’s mobility in the public sphere, i.e. outside of the house.” In this context a woman’s body was considered too vulnerable to be contaminated by contact with other men. Contact was dangerous.

On the other hand, if there was no contact between a man and a woman it means to be “literally barren,” and that results in contradiction: “[t]o wish all women to be chaste at all times goes contrary to other wishes […]” Mary Douglas says that it is paradox to search for purity because “it is an attempt to force experience into logical categories of non-contradiction. But experience is not amenable and those who make the attempt find themselves led into contradiction.” The next section discusses how the prevention of contact is associated with the purity of a family as a mechanism for the system of social status, while the aim of enforcing separation between men and women is contradictory.

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608 Jisoo Kim, supra note 604 at 62
609 Ibid.
611 Ibid at 91-92.
612 Ibid.
613 Douglas, supra note 508 at 162.
The Contact between the Inner and Outer

Contact is a core element to understand the relationship between spatiality and sexuality under the principle of the inner and outer that was applied as a Confucian norm during the Chosŏn period. Interpreting naeoebŏp through Mary Douglas’s insight on pollution beliefs, contact between nae and oe is dangerous.614 “Each sex is a danger to the other through contact.”615 Douglas further asserts that the idea of sexual danger mirrors hierarchy or symmetry in the social system. She associates the body with the social.616 She points out that “[s]ometimes bodily orifices seem to represent points of entry or exit to social units, or bodily perfection can symbolize an ideal theocracy.”617 For example, under the Hindu caste system, “women are the gates of entry to the caste.”618 Even though a woman married a man of higher caste, her caste determines the caste of her children.619 Similarly, under the hierarchy of social status in Chosŏn, women’s bodies were the point of entry and exit to the social status. A child followed a mother’s social status (yŏk ᴲィ) when a slave woman married to a commoner, according to Kyŏngguk Taejŏn,620 although the provision was changed several times. There was an exception that a child followed his or her father’s social status when a slave man married a commoner woman.621 Until the middle of the seventeenth century a child became a commoner by taking the mother’s status as a commoner.622 The exception suggests that social mobility was blocked for children who had slave fathers. This parallels the example of the caste system where a woman who has sexual

614 See ibid. at 3.
615 Ibid at.3.
616 Ibid at 4.
617 Ibid at 4.
618 Ibid at 126.
619 Ibid at 125.
620 경국대전 [Kyŏngguk Taejŏn] at 504, cited in Uyeong Cho, supra note 600 at 164.
621 Ibid at 164.
622 Ibid at 164.
intercourse with a man of lower caste was cruelly punished according to Douglas. Also, marriage between a yangban man and a slave woman was not permitted except taking a slave woman as concubine. Uyeong Cho argues that Kyŏngguk Taejŏn is premised on barriers between commoners and slaves, which strictly restrains an interchange of blood lineage.

The underlying anxiety about sexual danger represents that the blood royal and yangban should maintain their social status and survive as a minority group in the society. As Douglas states, “[t]he purer and higher its caste status, the more of a minority it must be” under the Hindu caste system. Because it is important to keep the purity of caste from sexual conduct, “in higher castes, boundary pollution focuses particularly on sexuality.” Similarly, in the Chosŏn dynasty, purity was essential for the maintenance of the hierarchical structure that centered on the loyal and the noble. It represents a minority’s anxiety about danger for the group survival, as Douglas indicates. This explains why the Chosŏn dynasty was interested in regulating marriage and prohibiting marriage between men and women from different social strata. There was a common interest between the dynasty and the high class in terms of group survival. The boundary pollution is well reflected in the law of the inner and outer, and the common interests between the royal and the yangban explains why the Chosŏn dynasty adopted the law, and incorporated it into the Kyŏngguk Taejŏn, the first uniform code to govern the Korean society. As a result, the yangban woman’s body, the gate of entry to hereditary status, was a site to be controlled, and her mobility was more restrained than men’s as a tactic for maintaining the purity of patriarchal lineage. It indicates

623 Jisoo Kim, supra note 604 at 57.
624 ibid at 125.
625 Hindoo is an old spelling of Hindu. Douglas, supra note 508 at 124.
626 ibid at 124.
that a woman is placed in a spectrum of social status to be exchanged through marriage between the groups of the same class, and considered a reproducer of the social status. Without the structure of family and social status, an individual cannot stay as an abstract entity in the text, bearing in mind that the practices do not always reflect the teaching and could be more complicated than the text.

Until early Chosŏn yangban women joined outdoor activities, and it was accepted for women to get remarried. It was not rare that yangban women committed adultery in early Chosŏn. Remarriage and adultery were punished according to Kyŏngguk Taejŏn which includes provisions that a remarried or adulterous woman’s sons were not allowed to take an examination either for civil and military affairs. Also, it required the reporting of yangban women’s immoral conduct including remarriage. In Power and Sexuality in Chosŏn, Hei-Sook Kim interprets this as state control over women’s sexual activities in a direct or indirect manner, and at the same time she raises the question why the state was interested in supporting marriage. Even the state’s financial support for a single woman’s marriage was regulated in Kyŏngguk Taejŏn for the poor yangban families whose daughters were still unmarried at the age of thirty. Kim states that the state’s engagement in filial piety and brotherly love (孝悌) was more central to Confucianism as a state ideology than merely sexual control as an ethical or moral matter. She argues that according to this system a well-regulated state must neatly arrange the family inside, thus reinforcing the idea of

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628 Young-sun Kim, supra note 610 at 93.
629 Ibid at 37; 대전 at 213-214, cited in Uyeong Cho, supra note 600 at 286; Kyŏngguk taejŏn at 198-9, cited in Jisoo Kim, supra note 604 at 52.
630 Ibid, supra note 632 at 45.
mutual resemblance between family and state.\footnote{Kim, \textit{ibid.} at 34.} Borrowing Douglas’ insight, adultery or remarriage was deemed “dirt” (or disorder) threatening hierarchical arrangements to ensure pure blood. Marriage within the hereditary system was regarded as a norm (or order) in \textit{Kyŏngguk Taejŏn}, with which family and state should conform. Sexual contact outside the normality of marriage was to be avoided because it could bring danger and disorder to the ideological foundation of a patriarchal state.

The pollution idea is simpler and clearer than the complex moral codes so that it is contagious and faster in distribution.\footnote{It is impossible that the moral code is to be “simple, hard and fast” as it often faces contradictory and uncertain situations. In uncertain moral situations, the pollution rules can be substituted for the moral code. Mary Douglas, \textit{supra} note 508 at 130.} It reinforces the boundary between the inner and the outer, which is also inscribed in \textit{Kyŏngguk Taejŏn}. In regard to the difference between moral rules and pollution rules, Mary Douglas says that the application of moral rules to the particular context is more obscure, contradictory, and uncertain than the one of pollution rules which are clear-cut because the pollution rules do not balance rights and duties.\footnote{Ibid. at 130.} Douglas suggests several functions of public rules. For example, in cases of contradictory situations within moral codes pollution rules simplify the conflict, or they fill in the blanks of moral codes.\footnote{Ibid. at 133.} The pollution rules can support plain and simple moral codes, although it is not true that moral codes always trigger the pollution rules.\footnote{Ibid. at 129-133.} Uyeong Cho says that \textit{Kyŏngguk Taejŏn} regulates only the core part of the hereditary apparatus, which existed in custom and customary law.\footnote{Uyeong Cho, \textit{supra} note 600 at 26.} It plays a role to tune and govern contradictory relationships between norms in a comprehensive way.\footnote{Ibid. at 27.} The pollution rules further strengthen the core
part of the moral codes (禮 Li) of Kyŏngguk Taejŏn, and fortify the gendered boundary between the inner and the outer for the hereditary system it prescribes.

It is not a coincidence that moral codes are located in the system of public law (公法) that regulates the relations between state and individuals or between states instead of in private law (私法) about the relations between individuals. Hei-Sook Kim argues that private morals in Kyŏngguk Taejŏn are generally placed in the realm of public law in modern society.642 Uyeong Cho suggests that the hereditary distinction apparatus normally belongs to a system of public law instead of private law, when law, custom or religion forms a dominant social norm.643 This is because the hereditary system needs to be acknowledged and condoned by the system of public law even when it originates from the private realm.644 This demonstrates that the private and public are intermingled and the division between the two were blurred, because the state constructed itself as a family, and the ethics and norms which governed a family were central to the social hierarchy that was the foundation of the state’s ruling order.

In sum, the state utilized the separation between the inner and outer to prevent people from border-crossings through contact, and its primary function was to maintain the hereditary system as a social order for purity of the yangban class and the royal. While North Korea historically excluded the yangban class in its mission of socialist revolution, separation or demarcation as a technique has persisted in the art of government from certain aspects of Confucianism for the purpose of disciplining people to avoid contact, for example,

642 Ibid. at 36.
643 Ibid. at 65.
644 Ibid. at 65.
between the categories such as core, complex and hostile groups, or between Koreans and non-Koreans.

4.6. Border Narratives from an Iconic Figure: Yŏllyŏ and Hwanhyangnyeo

The border expresses itself through ‘border narratives.’ Sharon Pickering explains that how the “border is narrated” refers to “how we can understand everyday deployments of ideologies of state and migration,” and “how we routinely inscribe borders with the meaning that serve to reinforce particular border imaginations, especially the practices of border policing.”645 Ruth Buchanan and Rebecca Johnson explore a metaphor of the Western frontier that demarcates “a mythic boundary between civilized and uncivilized, between a ‘masculinized’ West and a ‘feminized’ East.”646 They argue that the frontiers are essential to legal imaginations, and that modern law’s narrative of origin is placed on the boundaries between “male and female, inside and outside, law and violence, civilization and savagery.”647 Peter Fitzpatrick states that the mythic relationship between the savage and civilization (the violent origins) repeats itself to make civilization permanent, using Jacque Derrida’s notion of iterability.648 This narrative of law’s foundation is repeated to conserve its origin,649 and iterability “requires the origins to repeat itself originarily, to alter itself so as

646 Ibid. at 140.
to have the value of origin, that is, to conserve itself. “Buchanan and Johnson suggest how the narratives of law displace and vanquish “the violent and savage order,” and the masculine legal order dislocates “the feminine and the female subject” outside the law. Thus frontier narratives are shaped by the heroic voice of white and masculine agency and feminized/racialized victims. Buchanan and Johnson demonstrates that “the story of law’s foundation is not an ‘old’ story,” and it is endless repetition of law’s founding authority in which we live. The “same old stories” reflect a defensive voice in the invaded territory for state protection rather than a heroic voice for state intervention in the Western frontiers.

This chapter shows how “the same old stories” originated from the separation between the inner and outer in the Korean context. The bipolarity of gender is performative as a narrative with the pollution idea on the frontier. Yŏllyŏ (烈女) and Hwanhyangnye (還鄉女) as iconic figures, two official stories, reflect how the pollution ideas embedded in the principle of the inner and outer operate to trigger “the same old stories.” The pollution idea is not limited to the past but extended into the present and the future. It also works in both premodern society and modern society without distinction.

The truth of such didactic stories is challenged, contested, reconstructed and reframed by contemporary scholars from the factual or historical point of view. I read the simple stories lines of the traditional tales of Yŏllyŏ (烈女) and Hwanhyangnye as a myth and consider these stories as border narratives in the face of threats of neighboring state invasion.

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650 Ibid. at 43.
651 Ibid. at 132-133.
652 Buchanan & Johnson, supra note 647 at 137.
653 Ibid.
654 Mary Douglas, supra note 508 at 40.
during the Chosŏn dynasty. The stories demonstrate how borders create a binary opposition between purity and danger through the gender dimension in the contemporary context.

The state distributed Yŏllyŏjŏn, Yoo Han’s book on virtuous women in the Han dynasty of China, from the early Chosŏn, and awarded virtuous wives and daughters-in-law by establishing Yŏllyŏmun.655 One of the Yŏllyŏmun (烈女門) [Gate for a Virtuous Woman] is located in Paju, Gyeonggi province close to the Demilitarized Zone (DMZ). I encountered a writer in a Gyeonggi local newspaper, who triggered a spatial imagination between Paju, a frontier city facing North Korea, and Shin Pyeongsong’s loyalty and chastity.656 His article calls for loyalty to a country with Gyeonggi women’s spirit. Another Gate for a Virtuous Woman called Pongsŏri Ch’ungsinyŏllyŏmun (鳳棲里 忠臣烈女門) still stands in Bongseori, Paju, Gyeonggi-do, South Korea.657 The gate was founded for Shin Pyeongsong, Kim Bokgyeong’s daughter-in-law who killed herself to maintain her loyalty and chastity (sunjŏl 殉節) in 1636 when she was captured by soldiers of the Qing Dynasty during the Pyŏngja War.658

The photo in Figure 11 is another Gate for a Virtuous Woman called Kimsŏngmong ch’ō Yŏllyŏmun (金石夢 夫烈女門) in Paju, Gyeonggi province. In 1764, King Yeongjo established it to memorialize Nam Pyeongmun as Kim Seokmong’s widow for her womanly virtues and chastity.659 She committed suicide to keep her loyalty and chastity (sunjŏl) when resisting a villain’s rape attempt. A Tablet for a Virtuous Woman

655 Supra note 610 at 93-98.
657 Ch’ungsin 忠臣 refers to a loyal subject.
[Yŏllyojongnyŏgip ’yŏnaek], which is carved with this virtuous woman’s name and the award date, is hung with an official document on the Gate. They commemorate the commitment of yangban women to bodily purity at the cost of their lives.

Figure 11 Kimsŏngmong ch’ŏ Yŏllŏmun (金石夢妻烈女門)
Figure 12 A Tablet for a Virtuous Woman [Yŏllyojongnyŏgip ’yŏnaek] and Archive (© 2008 PAJU Cultural Center, by permission)

The Chosŏn dynasty adopted neo-Confucianism (Jujahak), and maintained a policy of promoting Confucianism and Suppressing Buddhism (崇儒抑佛) as a founding and governing ideology after the Koryŏ dynasty gave a way to the Chosŏn dynasty. It imposed the legal regulation of women’s mobility out-of-doors as part of “Confucian scholars’ project of replacing the ruling ideology of Buddhism with that of Confucianism.” One of the

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660 Ibid.
662 The Chosŏn dynasty was established by King T’aejo’s yoksŏngyŏngnyŏng (易姓革命) which refers to changing the dynasty.
663 Young-sun Kim, supra note 610 at 91.
examples is that Kyŏngguk Taejŏn prohibits women from visiting temples.664 Lee Ok-kyung links the emphasis on women’s chastity in the period of Chosŏn to “the castration of Buddhist influence in the political-economic realms.”665 Even after the Imjin War with Japan (1592-98) and the Pyŏngja War with Qing China (1636-37), the state put more emphasis on chastity as part of “the state’s (re)building process.”666

*Hwanhyangnye* (還鄕女), literally a woman who returned to her hometown, is situated on the other side of the spectrum of the stories. These were women who were kidnapped and taken by Qing soldiers during the Pyŏngja War, totaling an estimated three hundred thousands.667 Some of the women came back to Chosŏn by paying the ransom or running away.668 The children born to the returned women were called the offspring of barbarians (*horo* 胡虜).669 In particular, a hwanhyangnye were subject to opprobrium for failing to guard her chastity (*silchŏl* 失節) from barbarians.670 Some yangban husbands and their families claimed that these woman should not perform ancestral ceremonies and asked King Injo (仁祖) to grant them a divorce. In 1638, King Injo received two petitions from two yangban, a hwanhyangnye’s father and a hwanhyangnye’s father in law taking the

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669 *Supra* note 667.
opposite position.\footnote{Ibid; Myeonggi Han, “[병자호란 다시 읽기] (103) 환향녀의 슬픔 , 안추원과 안단의 비극” *The Seoul Newspaper* (24 December, 2008), online: 서울신문사 \textless http://www.seoul.co.kr/news/newsView.php?id=20081224026004\textgreater .} Han Igyeom, the *hwanhyangnye*’s father, appealed to King Injo to deal properly with the request of his son-in-law asked for a divorce from his daughter.\footnote{35 인조실록 (Seoul: 민족문화추진위원회, 1990) at 12, cited in Kim and Ko, *ibid.* at 16.} Jang Yu, the *Hwanhyangnye*’s father in law petitioned for his only son’s divorce, and claimed that they could not allow their ancestral ceremonies to be performed by a *hwanhyangnye*.\footnote{Kim and Ko, *ibid.* at 16.} Further, the offspring of the family of a married woman who is not chaste was not allowed to take a civil service examination and be appointed in a key post in the government according to *Kyŏngguk Taejŏn*.\footnote{Gihwan Lee, *supra* note 667.}

In the face of these petitions, King Injo disallowed divorce in general. Instead, he ordered the returned women to take a bath in a creek at the entrance to *Chosŏn* and clean their bodies in the belief that it would wash away all dirtiness (*pujŏng* 不淨).\footnote{Donsik Ju, *조선인 60 만 노예가 되다* (Seoul: hakgoje, 2007) at 130, cited in *supra* note 670 at 17.} The rivers were called *Hoejŏl-gang* (回節江), which literally refers to a river to restore chastity with a promise of putting the past behind them.\footnote{Donsik Ju, *ibid.*.} It began from *Hongjech’ŏn* (弘濟川), a creek outside *Hanseong* Fortress Wall, *Hoejŏl-gang* and it was extended to rivers such as *Cheongcheon-gang, Daedong-gang, Han-gang, Nak-dong-gang, and Yeongsan-gang* in the provinces as more *hwanhyangnye* came back home.\footnote{Munsu Han, “환향녀 (還鄕女), 그 이름을 족보에서 지워라 (1 부)” *高句麗歷史敘始* (2 Apr. 2013), online: greatcorea.kr <http://www.greatcorea.kr/sub_read.html?uid=264>.} King Injo also ordered that issues around chastity of these women should no longer be raised.\footnote{Munsu Han, *supra* note 677; Jiyeon Kim, “[열녀기행] <4> 환향녀, 조선의 성리학을 비웃다” *BookDaily* (5 Apr. 2013), online: <http://www.bookdaily.co.kr/news/articleView.html?idxno=39613>.}
I regard Yŏllyŏ and Hwanhyangnye as the effects of the operation of the principle of the inner and outer. The principle of the inner and outer was established on the basis of the relations between male and female, and inside and outside, and its mission was to maintain the purity of a family lineage, which underlies social order. Social order centers on the divide between purity and impurity of a family. Douglas links the notion of untidiness and uncleanness to “a systematic ordering.”679 Dirt is “matter out of place,” and fundamentally disorder.680 It is “the by-product of a systematic ordering and classification of matter.”681 Belief in pollution or danger guards the order by reinforcing social pressures.682 There is no dirt without system.683

The two iconic figures in the stories are positioned on the boundary between purity and danger, and they are the outcome of the orderings that are found in the principle of the inner and outer. Yŏllyŏ symbolizes purity and hoejŏl-gang dirt in the society as a whole. This ritual operates a purity/pollution dichotomy and sends a message about the importance of women’s chastity. A yangban woman’s chastity was weighed more against men’s, and the yangban body was centered on the pollution/purity ritual under the scheme of a hereditary system that serves the loyal and noble. The gendered inscriptions of purity and danger in Yŏllyŏmun contribute to the norm of “ideal” virtuous woman to discipline Chosŏn body in the country.

The Yŏllyŏmun for Shin Pyeongsong symbolizes a Chosŏn woman’s body as well as a yangban woman’s in the Imjin War. Mary Douglas argues that the body’s boundaries are symbolically used to exhibit danger to society boundaries with an example of the ritual of the

679 Supra note 508 at 161.
680 Ibid at 2.
681 Ibid at 35.
682 Ibid at 3.
683 Ibid at 35.
Coorgs.\textsuperscript{684} External invasion and threat marked a Chosŏn woman’s body as a point of entry or exit from and to the Chosŏn society. This resonates with King’s order that asked hwanhyangnye to clean their impurity at the entrance to Chosŏn. Douglas emphasizes that “[a]nything issuing from the body is never to be re-admitted, but strictly avoided,” and once it re-enters, it becomes the most dangerous pollution.\textsuperscript{685} There existed the fear of impurity in families and communities when hwanhyangnye re-entered Chosŏn. Hwanhyangnye’s stories indicate that married or pregnant women were put under the gaze of the purity of family after returning to home country. This leads to the context in which North Korean pregnant returnees’ narratives occur on the frontier where a socialist big family begins and ends.

4.7. Purity and Danger of the Socialist Big Family at Frontiers

There is some evidence that beliefs similar to those of the past about the pollution of border crossers by their contact with the outer world persist in North Korea. Testimonies from North Korean border crossers show how the “pollution beliefs” are applied to pregnant returnees in detention on the frontiers.\textsuperscript{686} I introduce the reports of forced abortions and killings of infants in detention based on the testimonies of North Koreans. Below I provide some background information to contextualize the incidents, proceeding to analyze how power relations at the micro-level perform the pollution ritual over pregnant bodies in detention. Detention facilities are often located in the geographic areas near the frontiers of North Korea.


\textsuperscript{685} \textit{Ibid.} at 122.

\textsuperscript{686} \textit{Ibid.} at 3.
Border Practices

Cases of baby killings or forced abortions in detention facilities have been reported in the international media. David Hawk’s 2003 report, *The Hidden Gulag*, included four witnesses’ testimonies involving forced abortions and five witnesses regarding infanticides, which took place from 1999 to 2000.\(^{687}\) The women had been repatriated to North Korea by China.\(^{688}\) Detainees less than three to four months pregnant received surgical abortions. If detainees were more than four months pregnant, they were subject to labor-inducing injections.\(^{689}\)

The Investigation Report on North Korean Human Rights estimates that three percent of the interviewees had forced abortions upon repatriation to North Korea, and twenty-one percent had witnessed forced abortions.\(^{690}\) The report gathers data and testimonies through in-depth interviews with fifty North Koreans who have settled in South Korea, and a survey of a hundred North Koreans in the Hanawon resettlement center in Anseong, South Korea. The survey participants left North Korea before 2005.\(^{691}\)

Norma Kang Muico of Anti-Slavery International includes testimony of a forced abortion in *The Forced Labor in North Korean Prison Camps*.\(^{692}\) There is also testimony

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689 This is information from the Former Detainee #8 who was at Chongjin jip-kyul-so, *Ibid.* at 65.


691 35% left North Korea in 2004, 26% left North Korea before 1999, 8% left North Korea in 1999, 12% in 2003, and 9% in 2002.

692 Anti-Slavery International is an international nongovernment organization which was founded in the United Kingdom in 1839. Anti-Slavery International, “Anti-Slavery International Today,” online: Anti-Slavery International
about a pregnant woman who was taken to a clinic for an abortion in *Hoeryeong* Security Agency (*Anjŏnbu, Poansŏng*) in 1997. Also, an interviewee witnessed two pregnant women leaving a detention center for an abortion at a clinic in the *Hoeryeong* Security Agency in 2004. While thirteen out of thirty interviewees encountered pregnant women from 2001 to 2006, Muico suggests that there had been improvement since 2000 based on testimonies that pregnant women were exempted from forced labor together with the elderly and sick.

The White Paper on Human Rights in North Korea documents cases of abortions, miscarriages and infanticides and willful neglect of newborn babies from 1997 to 2007. It describes a case of a woman eight months pregnant, who was 18 years old in the *Musan’gunn* labor training camp in 1997. She sank down in a swoon, and had a miscarriage after running sixty laps around the track because she was carrying "Chinese seeds." Also, a repatriated woman who was seven months pregnant was asked to get an abortion because she had “Chinese offspring” in the People’s Hospital in *Chonnae, Gangwon* province in April 2000. After a month, she was given an injection to induce labor against her will and her baby’s destiny is not known. In April 2004, a 30-year-old woman surnamed Baek from

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694 Norma Kang Muico, “Case Study 6,” ibid. at 42.
696 “There were two pregnant prisoners. They didn't have to work. They just had to sit quietly in the prison camp. Both were released early and sent home after signing a document stating that they would not return to China. The treatment of pregnant women has changed. Now they don't make the pregnant women abort their babies.” *Ibid.* at 17. Anti-Slavery International interviewed thirty North Koreans, who have been incarcerated for border-crossings in North Korea. The interviews were conducted in China and South Korea from 2005 to 2007. The report includes cases with the summary of interviews. Most of the interviewees were from the North-eastern province of North Hamgyeong and have been imprisoned since 2003. at 2.
Sakju, North Pyongan province, was forced to have an abortion in Sinŭiju Collection center hospital. She was caught when she visited her hometown with her Chinese husband. Her husband was deported after ten days of investigation. In February 2005, a forced abortion was performed on a woman surnamed Lee (who was born in 1967) was forced to have an abortion because she was blamed for bringing in “Chinese seed” in the Hoeryeong Security Agency.

These reports are extreme examples of the reinscribing of purity and patriarchal order on women who have transgressed the norm that women should stay in the private sphere and the norm of purity for a socialist big family. Inger Agger argues that when women leave the private sphere and enter the public, “the visible women become dangerous women – both sexually and politically.” In a similar sense, it could be signified as a transgression of the principle of the inner and outer if a North Korean woman left her homeland (nae) and entered a foreign land (oe). Contact between two separate spheres, nae and oe, becomes dangerous “sexually and politically.” Her act of border-crossing is viewed as a threat to the order and purity of a socialist big family. This is constructed as impurity and disorder, and re-entry requires a ritual to clean the impurity. The pregnant body is dangerous because the fetus is undecided and unspecified in the categories for purity under the gaze of socialist big family.

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700 Ibid.
701 In the Hoeryŏng Security Agency, several cases regarding forced abortions were reported. Ibid.
The Imprisoned Soul and Body under the Guard’s Gaze

Testimony from a woman, who was repatriated and detained in Ch’ŏngjindŏ detention center for a month in 2000, was recorded in the Investigation Report on Human Rights of North Korea through Testimonies as follows:

Room No. 1 was for people who’s capable to work, Room No. 2 was a compartment for patients with paratyphoid, plague or […]. Room No. 3 was a bit warm and cozy. Many pregnant women were let in [together with other women]. Once they were caught inside this they must give birth in here regardless of being in the sixth month of pregnancy or seventh month of pregnancy. The person who delivered a baby was a halmoeni (a grandmother). […] Because we were cramped for a cell, we all stood against the wall like this and saw the mother giving birth. […] We did all the things on our own. Security guards laid one bar upon another from outside, so there was no way out. Once a baby was born it was put face down. Putting them down this way, then the baby began crying. Struggling to be alive, crying for life, those times when the mother was waiting until her baby died left [me] really speechless. Healthy babies cried after 3 or 4 days […]. A security guard appeared after and said: […] Chinese seeds are not worth getting and should not be dropped in our Chosŏn, the North Korean land. If [you don’t like] seeing a baby crying like this, don’t go to China again. How good are ‘benevolent and virtuous politics (仁德政治)’ and ‘bold and magnanimous politics (廣幅政治)’ in North Korea! We are bringing in and accept all of you. So, go out after killing a baby. […] So I stayed there about just a month. In a month seven babies were born.703

Disciplinary power operates on detainees’ bodies as form of punishment and torture.

The testimony implies that the security guard did not enter the cell at the scene of a baby killing, but simply gazed inside from behind the bars. “Torture is a technique; it is not an extreme expression of lawless rage,”704 but a calculated process and among “the most

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703 Supra note 718 at 54.


“human things.” Although the testimony is not explicit, detainees acted as agents to commit infanticide. It suggests that these killings were part of regulatory practice and the normalized process in a cell. The interviewee testifies that seven babies died in a month. She says that once the dead bodies were left besides the toilets to be collected, male detainees went out to bury them at some point. The normalized practices made detainees’ bodies docile under surveillance through the guard’s panoptic gaze. Disciplinary power was exercised upon detained bodies in the cell. The pollution ritual distributes the idea to remove ambiguous and anomalous “dirt” to (re)gain social patterning and ordering out of an “illegitimate” pregnancy. It is simpler, faster, and more contagious than moral codes, which are enough to incarcerate the souls and bodies. As Foucault points out, “[t]he soul is the effect and instrument of a political anatomy; The soul is the prison of the body.” The pollution ritual imprisoned the soul of detainees under the gaze of a socialist big family. Disciplinary power coexists with sovereign power, and penetrates into detention centers and prisons to maximize the production of punishment on frontiers. Violence and discipline are in the interplay between socialist big family (state) and inmates (members of the society).

705 “The truth is that torture is one of the most ‘human’ things we know of, since the form of exercising power has been part of human relations at least since the ancient Egyptians.” Peter Suedfeld, Psychology and Torture (New York: Hemisphere Publishing Corporation, 1990), cited in Inger Agger, supra note 702 at 62.
706 Michel Foucault, supra note 704 at 30.
707 The frontier is at the nexus of the sovereignty-discipline-government. Michel Foucault neither argues that a society of sovereignty is replaced by a disciplinary society nor that a disciplinary society is subsequently replaced by a society of government. Michel Foucault, “Governmentality” in Graham Burchell & Colin Gordon & Peter Miller, eds., The Foucault Effect: Studies in Governmentality (Chicago: University of Chicago Press, 1991) at 102.
Re-entry to the Socialist Big Family

Zillah R. Eisenstein asserts that “[t]he body as ‘fact’ and the body as ‘interpretation’ are real, even if we cannot clearly demarcate where one begins and the other ends.”709 Douglas describes that the body is used to symbolize “danger to community boundaries.” As an example, the Coorgs “treat the body as if it were a beleaguered town, every ingress and exit guarded for spies and traitors.”710 In the context of North Korea the Chosŏn body is the entry to nae of a big family.

A former female detainee testified about her experience of seeing her newborn baby being disposed of at the hands of policemen in a labor correction center.711 On October 9, 2002 she was repatriated to North Korea when she was nine months pregnant with a Korean-Chinese man, and detained with three other pregnant women who underwent induced abortions in the labor correction center.712 She explains that “after I delivered my baby, some policemen wrapped it in a plastic bag and put it into a waste-basket. They said my baby was a ‘dirty one from a Chinese.’ I saw the bag moving. She was alive.”713 She recalled the guard’s words, “dirty one from a Chinese.” Her baby was treated as dirty, believing that it carried an impurity outside the territory to pollute orderings in a socialist big family. Reentry of pregnant returnees to North Korea is seen as dangerous to the community. Douglas explains that “[t]he most dangerous pollution is for anything which has once emerged gaining re-entry.”714 She also explains that an unborn child’s “present position

711 Eunyoung Choi, Gender, Justice and Geopolitics of Undocumented North Korean Migration (Ph.D. Dissertation, Syracuse University, 2010)
712 Ibid. at 94-95.
713 Ibid. at 95.
714 Douglas, supra note 508 at 123.
is ambiguous,” and something inarticulate is understood as pollution.\footnote{Ibid. at 95-96.} This detainee’s baby or fetus was placeless and stateless. It was simply not defined.\footnote{Ibid. at 95.} The “formless” fetus in a transitional status is dangerous and powerful.\footnote{Ibid. at 95.} The eyes of the gatekeeper of the socialist big family possibly may perceive the returnees’ fetus as not definable in the systematic patterning of a socialist big family.

The Chosŏn body is the entry to the nae of the state. A North Korean former detainee heard a guard say: “Chinese seeds are not worth getting and should not be dropped in our Chosŏn.”\footnote{The Centre for North Korean Studies at Dongguk University, 탈북자 증언을 통해서 본 북한인권 실태 조사 [Investigation Report on Human Rights of North Korea through Testimonies] 2004 년 국가인권위원회 인권상황 연구용역보고서 (Seoul: Dongguk University, 2004) at. 54.} The returnee’s pregnant body is viewed as being contaminated by Chinese blood, and her pregnancy is illegitimate within the state territory. A woman’s body and her fetus are perceived as inseparable at frontiers where her fetus is an infected part of her.\footnote{Supra note 711 at 78.} Their existence pollutes the purity of a socialist big family through patrilineal relations so that they are powerful and dangerous enough to overrule a mother’s belongingness.\footnote{Eunyoung Choi, supra note 711 at 95.} This suggests the context in which pregnancy is understood as a matter of national security. When the nation is identified with the family it facilitates the construction of national loyalty in familial terms.\footnote{Ida Blom, Karen Hagemann, and Catherine Hall, Gendered Nations: Nationalisms and Gender Order (Oxford; New York: Berg, 2000) at 8.} Home and homeland resemble each other. A woman’s act of border-crossing triggers the pollution rule for a socialist big family as well as violates criminal law. Because women’s bodies are metaphorically viewed as a gate to a family, they contain the possibility of creating impurity and a threat to a socialist big family, when a woman leaves nae (inside country) and enters oe (outside country). In this context, the conduct of border
crossing could be interpreted as a breach of a filial duty and loyalty to a unified family more than an individual’s violation of law. It disobeys the fatherly order. Pregnant returnees are lawbreakers and suspected internal enemies who have betrayed the big family. Border practices reiterate gendered orders and norms between protected and protector, *nae* and *oe*, and femininity and masculinity. Tortured bodies and souls in detention are the marks of sovereign state and patriarchal power. A technique that punishes female emigrants is associated with reproduction as a duty to the nation/state. This delegitimizes pregnancy outside the socialist big family and perceives the fetus as a contaminated part of a mother who is an enemy of the nation and family. Pregnancy outside the big family lineage is considered illegitimate and dangerous to the integrity of state identity and security in North Korea.

**4.8. Conclusion: Frontier Violence in Boundaries**

Derrida argues that “[v]iolence is not exterior to the order of *droit*. It threatens it from within.”\(^722\) “Violence is not an accident arriving outside law,” and “[t]hat which threatens law already belongs to it, to the right to law, to the law of the law (*droit*), to the origin of law (*droit*).”\(^723\) As such, violence is immanent in the foundation of the principle of inner (*nae*) and outer (*oe*) to maintain hierarchical order.\(^724\) Contradictions were internal to the spatial divide between the inner and outer to avoid contact beyond the boundaries.

\(^723\) *Ibid* at 35.
\(^724\) Derrida refers to the immanent violence in foundation of the law. *Ibid* at 34.
Contact is dangerous. Sexual contact is just one of the examples of these beliefs.\textsuperscript{725} It is an immanent violence in the order of law to prohibit border-crossings between men and women, between home and street, and between homeland and foreign land to maintain the purity of the socialist big family. The famine revealed the fragile and unstable borders of the socialist big family. The socialist big family is mixed with the private and public; private law is part of public law and the public is part of the private. The relationship of the inner and outer in this chapter is relative and relational, and is stretched out or reformulated to accommodate the context.

The mythic relations between female and male and between inside and outside repeat persistently and in return these processes promise perennial social order. The originality of pure lineage repeats itself by re-producing a socialist big family with “a performative and interpretive force,”\textsuperscript{726} and it is manifested in the form of border practices in North Korea. Derrida states that the iterability is “the violence of conservation.”\textsuperscript{727} The existence of police represents a mix of foundation and conservation, which produces “a phantom-like violence.”\textsuperscript{728} The stories reappear in different trajectories remaining with mark and trace.

This chapter traced two sites, the Gate of a Virtuous Woman \textit{Yŏllyŏmun}, which inscribed chastity at the entrance to the village, and \textit{Hoejŏlgang}, the river to restore chastity at the entrance to \textit{Chosŏn} during the \textit{Chosŏn} dynasty. These stories are reinscribed in the form of violence to pregnant bodies and souls on the frontier of North Korea. I argue that the foundation of the principle of inner and outer are made up of binary oppositions between female and male and inside and outside to avoid contact between them, and this bipolarity is

\textsuperscript{725} Supra note 508.
\textsuperscript{726} Derrida, supra note 722 at 13.
\textsuperscript{727} Ibid at 38.
\textsuperscript{728} Ibid.
practiced and performed on the frontiers where the state is constructed as a gendered embodiment. The relationship is extended, altering itself, to one between capitalism and socialism and between friends and enemies in the international realms of security. The pollution idea of purity/danger is the mechanism for maintaining the boundaries.

In socialist Chosŏn as well as imperial Chosŏn the state exercises political power over families and a metaphor of family is a part of the mechanism that reproduces political power. While in the imperial Chosŏn filial piety toward parents was weighed against loyalty to the king, the socialist Chosŏn prioritizes loyalty toward the socialist big family over filial piety toward immediate family. This chapter is an attempt to contextualize the foundation of the principle of inner and outer in the metaphor of a socialist big family, and apply it to the frontier violence in North Korea. It considers how bodily movements are policed and disciplined in a gendered manner, and reproduction is controlled in a cross border context. The next chapter examines the national frontier of North Korea where border patrols enforce emigration law and practices. It shows how militarized border at the Berlin Wall between East and West Germany and legal decisions about that space after the reunification of Germany.

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729 Supra note 517.
5. The Use of Firearms by North Korean Border Guards against Emigrants and the Necessity of National Security: The Lesson from the East German Border Guard Case

5.1. Introduction

We waited till dark and began crossing the frozen river, and then the guards saw us. My mother said to me, “Run! Run as fast you can!” I was so terrified and I ran as fast as I could. Behind my back, I heard a gun shot, but I did not turn back. When I finally stopped, I was in the middle of some barren fields, and my mother was nowhere near me. I walked and walked, crying and calling for my mother out loud. (41-year-old female, Bukchung County, Southern Hamkyung Province).  

North Koreans cross the national border through the Tumen and Ablok rivers to China, the first neighboring country to which North Koreans flee. The Tumen and Ablok rivers form a border between China and North Korea. At a national border, people crossing the border without official approval are considered illegal fugitives by the North Korean state authority. It is reported that those who cross the border without permits have been killed on the spot by border guards. The testimony above, which was introduced by the Good Friends, a NGO based in South Korea, was given by a North Korean woman, who came from Southern Hamkyung Province; she lost her mother while fleeing to China with her mother after she heard a gunshot.

731 Kumsoon Lee, 북한주민의 거주・이동 실태 및 변화전망 (Seoul: Korea Institute for National Unification, 2007) at 103.
In this chapter, I examine the legal codes relevant to a right to leave and a right to life, and those that apply to the use of firearms by North Korean border guards. I also explore the social/political context that reinforces the illegality of unauthorized emigration. I review the East German Border Guard cases. In the past, many of those who sought to flee to West Germany were killed by East German border guards. After the unification of Germany, some of the border guards and their superiors were convicted and sentenced to imprisonment for intentional homicide in the Regional Court. In some cases the Federal Supreme Court and the European Court of Human Rights upheld the conviction. I explore the connection between emigration and criminal law, in the context of national security, and the proportionality between the right to leave and the necessity of use of the firearms in the name of national security. While this chapter uses the rationale of proportionality as an analytical tool, it reveals the limits and conundrums of proportionality in different societal contexts. Lastly, I draw on the legal norms of transitional justice from the East German cases and on the possible applicability of the norms to the Korean peninsula upon the unification of North and South Korea.

Although legal values and frames have developed in different ways between the two Koreas since the division, transitional justice in a reunited Korea could lead to a range of processes to find out essential and common norms and values at a minimum level, that would allow the principle of proportionality to be applied to cases similar to the East German one. This chapter reflects that more than one regulatory regime regarding border-crossings in the domestic or international level could connect beyond the national boundaries for transnational justice.
5.2. Background

Institutional Practices at the Border

During the winter when the Tumen river is frozen, an increasing number of people flee to China. It was reported that 109 people were forcefully repatriated from Tumen in China to Onsung in Northern Hamkyung Province, North Korea for ten days on December 1, 2010. After the Army imposed self-censorship for about a month on December 1, 2010, it gave instruction that ‘a single person shall not be allowed to cross the border.’ This instruction reflects a noticeable increase in border crossers because of food shortage as well as skirmish between North and South Korea. North Korea Today, a newsletter by Good Friends also added that soldiers would be rewarded with university admission and vacation if they could catch illegal border crossers, smugglers, or fugitives. Soldiers were also directed as follows: ‘if you are asked to let someone to cross the border, you should wait until he or she enters border areas, and then catch him or her. You will be paid without any conditions.’ A businessman, who visits back and forth to the Tumen city of the Yanbian in Jilin province, says that it is an awe-inspiring atmosphere because all the junior members, who were newly appointed to the position, fall over themselves to be loyal. Border control has been strengthened since the outbreak of a localized skirmish after North Korean forces

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733 Ibid.
734 Ibid.
735 Ibid.
736 Ibid.
737 Ibid.
launched an artillery bombardment over the South Korean island of Yeonpyeong on November 23, 2010.

Border control has changed over times based on political needs. While it used to be that in times of economic difficulties border control was relaxed, it has been tightened since July 8, 1994 when Kim Il Sung passed away. Once again, the North Korean government curbed border crossing since Kim Jong-un was confirmed in his position as a successor by appearing beside Kim Jong-il in the 65th anniversary of the ruling Worker’s Party on October 9, 2010. According to Radio Free Asia based on a North Korean source, what Kim Jong-un did first was to close North Korea’s borders. It is reported that on January 3, 2011 Kim Jong-un’s order was given to the State Security Agency to “capture all defectors in China without exception.” “Defectors in China are the ones who are destroying the sincerity of our political ideology.” There is a group (an inspection unit), called kūruppa, whose purpose is to apprehend North Korean defectors in China from 2009, under the control of North Korean security agencies (powibuwŏn). This order was given when North Korea received a letter of cooperation from China, which addressed security issues in regard to North Korean defectors, according to North Korea’s high-level communications. In addition, there exists the Agreement on Mutual Cooperation of the Work for National

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738 Good Friends, 오늘의 북한, 북한의 내일 (Seoul: Jungto Press, 2006) at 130.
742 Ibid.
743 Junun Lee, ibid.
744 Ibid.
Security and Maintenance of Social Order in the Border Areas, a bilateral treaty, which was made between China and North Korea in 1986.\textsuperscript{745} In accordance with article 4, both parties shall cooperate to prevent illegal border-crossing, and people who do not have a legal document are considered illegal border-crossers. As a result of stricter border control between China and North Korea, Kyu Chang Lee found that more North Koreans attempted to use sea routes for defection in the beginning of 2011.\textsuperscript{746}

The Right to Emigrate

The states under the influence of the Soviet Union during the Cold War severely limited travel abroad, while the Western European States asserted greater freedom for travel.\textsuperscript{747} The German Democratic Republic (the GDR) was founded in the East under Soviet administration. The 1949 Constitution of the GDR allowed a right to emigrate to be limited by a law. Article 10 of the Constitution of the German Democratic Republic, which was promulgated on October 7, 1949, states that “every citizen has the right to emigrate. This right may be restricted only by a law of the Republic.”\textsuperscript{748} In 1977, the GDR said to the Human Rights Committee of the United Nations that it complies with freedom of movement as set in the International Covenant on Civil and Political Rights (the ICCPR).\textsuperscript{749} In 1984,


\textsuperscript{746} Kyu Chang Lee, \textit{supra} note 741 at 3.


\textsuperscript{749} \textit{Supra} note 747 at 9-10.
the GDR reported to the United Nations that it allowed a great number of people to travel abroad, and the restrictions were imposed for national security and public order.\footnote{Ibid. at 10.}

North Korea was under the trusteeship of the Soviet Union after Korea became independent of Japan in 1945. In 1947, Kim Tubong led a committee that drafted a provisional constitution, completed in February 1948.\footnote{RG 242, SA 2006, 15/39, Chosŏn imsihŏnbŏp chunbi e kwanhan pogo [조선 임시헌법 준비에 관한 보고, Report on the Prepartaion of a Korean Provisional Constitution] (Pyongyang: Propaganda Bureau, Pyongyang Special City People’s Committee, 1947), cited in Charles K. Armstrong, The North Korean Revolution, 1945-1950 (Ithaca and London: Cornell University Press, 2003) at 201.} Soviet archives serve as clear evidence of the significant role of the Soviet Union in drafting North Korea’s constitution and laws.\footnote{Kathryn Weathersby, “Soviet Aims in Korea and the Origins of the Korea War, 1945-1950: New Evidence form the Russian Archives,” Cold War International History Project Working Paper No. 8 (Washington D.C.: Woodrow Wilson International Center for Scholars, 17 November 1993), cited Armstrong, ibid.} In 1948, the People’s Democracy Constitution (Inminminjuŭi hŏnpŏp) was enacted under the influence of the 1936 Constitution of the Soviet Union.\footnote{Daegyu Yoon explains that “the Socialist Constitution” was enacted in 1972 after Kim Il Sung’s domination of the political system was established. Daegyu Yoon, “북한사회와 변천과 혁명의 변화.,” 2009년 북한현법 개정과 북한체제 변화 [The 2009 Amendment of the North Korean Constitution and Change of North Korean system], Proceedings of a Conference Held October 20, 2009 (Seoul: The Institute for National Security Strategy, 2009) at 5, online: Korea Peace Institute <http://www.koreapeace.or.kr/modules/forum/forum_view.html?fl_no=2676>; Armstrong, ibid.} The 1948 Constitution is almost identical to the provisional constitution that was made in 1947.\footnote{Ibid. at 5- 11.} Similar to the Constitution of the Soviet Union, freedom of movement was not included. It was in 1998 when the North Korean Constitution provided that a Gongmin has the right to freedom of residence and travel in article 75.\footnote{Socialist Constitution of the Democratic People’s Republic of Korea, adopted 27 Dec. 1972 by the first session of the 10th Supreme People’s Assembly (last amended 5 Sept. 1998), Information Center on North Korea online: Information Center on North Korea <http://unibook.unikorea.go.kr/?cate=1&sub_num=53&state=view&idx=86&sty=T&ste=%25C7%25E5%25FD>.} In August 2009, North Korea referred to article 75 when it submitted the Universal Periodic Review to the Human Rights Council.\footnote{In 2007, Universal Periodic Review was created by the resolution, which established the Human Rights Council, the successor to the United Nation Commission on Human Rights (1946-2006). The Working Group has three sessions per year, and at each session it reviews fulfillment of human rights obligations in sixteen
The Constitution comprehensively provides for the fundamental rights and freedoms in all fields of State and public activity such as [...] freedom of residence and travel. It also explicitly stipulates that these rights and freedoms are provided to everyone equally and practically, and shall be amplified with the consolidation and development of the socialist system.\(^\text{757}\)

On the other hand, the North Korean government criminalizes people who leave the country without state permission.\(^\text{758}\) In September 2009, following the reports, the Office of the High Commissioner for Human Rights compiled the information including the UNHCR’s observation of North Koreans’ continuous flow out of the country for protection and settlement, the Special Rapporteur’s report on the people who were persecuted by authorities for leaving the country without administrative permission, and the ICCPR’s recommendations in 2001 to remove administrative requirements for state permission and exit visa as a general rule.\(^\text{759}\) Finally, in January 2010, the Working Group in Human Rights Council on the Universal Periodic Review recommended that North Korea review national criminal and immigration legislation to comply with international obligations on the right to freedom of movement both within its territory and towards other countries, including protection of the right to leave the country.\(^\text{760}\) The report states that North Korea would examine these recommendations in due time, but it also indicates that North Korea would not

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\(^\text{760}\) Mexico, Hungary, New Zealand, and Malaysia are the member states, which made the recommendations to North Korea. UN HCROR, 13th Sess., A/HRC/13/13, (2010), Agenda Item 6, online: <http://lib.ohchr.org/HRBodies/UPR/Documents/Session6/KP/A_HRC_13_13_PRK_E.pdf> at para. 90(15), 90(81), 90(84) & 90(85).
support other requests from states such as France and Japan, regarding reform of criminal code, removal of prior state permission for travel or decriminalization of unauthorized exit.\textsuperscript{761}

The freedom of residence and travel in the constitution is not expressly delimited to the territory of a State, while the ICCPR distinguishes between the right to liberty of movement and freedom to choose residence within the territory of a State and the right to leave any country in article 12. This reveals differences between the North Korean Constitution and the reports by the civil society and the UN treaty bodies.

5.3. The Right to Leave One’s Own Country: Emigration and Criminal Law

The East German Criminal Code

The Criminal Code of the German Democratic Republic (GDR) criminalized border crossings without official approval as does the Democratic People’s Republic of Korea (DPRK). Section 213 of the Criminal Code of the GDR, titled “unlawful crossing of the border,” stated that illegal border-crossings constituted criminal offenses.\textsuperscript{762} Section 213(1) laid out that illegal emigrants and migrants, who resided in the GDR and passed through the GDR without authorization, were subject to up to two years of sentence, a suspended sentence with probation, or a fine as follows:

(1) Any person who illegally crosses the border of the German Democratic Republic or contravenes provisions regulating temporary authorization to reside in the German Democratic Republic and transit through the German

\textsuperscript{761} Ibid. at para. 91(43) & para. 91(44).
Democratic Republic shall be punished by a custodial sentence of up to two years, a suspended sentence with probation, imprisonment or a fine.\textsuperscript{763}

In serious cases, “border violators” shall be sentenced to a prison term of one to eight years in accordance with section 213(3), which listed what constitutes serious cases. Section 213(3) included jeopardizing life or health, using firearms or “dangerous means or methods,” committing forgery or falsifying documents, conspiring with others, and committing a second offense of illegal border-crossing as follows:

(3) In serious cases, the offender shall be sentenced to one to eight years’ imprisonment. Cases are to be considered serious in particular where
1. the offence endangers human life or health;
2. the offence is committed through the use of firearms or by dangerous means or methods;
3. the offence is committed with particular intensity;
4. the offence is committed by means of forgery, falsified documents or documents fraudulently used, or through the use of a hiding place;
5. the offence is committed jointly with others; or
6. the offender has already been convicted of illegally crossing the border.
(4) Preparation and attempt shall be criminal offences.\textsuperscript{764}

A danger to society is an important criterion to define a serious crime. “[A]ttacks dangerous to society, against the sovereignty of the German Democratic Republic” were considered “serious crimes” in the section 1(3) of the Criminal Code. Section 1(3) defined “serious crimes” as:


\textsuperscript{764} \textit{Ibid.}
attacks dangerous to society (gesellschaftsgefährliche Angriffe), against the sovereignty of the German Democratic Republic, peace, humanity or human rights, war crimes, offences against the German Democratic Republic and deliberately committed criminal acts against life (vorsätzlich begangene Straftaten gegen das Leben). Similarly considered crimes are other offences dangerous to society which are deliberately committed against the rights and interests of citizens, socialist property and other rights and interests of society, and constitute serious violations of socialist legality and which, on that account, are punishable by at least two years’ imprisonment or in respect of which, within the limits of the penalties applicable, a sentence of over two years’ imprisonment has been imposed [Italics added].

“Similarly considered crimes” were also included under section 1(3). Deliberate forms of conduct against “the rights and interests of citizens […] and other rights and interests of society,” were regarded as crimes dangerous to society, given that “socialist legality” is severely violated by the conduct. This legal text constructs the idea of danger in the context of political interests as well as economic interests of the state. These types of serious crimes are subject to punishment of no less than two years’ imprisonment. The definition of “serious crimes” in section 1(3) of the Criminal Code supports the interpretation of “serious cases” in section 213(3) of the Criminal Code.

In the 1992 border guard case, Michael-Horst Schmidt, who was shot to death by two border guards, used a ladder and was fired upon when he attempted to climb over the Berlin Wall (Figure 13). The Regional Court stated that a violation of section 213 of the

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765 Ibid. at para. 3.7.
766 Section 1(3) of the Criminal Code defines ‘similarly considered crimes’ as follows. “Similarly considered crimes are other offences dangerous to society which are deliberately committed against the rights and interests of citizens, socialist property and other rights and interests of society, and constitute serious violations of socialist legality and which, on that account, are punishable by at least two years’ imprisonment or in respect of which, within the limits of the penalties applicable, a sentence of over two years’ imprisonment has been imposed [Italics added].” Ibid. at para. 3.7.
Criminal Code dealing with the act of border-crossing was in most cases determined as a crime at the time of the act, which was punishable with more than a two-year prison term.\textsuperscript{768}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{Berlin_Wall_August_2013.png}
\caption{The Berlin Wall (August, 2013)}
\end{figure}

(© 2013 Kankan Xie, by permission)

In determining whether using a ladder was considered a ‘dangerous method,’ the Regional Court considered the “Common Standpoint on the Application of 213 of the CLC” that was written by Upper Court of the GDR and the general public prosecutor of the GDR in 1988.\textsuperscript{769} They explained that ‘dangerous method’ as defined in section 213(3) (no 2) of the CLC covered using “climbing aids for surmounting the border security installations.”\textsuperscript{770} Similarly, in \textit{Baumgarten v. Germany} the Human Rights Committee provided information that “the use of dangerous means” included using a ladder to get over the wall, which fell within a serious crime under the section 213(3) (no 2) of Criminal Code.\textsuperscript{771} Crossing the border with “particular intensity” in section 213 (3) (no. 3) was also regarded as a serious crime. In

\begin{itemize}
\item \textsuperscript{768} I use the term the Regional Court instead of the Young Persons Chamber, \textit{supra} note 762 at. 2.
\item \textsuperscript{769} \textit{Ibid.}
\item \textsuperscript{770} \textit{Ibid.}
\item \textsuperscript{771} \textit{Supra} note 765.
\end{itemize}
addition, a great deal of “physical efforts,” and a degree of intensity could determine whether the conduct of border-crossing is a misdemeanor or serious crime. Finally, the information clarified that “serious cases of illegal border crossing” were regarded as serious crimes, either because they were able to be subject to more than two years’ imprisonment or because they were seen as “attacks dangerous to society” or a “serious violation of socialist legality” under the section 1(3) of the Criminal Code. Going back to the 1992 border guard case, Manfred J. Gabriel argued that the 13-foot ladder that Michael-Horst Schmidt used should not be seen as “a dangerous means” under section 213(3)(no. 2) but admittedly, successful escapes were believed to be a threat to political and economic interests of East Germany although they could not justify the killings that sometimes occurred.

Section 213(3) (no. 2) of the Criminal Code in concert with the interpretation of “serious crimes” in section 1(3) of the Code suggested that illegal border-crossings by using a ladder to climb over the border fence were dangerous to society. It is important to know that illegal exits from East Germany were understood as jeopardizing “rights and interests of society” and forming “serious violations of socialist legality” as defined within section 1(3) of the Criminal Code. This suggests the context of how it is possible to interpret these sections so as to understand the actions of the border guards.

The Act of Border-Crossings and Dangerousness in the Criminal Code

Charles K. Armstrong introduced the 1946 Court record for the city of Haeju and outer counties that indicated that a number of people, such as “landlords, entrepreneurs, and ‘pro-Japanese elements,’” fled to South Korea or attempted to flee in Haeju near the 38th

772 Ibid.
773 Ibid. at para. 3.9.
774 Ibid. at 391
He found 62 cases regarding “assisting (people) across the border” (wŏlgyŏng annae) to South Korea. Leaving a country without state permission in North Korea was historically regarded as an anti-state act or conduct amounting to treason. It appears that the state has kept official records on border-crossings to South Korea, and they have been used to categorize citizens and screen them through the registration system.

<table>
<thead>
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<th>3 Classes</th>
<th>Categories</th>
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Table 1 Three Categories in the 1993 Guideline on the Residents’ Registration Book

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776 Ibid. at 204.
778 Supra note 779 [translated by author].
In the 1993 Guideline on the Residents’ Registration Book, the person, who was a returned citizen or had a member of family who defected to South Korea or flew abroad, has been categorized as members of “the complex class.”779 People are classified into basic, complex, and hostile classes as shown in Table 1. The complex class refers to the people who are considered by the state to pose potential problems socially and politically.780 National security is linked to the criminalization of emigration and the classification of the people who are potentially dangerous to the state. This indicates that a historical record of a person’s emigration negatively affects his or her life and their families and offspring, and provides the reason to put citizens under surveillance.

Kunsik Kim, an author of a North Korean book, Criminology 1, describes social dangerousness as the most fundamental nature of, and the basic sign of, crimes.781 Article 10 of the Criminal Code (the Concept of a Crime) defines a criminal offense as dangerous conduct that violates national sovereignty, socialist system, and legal order by intention or negligence.782 The concept of dangerousness has been commonly used in criminal codes in socialist countries. In Cuba, the Criminal Code defines “dangerousness” as “the special proclivity of a person to commit crimes, demonstrated by conduct that is observed to be in manifest contradiction with the norms of socialist morality.”783 The notion of dangerousness


780 Seungmin Park and Jinyeong Bae, “북한 사회안전부 주민등록사업과” “월간 조선” (July 2007) at 124.


782 제 10조 (범죄의 개념) 범죄는 국가주권과 사회주의 제도와 법질서를 고의 또는 과실로 침해한 행위를 준 정도의 위험한 행위이다.

is of a “pre-criminal state in which a person’s behavior suggests that he or she is of the type likely to commit a crime in the future.”\textsuperscript{784} Thus, a person deemed “dangerous” could be imprisoned before they committed a crime. This does not necessarily mean that the ways in which “a danger to society” is interpreted and used in Cuba are the same as it was in East Germany. But, it indicates that danger to society was an important factor in the definition of a serious crime in East Germany as explained in the border guard cases.\textsuperscript{785}

Further, Kunsik Kim states that it is important to establish and understand the characteristics of criminal conduct, emphasizing that a danger is an important factor to define a crime in order to distinguish between enemy and our side, a principal and an accessory, and a mastermind and a follower.\textsuperscript{786} The categorizations contained in the \textit{1993 Guideline on the Residents’ Registration Book} play a role in determining the category of people who are in a “pre-criminal state” which is likely to result in committing an anti-state crime. The categories produce the classification of suspected internal enemies, who could potentially betray the state. The registration book presumes that the North Koreans and their families who have a historical record of crossing national borders are potential internal enemies dangerous to society. This is a punitive consequence of crossing the border illegally, and draws on the relationship between danger and emigration as inscribed in the Criminal Code. The inviolability of national borders has always been the main concerns of the North Korean state in confronting South Korea, and North Korea has criminalized the people who crossed its national borders without permission. The registration book is one example that provides the context in which crossing the border illegally is considered dangerous to state and in return contributes to the categorization of the people into the complex group.

\textsuperscript{784} \textit{Ibid.}
\textsuperscript{785} \textit{Ibid.}
\textsuperscript{786} Kunsik Kim, at 94-95, cited in \textit{supra} note 781 at 103.
The North Korean Criminal Code

The Criminal Code of the DPRK functions to control emigration through the Criminal Code. The Criminal Code applies to border crossers into and out of North Korea. The 1987 Criminal Code stated in article 117 that a person who crosses the national border without permission shall be subject to labor-correction sentence for up to 3 years.\textsuperscript{787} The 1999 amendment to Criminal Code used the term “illegally” instead of “without permission” in article 117.\textsuperscript{788} Illegal border-crossings were subject to a maximum of three years’ labor-correction without distinguishing the offense from serious cases,\textsuperscript{789} and since then, the provision has been amended several times.

According to the 2004 Criminal Code, article 233 provides that the person who crosses back and forth across the border shall be held for up to a sentence of two years’ labor-training (\textit{ro-dong-dan-lyeon-hyeong}) in local detention centers.\textsuperscript{790} The person in serious cases shall be held for up to a sentence of three years’ labor-correction (\textit{ro-dong-gyo-hwa-hyeong}) in political detention camps.\textsuperscript{791} Article 31 of the 2004 Criminal Code sets out the definitions of labor-training sentence and labor-correction sentence as:

\textit{ro-dong-dan-lyeon-hyeong} shall be enforced in a way to send offenders to a certain place and compel them to work. During the term of execution the basic rights of citizens are guaranteed. The term of \textit{ro-dong-dan-lyeon-hyeong} ranges

\textsuperscript{787} Criminal Law of the Democratic People’s Republic of Korea, \textit{adopted} 3 Mar. 1950 by the 1\textsuperscript{st} Supreme People’s Assembly, \textit{amended} two times (last amended 5 Feb. 1987).
\textsuperscript{789} \textit{Ibid.}
\textsuperscript{790} Criminal Law of the Democratic People’s Republic of Korea, \textit{adopted} 3 Mar. 1950 by the 1\textsuperscript{st} Supreme People’s Assembly, \textit{amended} six times (last amended 29 Apr. 2004).
\textsuperscript{791} \textit{Ibid.}
from six months to two years. When crimes are aggregated or added up, the term of ro-dong-dan-lyeon-hyeong shall not exceed two years in total. The term for detention shall not exceed two years. One day for detention is counted as two days for ro-dong-dan-lyeon-hyeong.\(^{792}\)

**Ro-dong-gyo-hwa-hyeong** refers to sentencing and doing labor such as mining, industrial work, or textile manufacturing in penal labor camps.\(^{793}\) For less serious crime, ro-dong-dan-lyeon-hyeong is imposed, which compels detainees to perform labor work such as construction work, cleaning streets, or brick making in local labor-training detention centers.\(^{794}\)

The 2004 amendment to the Criminal Code revised article 233 (Illegal Border Crossing) by dividing the crime into offense and serious offense.\(^{795}\) In Sup Han pointed out that it separates economic defectors (those leaving so they can make a living) from the ones who leave the country illegally with a subversive intention.\(^{796}\) The maximum length of imprisonment was decreased to a two year labor-training sentence for less serious offenses, while a three year maximum was maintained for serious cases. This change of a sentencing period from three years to two years has been understood as reflecting the increasing number of border-crossings for economic survival.\(^{797}\) It also changed terms from “crossing the

\(^{792}\) Ibid.


\(^{794}\) Ibid.


\(^{796}\) In Sup Han, supra note 777 at 130.

border” to “crossing back and forth across the border” in the legal text of article 233. It seems that the provision broadly covers unlawful migrants into and out of North Korea while reflecting that there are people in a constant movement to and from North Korea.

In the 2009 Criminal Code, the length of a prison term in serious cases was raised from three to five year labor correction, but remained two year labor-training in local detention centers for less serious cases. Article 233 states that the person in serious cases shall be held for up to a five year labor-correction sentence (ro-dong-gyo-hwa-hyeong) in political detention camps. For example, on June 8, 2009 two U.S. journalists were sentenced to 12 years of ro-dong-gyo-hwa-hyeong on charges of illegally crossing a border from China (article 233) and antagonizing the Korean nation (article 69). In 2007 a gallop poll in South Korea conducted a survey of North Koreans who had defected to South Korea. The result showed that 67 percent of the participants in the survey who crossed the border illegally without authorization from the state were sentenced to labor-training in North Korea, 17.4 percent were subject to a labor-correction sentence, 7.8 percent bribed, 2.6 percent paid a fine, and 0.9 percent not punished.

In addition, article 62 (Betrayal of the Forefather) of the Criminal Code stipulates that the person who betrays the forefather land and flees to other countries […] shall be held for

798 Ibid.
800 As for the offense of antagonizing the Korean nation, the term of imprisonment (ro-dong-gyo-hwa-hyeong) is more than 5 years and less than 10 years. In serious circumstances, more than 10 years of ro-dong-gyo-hwa-hyeong shall be imposed. A foreign national is subject to this provision. Criminal Law of the Democratic People’s Republic of Korea, adopted 3 Mar. 1950 by the 1st Supreme People’s Assembly, amended thirteen times (last amended 2009).
801 4.3 percent of people did not answer the question. Kumsoon Lee, supra note 731 at 77.
802 34.8% of people who traveled in border areas without a travel certificate said that they were sentenced to ro-dong-dan-lyeon-hyeong and 17.4% responded that they were sentenced to ro-dong-gyo-hwa-hyeong. 20.9% were subject to fine and 20% offered bribes. 1.7% were not punished and 5.2% did not answer the question. Ibid. at 66.
up to a five year labor-correction sentence (ro-dong-gyo-hwa-hyeong). The person in serious cases is sentenced to life in prison, death penalty or confiscation of property (article 62). Article 233 and article 62 have provided a basis for punishment against unauthorized departure, which violates mobility restrictions.

5.4. The East German Border Guard Cases

The Border Guard Cases After Unification

After Germany was united in October 1990, courts in the Federal Republic of Germany (FRG) wrestled with the cases regarding border guards who had shot fugitives at the Berlin Wall. In the first border guard trial, two soldiers were convicted of killing twenty-year-old Chris Gueffroy in 1989. This case was presided by Judge Theodor Seidel. On February 5 1992, Judge Ingeborg Tepperwein convicted two other defendants of homicide for shooting and killing an individual who had attempted to take flight over the Berlin Wall in 1984. That case involved twenty-year-old Michael-Horst Schmidt who was climbing up a ladder to get over the wall on December 1, 1984. Two members of the border troops, a non-commissioned officer and a soldier, fired continuous shots at Schmidt after the non-commissioned officer shouted to him to stop and gave warning shots. Due to the rules of “secrecy and competence,” Schmidt was not delivered to the People’s Policy Hospital until

804 Ibid.
806 Ibid.
807 A bullet went through his back, which caused fatal injury. Neither of them has intent to kill him but they were aware of the possibility that the shot is fatal. Supra note 762 at. 2.
two hours later, although the evidence indicated that he would have survived with immediate medical aid.\textsuperscript{808} The rules required that a military ambulance be used, and the ambulance without a doctor took Michael to a police hospital instead of a nearby hospital.\textsuperscript{809} This was responsible for the delay in getting him medical treatment. Secrecy was prioritized over saving a life.\textsuperscript{810} The officer was sentenced to one year and six months as a youthful offender, and the other soldier was subject to a one-year and nine-month prison term.\textsuperscript{811} Both sentences were suspended and they were put on probation.\textsuperscript{812} On November 3, 1992 the Federal Court of Justice, \textit{Bundesgerichtshof}, upheld the decision. Judge Ingeborg Tepperwein’s ruling became the legal precedent that was followed in subsequent similar cases.\textsuperscript{813} I will now examine the reasoning Judge Tepperwein deployed in reaching her judgment, and compare it to the reasons of the Federal Court of Justice that upheld the trial decision.

**A Ground of Justification of the Use of Firearms**

Intentional homicide was an offence under the East German Criminal Code.\textsuperscript{814} Conduct amounted to intentional homicide when the elements of a definition of homicide were satisfied. The wrongfulness of the conduct might be taken away by a justification, and homicide in self-defense was not wrongful and punishable.\textsuperscript{815} Manfred J. Gabriel explains that although shootings at the national border constituted intentional homicide, they were not

\textsuperscript{808} Ibid. at 1-2.
\textsuperscript{809} Supra note 767 at 385; 1993 NJW 141, 144, cited in supra note 767 at 385.
\textsuperscript{810} Supra note 762 at 18.
\textsuperscript{811} Ibid. at 1.
\textsuperscript{812} Ibid. at 1; Manfred J. Gabriel supra note 767 at 385.
\textsuperscript{813} A. James MacAdams, supra note 805 at 247.
\textsuperscript{814} Supra note 767 at 407.
\textsuperscript{815} “The effect of a justification is to remove an act’s wrongfulness,” and “[w]ithout justification, the killings were wrongful homicide,” ibid. at 407.
wrongful under the *Border Act* and not subject to punishment because a justification under the *Border Act* removed the wrongfulness.\(^{816}\)

Judge Tepperwein applied the GDR *Border Act* of 1982 to two border guards.\(^{817}\) She referred to section 26 and 27 of the *Border Act*, which showed that the conduct of shooting had violated the border law.\(^{818}\) The section 27 was as follows:

(1) The use of firearms is the extreme measure of force against persons. Firearms may be used only in cases where physical action with or without aids has proved unsuccessful or manifestly does not promise success. Use of firearms against persons is admissible only where the objective cannot be accomplished by using weapons against objects or animals.

(2) The use of firearms is justified in order to prevent the imminent perpetuation or continuation of a criminal act that according to the circumstances constitutes a major crime.\(^{819}\) It is also justified in order to apprehend persons pressingly suspected of a major crime.

(5) Where firearms are used the person’s life is to be spared as far as possible. The wounded are to be offered first aid, necessary security measures being complied with.\(^{820}\)

The authority to use firearms was given to the border guards to prevent illegal flight as defined in the *Border Act*.\(^{821}\) But, Judge Ingeborg Tepperwein found that each border guard

\(^{816}\) *Ibid.*


\(^{819}\) Major crime is translated as a felony. *Supra* note 767 at 390.

\(^{820}\) (3) The use of firearms is in principle to be announced by shouting or firing a warning shot, unless imminent danger can be averted or removed only by purposeful use of firearms.

(4) Firearms are not to be used where the life or health of uninvolved persons may be endangered, the persons seem from personal appearance to be of childhood age, or the territory of a neighboring State would be shot at. As far as possible, firearms are not to be used against juveniles or females. *Supra* note 818.

\(^{821}\) A. James McAdams, *supra* note 805 at 248.
went over the authority by shooting at unarmed fugitives.\textsuperscript{822} She ruled that the border guards’ shots could not be justified by section 27(2) of the \textit{Border Act}.\textsuperscript{823} The conduct of border-crossing was not sufficiently dangerous to justify the use of deadly force in a justification defense under the \textit{Border Act}. Judge Tepperwein in this Regional Court explained that “the mildest means,” such as a single shot at the legs, were available as options to the border guards. Section 27(5) of the \textit{Border Act} set out that “person’s life is to be spared as far as possible” in using firearms.\textsuperscript{824} This Regional Court further stated that because “life is the highest legal interest,” the objective of the State, which was to prevent individuals from fleeing from East Germany, could never justify killing an unarmed human being who did not threaten the life of others according to the principle of proportionality.\textsuperscript{825} The means for prevention and deterrence of crimes should be proportionate to the offense being committed.

Unlike the Regional Court, the Federal Court of Justice found that “the shots at the border could be justified under the statutory language of the East German \textit{Border Act}.”\textsuperscript{826} The Federal Court held that a single shot could not prevent flight because Schmidt was about to get over the wall in a few seconds. There was no other way to spare the life “as far as possible” (27(5) of the \textit{Border Act}). For that reason the conduct of continuous shooting was justified by section 27(2) of the \textit{Border Act}, taking into consideration the objective of the state, in which the prevention of flight was overriding state interests, and the “total context of the command.” In light of state practice the prevention of border crossings took precedence over the right to life. In other words, where there is no other means but to use firearm to

\begin{itemize}
\item\textsuperscript{822} \textit{Ibid.} at 248.
\item\textsuperscript{823} \textit{Supra} note 762 at 3.
\item\textsuperscript{824} Section 27(5) states that “[w]here firearms are used the person’s life is to be spared as far as possible.” \textit{Supra} note 818.
\item\textsuperscript{825} \textit{Supra} note 762 at 8.
\item\textsuperscript{826} Manfred J. Gabriel, \textit{supra} note 767 at 395.
\end{itemize}
achieve the objective of the prevention of flight in conflict with the sparing of life, shooting
to death, even with the intention of killing, is allowed by the literal interpretation of the
Border Act.\textsuperscript{827} Thus, there existed a ground of justification. But the Federal Court of Justice
continued that the ground of justification must not be considered in the special circumstances
such as gross violation of justice and humanity.\textsuperscript{828} This led to the conclusion that shooting
was no longer justified.

Manfred J. Gabriel criticized the trial court for interpreting the statutory language in a
Western liberal way, and failed to include the perception of East Germany in the standards.
He asserted that the Constitution includes the provision regarding “impenetrability of the
borders” instead of the right to life.\textsuperscript{829} This could be a demonstration that “[t]he legal
understanding at the time may well have been that, where the state’s interest was at stake,
human life was of no particular value – especially the lives of those who obviously failed to
appreciate the blessings of Socialism.”\textsuperscript{830}

Unlike the Regional Court, the Federal Court of Justice found that the ground of
justification should be excluded from consideration as an extreme exception, because it is in
gross violation of justice and contravenes “law with a higher priority.”\textsuperscript{831} The Court applied
the principle of Radbruch: when the statutory ground is “false law,” it should give way to
justice in the conflict between positive law and justice.\textsuperscript{832} Gustav Radbruch was a legal
scholar in Germany who experienced internal exile after being dismissed from his professor’s

\begin{itemize}
\item \textsuperscript{827} \textit{Supra} note 762 at 6.
\item \textsuperscript{828} \textit{Ibid.} at 8.
\item \textsuperscript{829} \textit{Ibid.} at 393.
\item \textsuperscript{830} \textit{Ibid.} at 393; “If only the state’s interest is sufficiently stressed, any potential successful attempt to flee can be regarded as a felony under the amorphous East Germany provisions.”
\item \textsuperscript{831} \textit{Supra} note 762 at 8.
\item \textsuperscript{832} \textit{Ibid.} at 8.
\end{itemize}
position at the University of Heidelberg during the Nazi period. He introduced the Radbruch formula in “Statutory Injustice and Suprastatutory Law,” which he published in 1946, as follows:

The conflict between justice and legal certainty may be resolved in that the positive law, established by enactment and by power, takes precedence even when its content is unjust and improper, unless the contradiction between positive law and justice reaches such an intolerable level that the statute, as “incorrect law” [unrichtiges Recht], must yield to justice. It is impossible to draw a sharper line between cases of statutory non-law and law that is still valid despite unjust content. One boundary line, however, can be drawn with utmost precision: Where there is not even an attempt to achieve justice, where equality, the core of justice, is deliberately disavowed in the enactment of positive law, then the law is not merely “incorrect law,” it lacks entirely the very nature of law. For law, including positive law, cannot be otherwise defined than as an order and legislation whose very meaning is to serve Justice [Italics added].

The Federal Court decided that the state passed beyond the utmost limit in the conflict between positive law and justice, and indicated that the conduct of the state “reaches an intolerable level” so the Border Act as “an incorrect law” should submit to justice. The Court also considered the standards from article 12 of the ICCPR on the right to leave any country. The GDR acceded to the ICCPR in 1974. The ICCPR came into effect for both East and West Germany on March 23, 1976. The Court stated that international obligations that the GDR entered into were recognized in article 51 of the Constitution, and it suggested contradictions between human rights in international law, and its application on

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834 Gustav Radbruch, “Gesetliches Unrecht und übergesetzliches Recht” (1946) 1 Süddeutsche Juristen-Zeitung at 107, cited in ibid. at 166.
835 Supra note at 762.
836 Ibid. at 9.
837 Ibid. at 9.
the use of firearms at the border. The right to life is also guaranteed in article 6 of the ICCPR while it was not expressed in the Constitution of the GDR as it was in western constitutions. Nonetheless, the Court interpreted article 30(1), which declared that personality was inviolable, as including the right to life, and explains that the restriction on article 30(1) should be bounded by laws according to article 30(2). Finally, the Federal Court applied the principle of proportionality, which was present in section 27(1)(sentence 1) of the Border Act and article 30(2)(sentence 2) of the GDR constitution.

5.5. The Right to Leave and The Principle of Proportionality

The ICCPR

The Universal Declaration of Human Rights (the UDHR) prescribes in article 13(2) that “[e]veryone has the right to leave any country, including his own, and to return to his country.” The ICCPR also recognizes the right to movement and residence within state territory in article 12(1), and the right to leave any country in article 12(2). Article 12(2) of the ICCPR lays out that “[e]veryone shall be free to leave any country, including his own.” But the right to freedom of movement and the right to leave may be restricted when

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838 Ibid. at 12; The 1968 Constitution of the GDR has article 30 as follows:
(1) The person and liberty of every citizen of the German Democratic Republic are inviolable.
(2) Limitations are permissible only in connection with punishable acts or curative treatment and must be legally based. In this respect the rights of such citizens may be limited only in so far as is legally permissible and unavoidable.
(3) Every citizen has the right to the assistance of state and social organs for the protection of his liberty and the inviolability of his person.


839 “12(1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.” The Universal Declaration of Human Rights (the UDHR) sets out in article 13(1) that “[e]veryone has the right to freedom of movement and residence within the borders of each state.” Article 13(2) of the UDHR also states that “[e]veryone has the right to leave any country, including his own, and to return to his country.”
“provided by law, [and] are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant” in accordance with article 12(3) of the ICCPR. 840

Restrictions on the rights are required to be “necessary” for the reasons listed in the exception clause: national security, public order, public health or morals or the rights and freedoms of others (article 12(3) the ICCPR). 841 For example, in Lauri Peltonen v. Finland Finland refused to issue a passport to the petitioner because he did not complete his compulsory military service. 842 According to Finish law, “delivery of a passport ‘may be denied’ to persons aged 17 to 30 if they are unable to demonstrate that the performance of military service is not an obstacle to the issuance of a passport.” 843 The Human Rights Committee concluded that states could apply “reasonable restrictions” to an individual’s right to leave the country until an individual would complete a national obligation and therefore they would not constitute a violation of article 12. 844

The principle of proportionality is used to assess whether the restrictions are necessary. General Comment No. 27 (Freedom of Movement), adopted by the Human Rights Committee of the ICCPR, states that “restrictive measures must conform to the

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840 “3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.”
841 The European Court of Human Rights uses a clause, “necessary in a democratic society” for the listed reasons (article 2(3)).
843 Peltonen v. Finland, ibid. at para. 2.1.
844 Ibid. at 9.
principle of proportionality.” Hannum argues that “the limitation imposed [should] be proportional or appropriately related to the overriding societal interest which renders the limitation necessary.” The principle of proportionality is applied to decide the necessity of the restrictions on the right to freedom of movement and the right to leave for the listed reasons. General Comment No. 27 further emphasizes that the principle “has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law.”

The test of ‘necessity’ introduces an objective element to determine whether a state restriction is allowed under the Covenant because it is not sufficient that a state decides the desirability or expediency of restrictions nor that the restrictions are reasonable. General Comment No. 27 lists three elements of the principle of proportionality: the “appropriate means,” the “least injurious means,” and the “proportionate means.” First, the means should be appropriate to achieve the objective (the appropriate means test). It asks whether the restrictive measures serve a legitimate goal. Second, the means should be “the least intrusive instrument amongst those which might achieve the desired result” (the least injurious means test). The restrictive measures should infringe upon freedom of movement (or a right to leave) to a minimum degree. Third, the means should be

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847 Supra note 845 at para. 5.
848 Ibid.
849 Ibid.
852 Supra note 845.
“proportionate to the interest to be protected” (the proportionate means test).\textsuperscript{852} It requires a proportion between the degree to which the infringement limits the right and the extent to which the objective is furthered.\textsuperscript{853} If the degree of the infringement on the rights outweighed the effect of the measures for the objective, it would violate the principle of proportionality. The Human Rights Committee recognizes the principle of proportionality between the restrictions over rights and the objective.\textsuperscript{854} The necessity between restrictions and the objective must meet the three requirements for the principle of proportionality, which is a general principle of international law.\textsuperscript{855} General Comment No. 27 specifies that the limitations of access to military zones for national security or “freedom to settle in areas inhabited by indigenous or minorities communities” meet the requirements of proportionality.\textsuperscript{856} On the other hand, the cases regarding a holder of state secrets who is stopped from leaving a country or an individual who is prevented from “traveling internally without a specific permit” do not satisfy “the test of necessity or the requirements of proportionality.”\textsuperscript{857}

Further, restrictions in exceptional circumstances must be provided by law, and must be “necessary in a democratic society.”\textsuperscript{858} In adopting laws, “the relations between right and restriction, and between norm and exception, must not be reversed” (General Comment No. 27).

\textsuperscript{852} Ibid.
\textsuperscript{853} Supra note 850; Guofu Liu, \textit{The Right to Leave and Return (RLR) and Chinese Migration Law} (Ph.D. Dissertation, University of Technology, Sydney, 2005) at 87-88.
\textsuperscript{854} Liu, \textit{Ibid.} 853 at 88.
\textsuperscript{855} See \textit{Ibid.} at 26-27; Hurst Hannum insists that “[i]t is not sufficient that a state decide that a particular restriction may be desirable or politically expedient, nor is it sufficient that the restriction may even be reasonable.” Hurst Hannum, \textit{The Right to Leave and Return in International Law and Practice} (Dordrecht: Martinus Nijhoff Publishers, 1987) at 27.
\textsuperscript{856} Supra note 845 at \textit{para.} 16.
\textsuperscript{857} Ibid.
\textsuperscript{858} Ibid. at \textit{para.} 11.
Colin Harvey and Robert P. Barnidge, Jr. examine a number of Communications on the right to leave under the Human Rights Committee, and argue that restrictions on the right to leave must be necessary and must not replace the rule with an exception. As the General Comment No. 27 indicates, the ICCPR does not allow the limitations to the right to freedom of movement to “swallow the rule.”\footnote{Harvey and Barnidge, supra note 842 at 18.}

North Korea is party to the International Covenant on Civil and Political Rights. North Korea announced that it had withdrawn from the ICCPR in August 1997 when the session of the UN sub-commission on Prevention of Discrimination and Protection of Minorities adopted a resolution on human rights in North Korea.\footnote{The Bureau of Democracy, Human Rights, and Labor, “2001 Country Reports on Human Rights Practices” (4 March 2002), online: The UN Department of State <http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8330.htm>.} In response to this, the U.N. Human Rights Committee issued a statement that the attempt to withdraw from the ICCPR was not valid.\footnote{Ibid.} It explained that the Covenant did not include a provision for withdrawal, and the Secretary-General suggested that “a withdrawal from the Covenant would not appear unless all States Parties to the Covenant agree with such a withdrawal.”\footnote{Ibid.} In 2001 North Korea resubmitted reports on human rights to the U.N. Human Rights Committee on the ICCPR.\footnote{Ibid.}
The GDR Constitution and the Border Act

The Regional Court and Federal Court of Justice state that the principle of proportionality was laid out in article 30(2) of the GDR Constitution and article 6 and 12 of the ICCPR.\textsuperscript{865} The 1968 Constitution of the GDR, which was amended on October 7, 1974, was worded as follows in article 30(2):\textsuperscript{866}

Restrictions are authorised only in respect of conduct punishable under the criminal law… and must be prescribed by law. However, citizens’ rights may be restricted only in so far as the law provides and when such restriction appears to be unavoidable.\textsuperscript{867}

The Federal Court stated that the principle of proportionality is expressed in the formulation of section 27 (1)(sentence 1) of the Border Act that reads: “The use of firearms is the extreme measure of force against persons.”\textsuperscript{868} The Court viewed the wording, “the [most] extreme measure,” as acknowledging that the principle of proportionality was present in the GDR.

Section 27(2) of the Border Act stipulates that the border guards are justified to use firearms “to prevent the imminent commission”\textsuperscript{869} or “continuation of a criminal act that

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\textsuperscript{865} Supra note 762 at 3.
\textsuperscript{866} “Einschränkungen sind nur im Zusammenhang mit strafbaren Handlungen oder einer Heilbehandlung zulässig und müssen gesetzlich begründet sein. Dabei dürfen die Rechte solcher Bürger nur insoweit eingeschränkt werden, als dies gesetzlich zulässig und unumgänglich ist.” Verfassung der Deutschen Demokratischen Republik, vom 6. April 1968 (in der Fassung vom 7. Oktober 1974); “Restrictions are only in connection with criminal actions or treatment and must be duly authorized by law. In this case, the rights of such citizens to be limited to the extent that this is legally permissible and necessary.” Constitution of the German Democratic Republic of 6 April 1968 (amended 7 Oct. 1974), online: Document Archiv <http://www.documentarchiv.de/ddr/verfddr.html>.


\textsuperscript{868} Supra note 762at 13; Supra note 818 at 67.

\textsuperscript{869} German Federal Constitutional Court, Karlsruhe: Order of the Second Senate of 24 October 1996 – 2 BvR 1851/94 et al, at. 67.
Thus, the border soldier could use firearms to stop flight under article 27(2). Nonetheless, the Court emphasized that when section 27(2) of the Border Act (prevention of “the imminent commission”) is interpreted, the principle of proportionality has to be considered in a way “sympathetic to human rights.”

The Court continued that although the border soldier might be able to the use firearms, “the ground of justification reached its limit when shots were fired at a fugitive who, according to the circumstances, was unarmed and not otherwise a danger to the life and limb of others, with the – conditional or unconditional – intention to kill him.” In the application of the principle in this context, given the nature of the Constitution, a right to life -- as an interest to be weighed against restrictive measures -- has high priority. The priority is also supported by section 27(5)(sentence 1) of the Border Act: “[w]here firearms are used the person’s life is to be spared as far as possible. The wounded are to be offered first aid, necessary security measures being complied with.”

In addition, this interpretation of the Border Act “sympathetic to human rights” of the Border Act is connected to the issue of prohibition on retroactivity: article 103(2) of the Basic Law prescribes that “[a]n act may be punished only if it constituted a criminal offense under the law before the act was committed.” The Federal Court stated that if the law at the

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870 Manfred J. Gabriel, supra note 767 at 82, n. 390.

§ 27 (2) Grenzgesetz der Deutschen Demokratischen Republik v. 25.3.1982 (GBl. I. S.197) [East German Border Act] [translated by Manfred J. Gabriel]

(1) [Use of firearms as last means, and use against persons not permitted if other means are available]
(2) The use of firearms is justified to prevent the imminent commission or continued execution of a crime which under the circumstances appears to be a felony […]
(5) In using firearms the life of persons must be preserved if possible.

871 Supra note 762 at 13.

872 Ibid. at 13.

873 (3) The use of firearms is in principle to be announced by shouting or firing a warning shot, unless imminent danger can be averted or removed only by purposeful use of firearms.
(4) Firearms are not to be used where the life or health of uninvolved persons may be endangered, the persons seem from personal appearance to be of childhood age, or the territory of a neighboring State would be shot at. As far as possible, firearms are not to be used against juveniles or females. Supra note 818.

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time of the act is interpreted in a way, which is “sympathetic to human rights,” the act of border guards ought not be justified although it would have been justified in the context of state practice.\textsuperscript{874} The Court held that the expectation of the accused that the law would be applied on the basis of state practice did not deserve protection from the prohibition on retroactivity.\textsuperscript{875}

5.6. The Principle of Proportionality in Transitional Justice

Patricia Goedde argues that the North Korean legal system is based on socialist legality in which law is an instrument of state objectives while North Korean law is uniquely developed.\textsuperscript{876} She explains that “[i]t would be easy to dismiss North Korea as having no law under the assumption that anything outside the conceptual construct of ‘rule-of-law’ is simply not ‘real’ law.”\textsuperscript{877} Wook Yoo also contends that North Korean laws are more than a just political tool or means, or the instructions of the Dear Leader and the Labor Party.\textsuperscript{878} North Korea does not fit within the ideal archetype of the rule of law in liberal states, but law cannot be simply disregarded because law is constructed by society and law shapes society. Particularly in the context of transitional justice, “[l]aw is caught between the past and the

\textsuperscript{874} Supra note 762 at 15.

\textsuperscript{875} Ibid.; While the ECHR states that the term “law” in article 7 § 1 of the Convention includes unwritten law, the court holds that State practice, such as the GDR’s border control policy violating the right to life, cannot be protected in the “law” in article 7 of the Convention. It also says that State practice must be restricted by the GDR’s Constitution, People’s Police Act and State Borders Act; the right to life is “the supreme value in the hierarchy of human rights.” Supra note 867.


\textsuperscript{877} Ibid. at 1266-1267.

\textsuperscript{878} Wook Yoo, “북한의 법체계와 북한법 이해방법 : 북한 현법상의 법령·경령·결정 등 입법형식을 중심으로 ” (May 2011) 6 Unification and Law 50 at 104, online: KongamKorea <http://www2.korea.kr/expdoc/viewDocument.req?id=28638>. 

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future, between backward looking and forward-looking, between retrospective and prospective, between the individual and the collective.

While in the post-Communist court decisions, it was prevalent to turn down the previous legal defenses as a “transitional rule of law,” the Federal Court in border guard cases in Germany demonstrates the importance of examining existing laws and practices to establish transitional justice after unification.

Ruti G. Teitel argues that transitional justice seeks “an interpretative, historical, and comparative method,” and law in transitional periods is both “backward- and forward-looking” and “continuous and discontinuous.” For transitional justice in the unified Korea, this chapter attempts to identify provision of the Criminal Code in North Korea, which is interpreted comparable to the principle of proportionality, and provides the relationship between freedom of movement and the principle of proportionality in South Korea. This attempt is one of the ways to understand the transition as an ongoing process of legal continuity and comparability between North and South Korean laws. International law will serve as a bridge or mediator between two different text and contexts in a transitional period.

880 Ibid. at 19.
881 Ibid. at 213.
882 Ibid. at 7.
883 Ibid. at 215.
884 Ibid. at 20.
The Excessive Self-Defense Homicide in Criminal Law in North Korea

There is no explicit provision that expresses the principle of proportionality in the North Korean Constitution. Instead, there is a provision in the Criminal Code which is likely to be applicable to border guards who kill unarmed fugitives at the national border. Article 281 (Excessive Self-defense Homicide) provides that a person who kills any other person over the extent necessary to self-defense or performance of official duty, shall be subject to correctional labor for less than three years. The provision is under chapter nine [Crimes Infringing on Gongmin’s Life and Property] of the Criminal Code. Article 281 applies to either an act of self-defense or an act in performing official duties. In other words, deadly force ought to be used to the extent that it is necessary to prevent serious crimes in self-defense or perform official duty of arresting and detaining offenders. In addition, although the right to life is not prescribed in the North Korean constitution just like the East German constitution, the constitution includes the responsibility of prosecutor’s offices and courts, which is to protect a citizen’s life.

Article 281 covers the cases not only where a person uses force that exceeds the extent necessary to protect oneself from imminent crimes, but also where a person having an official duty kills criminals by exceeding the degree of performance of duty in arresting and detaining them. This offense is different from intentional homicide in a sense that it is

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885 Article 1 (Mission of Criminal Code) The criminal law of the DPRK defends national sovereignty and the socialist system and ensures the independent and creative life of the people by establishing correctly penal responsibility and criminal system.
Article 7 of Criminal Code (The Principle of the Application of Criminal Punishment) State applies criminal punishment in consideration of severity and weight of the offense, and degree of introspection.
886 제281조 (정당방위초과살인죄) 정당방위의 정도를 넘었거나 직무집행상 필요한 정도를 넘는 행위를 하여 사람을 죽인 자는 3년이하의 로동교화형에 처한다.
887 Supra note 767 at 393.
committed in order to prevent from a socially dangerous crime. 889 It is considered less dangerous than homicide itself. 890

In sum, article 281 (Excessive Self-defense Homicide) can be interpreted as including the principle of proportionality to apply to cases regarding border guards’ use of firearms. In addition, General Comment 27 notes that if an individual is prohibited from traveling internally without a specific permission, it does not meet “the test of necessity or the requirements of proportionality.” 891 The principle of proportionality is applicable to border crossings internally as well as internationally in North Korea.

The Principle of Proportionality in South Korea

“Freedom of movement and the right to move” are prescribed in article 14 of the South Korean Constitution. Article 14 states “[a]ll citizens enjoy the freedom of residence and the right to move at will.” But article 37 (2) of the constitution justifies restrictions for national security. Article 37(2) contains the principle of proportionality that “[t]he freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.” 892

The National Security Act proclaimed in 1948 and the Law Governing Exit and Entry proclaimed in 1963 have restricted entry and exit from/to North Korea for a security reason.

889 Ibid.
890 Ibid; But this provision is not applicable to anti-state struggle. That is, it is lawful if an anti-state enemy is killed beyond the extent necessary for the prevention. ibid.
891 Supra note 845.
Article 93 of the *Law Governing Exit and Entry* sets up a procedure for travel between the two Koreas. Article 93(1) provides that a national “who resides south of the Military Demarcation Line (hereinafter referred to as ‘South Korea’) or in a foreign country, enters or departs from the Republic of Korea through the area north of the Military Demarcation Line (hereinafter referred to as ‘North Korea’) undergo an immigration inspection before he goes to North Korea from South Korea, or after he comes to South Korea from North Korea.”

It is also required to have a visit certificate from the Minister of Unification when a North Korean visits South Korea or a South Korean visits North Korea according to article 9(3) of the *Inter-Korea Exchange and Cooperation Act*.

The *National Security Act* criminalizes the person who travels to North Korea without an immigration inspection. For example, those who “escape to or infiltrate from an area controlled by anti-state groups” are sentenced to up to 10 years in prison in article 6(1) and those “who plan or plot acts” are sentenced to up to 7 years of imprisonment” in article 6(5). And, those “who escape to or infiltrate in order to receive from, discuss with or execute anti-state acts for anti-state groups […]” will be imposed death penalty or minimum

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5 years of imprisonment according to article 6(2). In fact, there have been cases in which South Korean citizens who visited North Korea without undergoing the required procedure were imprisoned pursuant to the *National Security Act*.

“Anti-state groups” are defined in article 2 (1) of the *National Security Act* as “domestic or foreign organizations or groups whose intentions are to conduct or assist infiltration of the Government or to cause national disturbances.” The *National Security Act* has a special status which is effective before criminal law applies the case. The definition of “anti-state groups” does not specifically refer to North Korea or any other communist regime, but North Korea has been interpreted as an “anti-state group,” particularly based on article 3 of the constitution law.

When article 8(1) of the *National Security Act* was challenged in the Constitutional Court, it held that freedom of movement and the right to move “may be restricted by law only when necessary for national security, the maintenance of law and order, or for public welfare” as stated in article 37(2). The Court also notes that the *National Security Act* is strictly applied and interpreted to the minimal extent necessary for the objective on the basis of article 1 of the *National Security Act*. Article 1 states that “[i]nterpretation and application of this Law shall be limited to the least measures required to achieve the objectives of (1) above and any expanded interpretation of this Law or infringement of the basis citizens’ rights guaranteed by the Constitution shall not be permitted.” Even when

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896 Ibid.  
897 Ibid.  
899 Ibid.  
900 Supra note 895.
such restrictive measures are applied, they shall not violate the “essential aspect” of the freedom to movement in accordance with article 37(2) of the constitution.  

As long as tensions between North and South Korea remain on the Korean peninsula, although the Soviet Union collapsed in 1991, the interpretation of North Korea as “an anti-State group” would be valid in South Korea. Should the two Koreas reunite, the cases regarding border guards’ use of firearms or the National Security Act could call for transitional justice in the unified Korea. Transitional justice is a process to redress the grievances as a result of human rights abuse rather than the rigid sets of rules and norms in the treatment of human right abuses.

While the principle of proportionality as a process “invites substantive, value-based considerations,” the relationship between norm and exception must not be reversed as General Comment No. 27: Freedom of movement (art.12) instructs. Restrictive measures must not be too general and serious to override the relationship between rule and exception. The South Korean Constitution also lays out that “[e]ven when such restriction is imposed, no essential aspect of the freedom or right shall be violated.” Despite different values and systems between the two Koreas, it is important to recognize that the principle of proportionality is a process which seeks essential norms rather than rigid rules for transnational justice in the unified Korea. While there exists a gap between the two Koreas with regard to how legal values and frames have been developed since the division, transitional justice would call for a range of processes and mechanisms in order to create

901 Supra note 892.
904 Supra note 845.
awareness of a common and core ground, which could allow the principle of proportionality to be applied in a transitional process.

5.7. Conclusion

Transnational law embraces different regulatory regimes in North and South Korea, and in East and West Germany, and encompasses border-crossing interactions of law and regulations including international human rights law. Rainer Forst points out that “the various contexts of justice – local, national, international, and global – are connected through the kind of injustice they produce, and a theory of justice must not remain blind to this interconnectedness.” The chapter suggests that the contexts of injustice, in which the divided Germany and Korea are situated at the national and international levels, are similarly related and comparably connected. It also addresses the importance of transitional justice as a process for re-unification of Korea by exploring legal contestations in the border guard cases in Germany. Law on transitional borders is both “settled and unsettled,” “backward-and forward-looking” and “continuous and discontinuous.”

After the unification of Germany, border “guards stood at a geographical and juridical border” in the transitional context. In border guard cases in Germany, the courts’ approaches to East German laws and practices were not the same. In the first Border Guard trial, Theodor Seidel, the presiding Judge, did not consider the East German penal code. Judge Seidel took a position that the East German laws did not deserve any respect due to a

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905 International law was an important source of law in German border guards.
907 Supra note 879 at 7 and 215.
908 Ibid. at 19.
lack of legitimacy. Contrary to Judge Seidel, Judge Tepperwein referred to and applied the GDR Border Law of 1982 to two border guards in the Regional Court. She considered that the East German laws had certain meanings in the GDR despite all of the limitations. The decision demonstrated that “laws [...] were binding” in East Germany based on the East German Constitution. A. James McAdams asserts that Judge Seidel implies that the GDR was a “state without law” (an *Unrechtsstaat*) but Judge Tepperwein and the Federal Court of Justice recognized the system in the GDR as more complicated than “the lawless state.” East German officials also understood that the GDR was a legalist country, and statutory law was binding. Because a ground of justification of the *Border Act* recognized at the time of acts in question violated the right to life and freedom to travel abroad as articulated in the ICCPR and even within the GDR law (wherein these rights and freedoms are prioritized over state interests) the Federal Court decided that such a ground of justification should not be taken into consideration.

While this chapter used the rationale of the proportionality as the German court applied as a legal ground, there are the limits and conundrums around the use of the principle of proportionality in different societal contexts. In light of the principle of proportionality, the East German Border Guard cases show that the rights to life and freedom of movement have a higher value than the state objective of prevention of crossings of the border. The Court draws the right to life from the fact that the GDR abolished the death penalty in 1987 and that the GDR was party to the ICCPR (article 6 of the ICCPR), although the Constitution

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of the GDR did not have a provision on the right to life. The border guard cases in Germany delivered a lesson that although East Germany did not have same societal values and understanding of laws and societal values generally as in western liberal countries, it is critically important to examine that there existed law and practices, and explore the possibility of negotiations for a common and core ground at a minimum level between states.

Ruti G. Teitel argues that transitional justice seeks “an interpretative, historical, and comparative method.” This Chapter endeavors to explore common legal and social norms between the two Koreas, which would allow a room for the principle of proportionality in the transitional context in the unified Korea. Freedom of movement and the right to leave the country are restricted in the North Korean Criminal Code for national security, which is presented as a set of overriding state interests. Testimonies indicate that shooting at fugitives is allowed as institutional practices under certain conditions. Article 281 (Excessive Self-defense Homicide) could be interpreted as constituting the principle of proportionality. The officers are not allowed to kill a person by exceeding authority or official duty, and otherwise they are subject to punishment. The interpretive processes of article 281 would invite collective memories and traumas from the legacy of human rights abuse for transitional justice. The next chapter examines cases in the U.S. with research questions: whether the person who has a fear of being punished for illegal exit without state permission is eligible for refugee status in the U.S., and what the implications would be for North Korean asylum seekers.

914 Supra note 762 at 12; supra note 767 at 393.
915 Supra note 879 at 213.
6. Punishment for Illegal Departure from North Korea as a Legal Ground for Asylum and Refugee Status in the United States

6.1. Introduction

As explored in Chapter Two and Five, North Korea controls internal and international migrations stringently, even by the standards of newly established socialist regimes. The right to leave one’s own country can be protected where there exists the right to enter another country. Chapter Six, Seven, and Eight consider the right to seek asylum, and the Refugee Convention and other relevant domestic statutes as well as legal cases to determine who is eligible for refugee status and who is protected. The limited categories in the refugee definition construct the borders, which produce “others.” North Koreans who do leave do not necessarily have the right to enter another country unless they are given refugee status. Existing scholarly work in South Korea suggests that refugee status should be given to North Koreans who flee to other countries and would be subject to punishment upon repatriation according to the North Korean criminal law and practices. Elim Chan and Andreas Schloenhardt argue that the sanctions on illegal departure under article 47 and 117 of the North Korean Criminal Code satisfy a well-founded fear of persecution based on an imputed political opinion, which meets the definition of refugee. They further consider illegal departure on a basis of refugee sur place. Other literature on North Korean returnees also

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919 Ibid.
suggests that the punishment for illegal departure may amount to persecution under United Nations Convention Relating to Status of Refugees (Refugee Convention), which entered into force in 1951. What has not been explored in the scholarly literature is these arguments in support of refugee claims of North Koreans have been received in courts outside South Korea, and whether previous cases involving asylum seekers from other countries are applicable to North Korean asylum seekers.

The chapter follows laws on departure and arrival as one of the multiple sites and nodes in transnational law. I track court decisions on illegal departure in the United States to examine whether they are applicable to North Korean asylum seekers. I analyze the cases in the United States which considered illegal departure from Cuba, China and Yugoslavia in determination of refugee status, and attempt to find a connection between restrictions on illegal departure and persecution for refugee status. In addition, the chapter examines illegal exit cases in Canada and suggests to apply the analysis of the internal flight alternative based on Michigan Guidelines on the International Protection of Refugees to cases of illegal departure. In fact, while the rationale of the internal flight alternative is often used to deny refugee status, internal passport regimes in socialist countries are not well dealt with in refugee cases. This chapter emphasizes the importance of considering and understanding the workings of internal borders in the determination of refugee status. In conclusion, this chapter briefly links the context of North Korean asylum seekers to the case of illegal

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920 The 1951 Convention relating to the Status of Refugees entered into force on April 22, 1954 and the 1967 Protocol on October 4, 1967. The definition of article 1A(2) is as follows: “[a]s a result of events occurring before 1 January 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events [...].”

departure in the U.S. and Canada, and argues that punishment for illegal departure in North Korea amounts to persecution in the definition of refugee.

6.2. North Korean Asylees and Refugees in the U.S.

6.2.1. The North Korean Human Rights Act

The U.S. Senate and the U.S. House of Representatives passed the North Korean Human Rights Act of 2004 on September 28 and October 4, 2004, and President George W. Bush signed it on October 18, 2004. Since the U.S. enacted the North Korean Human Rights Act (the NKHRA) in 2004, the U.S. Refugee Admissions Program (the USRAP) processed 238 North Korean refugee resettlement cases as of March 29, 2010. Before 2004 no North Koreans had been resettled by the United States. Of the 238 resettlement applicants, 94 arrived in the US while 107 applications were withdrawn, 18 were rejected, 5 cases were closed, and 14 were pending. Nine individuals arrived in the US in 2006, twenty two in 2007, thirty seven in 2008, twenty five in 2009, and one in 2010. In 2008, the NKHRA was amended by the North Korean Human Rights Reauthorization Act which extended the NKHRA to 2012. The NKHRA of 2012 re-authorizes the Act through fiscal year 2017.

924 Ibid. at 3.
925 Ibid.
The North Korean Human Right Act has prioritized refugee settlement processes for North Koreans, which is Priority One. Priority One refers to refugees in urgent need for resettlement that UNHCR or State Department identified as:

- persons facing compelling security concerns in countries of first asylum;
- persons in need of legal protection because of the danger of refoulement;
- those in danger due to threats of armed attack in an area where they are located; or persons who have experienced recent persecution because of their political, religious, or human rights activities (prisoners of conscience);
- women-at-risk; victims of torture or violence, physically or mentally disabled persons; persons in urgent need of medical treatment not available in the first asylum country; and persons for whom other durable solutions are not feasible and whose status in the place of asylum does not present a satisfactory long-term solution.

While Priority One (“Individual Referrals”) status is assigned by UNHCR or U.S. embassies, it is still required to prove “a creditable fear of persecution or history of persecution in the country” from which they fled. International organizations or NGOs, called Overseas Processing Entities (OPE), conducts prescreening interviews by referrals from the U.S. embassy. Next, the U.S. government agencies complete security checks, and officers at the Department of Homeland Security and the U.S. Citizenship and

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928 Supra note 923.
930 Priority Two is understood as “Group Referrals” because it comprises specific groups in need of resettlement (within specified nationalities, clans or ethnic groups, sometimes in particular places) who are determined by the Department of States. It is based on “open-access model” so that individuals could have access to the program and establish their eligibility. On the other hand, Priority One (“Individual Referrals”) considers refugee cases from any individuals in any locations, when UNHCR, a U.S. Embassy, or a designated NGO refer the case to the program. IRAP (Iraqi Refugee Assistance Project) Refugee Roadmap, What are the differences between Priority 1, 2, and 3 refugee cases? online: 2011 Iraqi Refugee Assistance Project <http://refugeeroadmap.org/questions/what-are-the-differences-between-priority-1-2-and-3-refugee-cases>.
931 Ibid.
932 The State Department’s Bureau for Population, Refugees, and Migration (PRM) makes contracts with Overseas Processing Entities (OPE) to prescreen interviews. Ibid.
Immigration Services (DHS/USCIS) interview the refugee applicants.\textsuperscript{933} Then, DHS/USCIS determines whether the refugee applicant is eligible for resettlement and it finalizes approval if security checks and medical screening clear.\textsuperscript{934} Finally, UNHCR or the U.S. embassy ask exit permission to the country where refugee cases are processed.\textsuperscript{935}

While this resettlement program is designed for a person outside the U.S. to apply for refugee status to resettle in the U.S., there is an asylum application process within the U.S. Asylum seekers are eligible for asylum when they are physically in or at a port of entry in the U.S. without regard for legal status.\textsuperscript{936} Asylum is granted on an individual basis.\textsuperscript{937} There is no annual cap on this admission, unlike the US Resettlement program that has the ceiling number determined annually by the president in consultation with Congress.\textsuperscript{938} Since 2005, 33 North Korean have sought asylum in the U.S. according to U.S. Citizenship and Immigration Services (USCIS) data (the United States Government Accountability Office). Of 33 applicants, 24 North Koreans sought asylum through the affirmative applications process, which is for applicants in the U.S. who are not in removal proceedings.\textsuperscript{939} Nine North Koreans in the expedited removal proceedings were placed in the credible fear process. The expedited removal proceedings usually apply to aliens at a port of entry who do not have valid documentation or commit fraud or misrepresentation (INA Section 235(b)(1)).\textsuperscript{940} Those found to have a credible fear of persecution by an asylum officer are scheduled for

\begin{flushright}
\textsuperscript{933} Supra note 923 at 11.\\
\textsuperscript{934} Ibid.\\
\textsuperscript{935} Ibid.\\
\textsuperscript{936} Jeanne Batalova, “Spotlight on Refugees and Asylees in the United States,” Migration Information Source, (July 2009) online: Migration Policy Institute <http://www.migrationinformation.org/USFocus/display.cfm?id=734>.\\
\textsuperscript{937} Ibid.\\
\textsuperscript{938} Ibid.\\
\textsuperscript{939} Supra note 923.\\
\end{flushright}
hearing in immigration court. The report states that the number of asylee is likely to be higher than 33 because the data do not include defensive applications that may be submitted by an alien subject to removal proceedings. Data includes only affirmative applications and credible fear cases.

6.2.2. ‘Firm Resettlement’ in South Korea

The North Korean Human Rights Act of 2004 deals with a potential conflict with article 3 of the South Korean Constitution, which provides a theoretical foundation that a North Korean could enjoy the right to citizenship in South Korea. The possible dual nationality of North Korean asylum seekers based on the South Korean Constitution has been a legal issue in refugee determination in Australia, Canada and the United Kingdom. The next chapter addresses the same issue in Canada and provides detailed information on the South Korean constitution and relevant laws as well as a court decision in Kim v. Canada (2010) F.C.J. 870. The North Korean Human Rights Act of 2004 states the purpose of the section 302 (“eligibility for refugee or asylum consideration”) that:

[t]he purpose of this section is to ensure that North Koreans are not barred from eligibility for refugee status or asylum in the United States on account of any legal right to citizenship they may enjoy under the Constitution of the Republic of Korea. It is not intended in any way to prejudice whatever rights to

941 Thomas Alexander Aleinikoff et al., ibid., at 677.
942 Supra note 923.
943 Ibid. at 33.
944 Ibid.
citizenship North Koreans may enjoy under the Constitution of the Republic of Korea.947

Sec. 302 of the Act clarifies that North Koreans are not excluded from applying for refugee status or asylum because a North Korean could have the legal right to citizenship under the South Korean constitution. Further, sec. 302(b) states that “[f]or purposes of eligibility for refugee status under section 207 of the Immigration and Nationality Act (8 U.S.C. 1157), or for asylum under section 208 of such Act (8 U.S.C. 1158), a national of the Democratic People’s Republic of Korea shall not be considered a national of the Republic of Korea.”

In re K-R-Y- and K-C-S- is a case in the U.S. that addresses the issues of North Korean asylum seekers who firmly settled in South Korea prior to arrival in the United States.948 The case was involved in two North Koreans who were granted South Korean citizenship five or six months after they arrived in South Korea. In 2004, the Immigration Judge declined each application for asylum and ordered them removed to South Korea. In 2005, the Board of Immigration Appeals (BIA) dismissed their appeals because they were not eligible for asylum on the basis of firm resettlement in South Korea after acquiring the South Korean citizenship. Under INA § 208(b)(2)(A)(vi), if “the alien was firmly resettled in another country prior to arriving in the United States,” he or she is not eligible for an asylum.949 “Firm resettlement” means that prior to arrival in the U.S., he or she was awarded

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947 This section 302(a) provides the relationship between South Korean Constitution and North Korean application for asylum in the US. Supra note 922.
“permanent resident status, citizenship, or other type of permanent resettlement” by another country.950

The two North Korean asylum applicants claimed that section 302 of North Korean Human Rights Act would not bar them from eligibility for refugee status or asylum in the United States.951 They argued that this represents the legislator’s intent and the Act was “an exception to the firm resettlement bar.”952 But the BIA pointed that the Act does not establish an independent ground for giving asylum for a national of North Korean.953 It also made it clear that in interpreting sec. 302 of the Act in plain language, the Act does not disqualify North Korean asylum applicants for “any prospective claim” to the South Korean citizenship. This is limited to North Korean’s “prospective” claims. The BIA cited Section-by-Section Analysis in the Act as follows:

Sec. 302. Eligibility for Refugee or Asylum Consideration--Clarifies that North Koreans are eligible to apply for U.S. refugee and asylum consideration (as anyone else is), and are not preemptively disqualified by any prospective claim to citizenship they may have under the South Korean constitution. This does not change U.S. law but makes it clearer, explicitly endorsing the approach of U.S. Immigration Courts in proceedings involving North Koreans, in which their asylum claims were adjudicated with reference to the actual circumstances they face inside North Korea. It is meant to put to rest the erroneous opinion (proposed by some State Department personnel) that, because North Koreans may be able to claim citizenship if and when they relocate to South Korea, they must be regarded as South Koreans for U.S. refugee and asylum purposes, irrespective of whether they are able or willing to relocate to South Korea.954

950 Ibid.
951 Supra note 948 at 135.
952 Ibid. at 135.
953 Ibid. at 135.
954 Supra note 922 [Italic added].
Sec. 302 does not allow to regard a North Korean as a South Korean national regardless of whether a North Korean is “able and willing” to settle in South Korea. But the two North Korean cases before the BIA are not relevant to the issue because the respondents received the South Korean citizenship. This indicates that they were “able and willing” to live in South Korea. In addition, the BIA stated that the two North Koreans have a crucial link to South Korea as they were employed, moved across the country, and raised children. For the issue of dual nationality for North Koreans in South Korea, the North Korean Human Rights Act includes a provision (sec. 302), and In re K-R-Y- and K-C-S clarifies the meaning of the sec. 302 and limits the scope of the application to “propective claims” to the South Korean citizenship on the basis of firm resettlement.

6.3. The Definition of Refugee and ‘Illegal Departure’ Cases in the U.S.

The legal definition for asylees and refugees is the same based on Immigration and Nationality Act § 101(a)(42) (INA § 207 and 208). They are defined in the Act as:

[a]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

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955 Supra note 948 at 136.
956 Ibid.
958 Ibid.
In order to meet this definition, a North Korean seeking asylum must show that he or she has a well-founded fear of persecution owing to race, religion, nationality, membership in a particular social group, or political opinion. This chapter focuses on the relationship between the concept of persecution and illegal departure, and determines the possibilities for North Korean asylum seekers based on the US cases involving asylum seekers from other countries.

### 6.3.1. Definition of Persecution

Asylum seekers have to establish that they would be persecuted upon return to the country of origin. There is no universally accepted standard about what constitutes persecution.\(^959\) The drafters of the Refugee Convention did not define persecution because they thought that the concept of persecution was sufficient to cover a number of situations that occurred during and following WWII, including different violations of human rights, while they intended to limit to the cases where a state fails to provide protection.\(^960\) James Hathaway suggests the definition of persecution to be “the sustainable or systematic violation of basic human rights demonstrative of a failure of state protection.”\(^961\) Similarly, Rodger Haines defines persecution as “the construct of two separate but essential elements, namely risk of serious harm and failure of state protection.”\(^962\) Drawing on these definitions, there are two important components: a failure of state protection and serious harm or violation of

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\(^961\) Ibid. at 104-105.

human rights. Does every punishment for the crime of illegal departure rise to the level of serious harm? How and in what way is it determined whether severe punishment for illegal departure is disproportionate to violate international law?

In deciding on serious harm or violation of human rights, Hathaway refers to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant of Economic, Social, and Cultural Rights as guidelines. He categorizes the types of the rights which are the benchmark to decide on the degree of violation of human rights and the level of seriousness that amounts to persecution. First, serious harm that violates the core rights always constitutes persecution. The core rights are non-derogable, which should not be denied even during public emergency. The examples are the right to life and the right to be free from torture or cruel, inhuman, or degrading punishment or treatment. Second, there is the harm that violates the rights which may be deprived only in time of public emergency; this is generally equivalent of persecution. Hathaway includes in this category the right to freedom of movement and the right to leave any country including one’s own. The third category refers to the rights which amount to persecution when it reaches an extreme level: the right to food, clothing or housing in the ICESCR. Restrictions on illegal departure are associated with violation of the right to leave. Thus, the harm that results from a violation of freedom of movement may amount to persecution.

963 Supra note 960, at 107
964 Ibid. at 109-112.
965 Ibid. at 109.
966 Ibid.
967 Ibid.
968 Ibid.
969 Ibid. at 111.
6.3.2. Punishment for Illegal Departure

As for illegal emigration, the legal issue is whether prosecution or punishment for illegal emigration constitutes persecution. This consideration addresses a question of whether prosecution or punishment for a violation of law is persecution because the refugee regime makes a distinction between prosecution and persecution. The UNHCR Handbook, which is not binding but gives guidance, lays out in para. 56 that:

[p]ersecution must be distinguished from punishment for a common law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees. It should be recalled that a refugee is a victim--or potential victim--of injustice, not a fugitive from justice.970

Because the Refugee Convention is not designed to protect “a fugitive from justice,” those who flee from prosecution or punishment for a common crime are not entitled to refugee status. This is the general rule regarding punishment for an ordinary criminal offense. In Li v. I.N.S., the court held that “[c]riminal prosecution for illegal departure is generally not considered to be persecution,” and the petitioner failed to establish that the punishment for illegal departure would be imposed because of his political opinion.971 In Abedini v. I.N.S, the court ruled that punishment for dodging mandatory military service or using a false passport does not constitute persecution.972 Both cases, Li v. I.N.S. and Abedini v. I.N.S., concluded that it did not amount to persecution for a state to limit travel abroad or require military service. However, there was an exception to this general rule because

970 Supra note 959.
971 Li v. I.N.S., 92 F.3d 985 (9th Cir. 1996).
972 Abedini v. I.N.S, 971 F.2d 188 (9th Cir. 1992).
difference between prosecution and persecution is blurry on occasion. This exception was triggered where punishment is disproportionately severe.

*Francisco Lucas Rodriguez-Roman v. I.N.S* is the most important case in Ninth Circuit to deal with whether prosecution or punishment for illegal departure amounts to persecution. This case involved a citizen of Cuba who left Cuba because of his anti-communist beliefs while he worked as a crew member for the merchant marine. Rodriguez-Roman sought review of a decision of the Board of Immigration Appeal (BIA) which affirmed the Immigration Judge (IJ)’s decision that denied a request of withholding of deportation and asylum under § 243(h) and § 208(a). The ninth circuit granted the petition and vacated the BIA decision because there was clear probability that he would be subject to severe punishment for the crime of illegal departure once he returned to Cuba. The court used the UNHCR Handbook in determining whether incarceration as a result of a violation the Cuba’s laws was severe punishment.

The UNHCR Handbook states that in refugee determination processes a state authority should examine whether a penalty is excessive and whether domestic law complies with human rights standards including discriminatory application of law in case that the law itself is not discriminatory. The UNHCR Handbook suggests that in assessing the laws in foreign states, national legislation and international human rights instruments may provide standards. In short, the general rule is that penalties on unauthorized emigration are not persecutory unless there is disproportionately severe punishment.

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974 Abedini, 971 F. 2d at 191, Rodriguez-Roman, 98 F.3d 416 at 426, Li v. INS, 92 F.3d 985 at 988.
975 Francisco Lucas Rodriguez-Roman v. I.N.S, 98 F.3d 416 (9th Cir. 1996).
976 *Ibid.* at 430-431. The court sees that clear probability standard for withholding of deportation under 243(h) is stricter than well founded fear standard which applies to asylum claims under 208(a).
978 *Ibid.* para. 60
The relationship between punishment and persecution applies to the cases of illegal departure because punishment on illegal departure is generally considered a result of a violation of law, not persecution. However, the UNHCR Handbook particularly provides guidelines on illegal departure in para. 61:

The legislation of certain States imposes severe penalties on nationals who depart from the country in an unlawful manner or remain abroad without authorization. Where there is reason to believe that a person, due to his illegal departure or unauthorized stay abroad is liable to such severe penalties his recognition as a refugee will be justified if it can be shown that his motives for leaving or remaining outside the country are related to the reasons enumerated in Article 1A (2) of the 1951 Convention.  

It is called the offence of Republikflucht. The East German regime made the term Republicflucht which refers to “flight from the [German Democratic] Republic.” Similarly, Refusnik refers to those in the Soviet Union who were denied permission to leave the country. Goodwin-Gill & Mcadam argue that heavy penalties have been used by totalitarian states in order to prevent their nationals from going abroad. Where there is disproportionately severe punishment for illegal departure or unauthorized stay abroad, the person is eligible for refugee status.

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979 Supra note 959, para. 61.
982 Mark Ya Azbel, refusenik, explains processes for the exit visa in Russia as follows: “I had to cope with an unbelievable amount of red tape. I had often accompanied friends who were leaving Russia on their races through Moscow from bureau to department, from ministry to embassy, from bak to customs, where the emigrants had to fill out forms, obtains affidavits, make any number of payments (both legal and bribes); seek officials’ signatures, countersignatures, seals, and stamps; produce the enormous sheaf of documents a Soviet citizen has to accumulate - but not until my own permission came did I know what it was like to spend so many of my working hours performing this staggering number of final duties.” Carol Kismric, Forced Out: The Agony of the Refugee in Our Time (London: Human Rights Watch and The J. M. Kaplan Fund, 1989) at 82-85, cited in T.A. Aleinikoff, D.A. Martin, H. Motomura and M. Fullerton, footnote, Forced Migration: Law and Policy (West Publishing Co., 2007) at 92-93.
983 Supra note 980, at 103.
6.3.3. Military Desertion and Illegal Departure

In some cases, military desertion is erroneously viewed as analogous to illegal departure. In the Rodriguez-Roman case, the United States Court of Appeal for the Ninth Circuit found that the Board of Immigration Appeals (BIA) attempted to apply the rule of military desertion to the cases of illegal departure.\footnote{Francisco Lucas Rodriguez-Roman v. I.N.S, 98 F.3d 416 (9th Cir. 1996) n. 16.} The immigration judge and the BIA held that the punishment which Rodriguez would face constituted prosecution instead of persecution. Punishment for avoiding military desertion is generally not regarded as persecution. In addition, conscription \emph{per se} is not persecution (Abedini \emph{v. INS}) with strict exceptions (e.g. conscientious objector). In \emph{M.A. v. INS (M.A.II)}, the United States Court of Appeals held that international law and BIA precedent acknowledge that “a sovereign nation enjoys the right to enforce its laws of conscription, and that penalties for evasion are not considered persecution.”\footnote{Corey Ross, “Before the Wall: East Germans, Communist Authority, and the Mass Exodus to the West” (Jun., 2002) 45:2 The Historical Journal 459 at 467.}

Corey Ross explains that in East Germany, the word \emph{Republikflucht} had the implications of \emph{Fahnenflucht}, military desertion.\footnote{M.A. v. INS (M.A.II), 899 F.2d 304 (9th Cir. 1990).} Illegal emigrants to the West were explained by “conspiracy theory of western subversion” or “betraying or deserting the socialist project.”\footnote{Ibid.} According to Rodriguez-Roman case, illegal emigrants in Cuba are labeled as a traitor, and illegal departure is a treasonous criminal conduct. It is critical to approach individual refugee cases without falling into the state perspectives, and it is necessary to make a distinction between military desertion and illegal emigration. They could not require the same level of state obligations.
In general, states could impose military service obligation on citizens, and punishment for failure to comply with the duties does not constitute persecution, while there are exceptions. The right to leave one’s own country could not be used as an excuse to escape from national obligations such as a military duty.\textsuperscript{988} Where there is a conflict between a military obligation and a right to leave, it is exceptionally allowed that the right to leave is restrained to the extent that the exception would not trump the rule. While a state could impose a constitutional obligation to perform military service, it is not justified to establish a duty not to leave one’s own country as a rule. The relationship between the rule and exception cannot be overturned. Therefore, the general rule in the consideration of refugee status for illegal emigrants should not be more stringent than that for military desertion. The scope of the exception, which falls within the concept of persecution, is broader than the cases of military desertion.

\textbf{6.3.4. Severe Harm}

Persecution consists of two important elements: a failure of state protection and serious harm or violation of human rights. The following cases demonstrate how the courts understand persecution in a link to the punishment of illegal departure. In the case of \textit{Janus & Janek}, Jaroslav Janus and Janek had been convicted for leaving Czechoslovakia without a permit.\textsuperscript{989} Janus had been imprisoned for one year and his property confiscated. Janek was sentenced to eight months in prison. The BIA recognized that they should not be deported to Czechoslovakia because they would face severe punishment for an offense of illegal departure for political reasons: Janus left the country without any intention of returing

\textsuperscript{989} The case of Janus & Janek, 12 I. & N. Dec. at 873 (BIA 1968), cited \textit{ibid.} at 428.
because he did not agree with the Communist system. The BIA ruled that on their return they would be subject to “punishment for violation of an ordinary statute [...], but persecution for the political offense.” It held that one year or eight months of imprisonment was sufficient to constitute persecution.

However, in Sovich v. Esperdy, the court held that not all incarcerations were persecution. While long years of imprisonment for escaping from a cruel dictatorship would fall within physical persecution under § 243(h) of the Statute, “a brief confinement for illegal departure or for political opposition to a totalitarian regime would not necessarily fall within the ambit of Congress's special concern in enacting this provision.”

In the case of Rodriguez-Roman, the petitioner claimed that he would be subject to prolonged detention for his illegal departure, if deportation occurred. He argued that due to illegal departure he would be perceived as a traitor by the Cuban government, who would be sentenced to twenty years in prison or death. He also submitted the report from Amnesty International which introduced a case involving six-year imprisonment for illegal departure. The court cited a State Department report, which indicated that the sentence for unlawful departure in Cuba was likely to be three years. The IJ also stated that the punishment is “harsh, if not fatal.”

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990 Ibid.
991 Ibid.
992 Ibid. at 431.
993 In 1956, Sovich fled from Yugoslavia to Italy and stayed there for one year, while he received refugee status. In 1957 he was employed on a Panamanian vessel and, in 1958, entered the United States as a non-immigrant crewman. In January, 1959, Sovich overstayed in the United States and became subject to deportation. He claimed that he would be sentenced for his illegal departure and his opposition to Communism on the grounds of political opinion and religion upon his return to Yugoslavia. Sovich v. Esperdy, 319 F. 2d 21 (2d Cir. 1963) at 23; Ibid. at 21.
994 Ibid. at 21
995 Supra note 984, at 419.
996 Ibid. at 420
997 Ibid. at 431.
998 Ibid. at 431.
severe and sufficient to be persecution. In determining the level of severity, the court considered the fact that illegal departure would be considered a treasonous act and he would be likely to face “harsh conditions” including cell assignments with inmates, the denial of medical care, and possibly disappearance.

6.4. The Chinese Laws and Regulations

In Jin Ying Li v. I.N.S., the petitioner claimed that he was likely to have “extended detention, exorbitant fines and torture at the hands of the local authorities” because illegal departure was considered as “the expression of an anti-China opinion.” Affirming the denial of application for asylum and withholding of deportation, the court held that petitioner’s allegation of severe punishment was rebutted by the report of the Department of State Bureau of Human Rights and Humanitarian Affairs. According to the report, Chinese who had been returned to the Fujian province in 1993 were discharged within three weeks of arrival after receiving a fine. The report also stated that while the criminal code stipulated that punishment for a violation of the exit restriction was to up to one year in prison, there were no reports of criminal imprisonment for repeated illegal emigration. The Chinese petitions related to the matter of illegal departure have been denied relying on this ninth circuit case such as Yan Chen v. Eric H. Holder Jr., Attorney General (9th Cir. 2010).

How do the Chinese laws criminalize illegal departure and unauthorized stay abroad? This questions the degree of severity to satisfy persecution and the information that courts relies on. A report from the United States Bureau of Citizenship and Immigration Services

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999 Jin Ying Li v. I.N.S., 92 F.3d 985 (9th Cir. 1996), at 988.
1000 Ibid. at 988.
1001 Ibid. at 988.
(BCIS) concludes that illegal emigration in China is treated in a lenient way under different border management laws which regulate no more than ten days of detention by the Public Security Bureau.\textsuperscript{1002} This report came out on December 17, 1998, two years after the \textit{Li} case. The BCIS report relies on news articles and information from Chinese Embassy in Washington DC and Australian Consulate. It cites statement from the Chinese Embassy in Washington, DC in the York Daily Record: “[s]o long as they have not violated the Chinese criminal law, we do not bring any criminal charges against those illegally emigrated Chinese citizens after their repatriation.”\textsuperscript{1003} It also used words from the Australian Consulate in Shanghai to Canberra in 1994 as follows:

[the official attitude toward illegal immigrants was that they were victims even though they had broken the law. They were not punished when they returned to China. Illegal immigrants were interred when they arrived. This was to allow authorities to complete health and identity checks. The latter was sometimes time consuming because the [illegal immigrants] often had no documentation when they returned. After they received ‘education’ they were allowed to return to their home villages. The [illegal immigrants] were charged for accommodation while in custody and for the cost of this compulsory ‘education.’\textsuperscript{1004}

\textsuperscript{1003} It also uses Yu Daodang’s words, a spokesman for the Fujian province government, who did an interview with Los Angeles Times in 1993. He said that “while convicted smugglers are imprisoned, people caught trying to leave or those sent back from other countries are not punished in labor camps, but are given strict lectures.”
\textsuperscript{1004} \textit{Ibid.}
The American Consulate in Guangzhou also supports that returnees receive small fines and brief periods of detention for about one week to a little longer than one month.\(^{1005}\) They also get medical examinations and education about the problems of illegal immigration.\(^{1006}\)

On the other hand, the BCIS report states that articles 176 and 177 of Criminal Code in the People’s Republic of China regulate illegal departure under Chapter VI of the Code, Crimes of Obstructing the Administration of Public Order, and explains that those who are returned to China would be considered “ordinary criminals,” and would be sentenced for one to five years and be fined. Article 176 of the 1979 criminal law states that “[w]hoever, in violation of the exit and entry regulations, secretly crosses the national boundary (borderline), if the circumstances are serious, shall be sentenced to fixed-term imprisonment of not more than one year, criminal detention or public surveillance.”\(^{1007}\) Article 176 is seemingly replaced by article 322 of the 1997 criminal code\(^{1008}\) under Chapter VI of the code, Crimes of Disrupting the Order of Social Administration (Section 3 Crimes of Disrupting Administration of the Border):

Whoever violates the laws and regulations controlling secret crossing of the national boundary (border), and when the circumstances are serious, shall be sentenced to not more than one year of fixed-term imprisonment and criminal detention or control.\(^{1009}\)

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\(^{1005}\) Ibid.  
\(^{1006}\) Ibid.  
\(^{1009}\) Article 322 provides penalties for illegal emigration. Ibid..
Australian Refugee Review Tribunal describes article 322 as the provision which penalizes illegal emigration in RRT Research Response. However, there is no explicit explanation about the article 322 plays out in practice. None of the reports are clear about the way in which article 322 applies to cases, particularly in local areas, and how to interpret “the laws and regulations controlling secret crossing of the national boundary,” and “serious circumstances” which causes less than one year of detention.

Besides the criminal law, there are administrative laws associating with exit and entry such as the *Law on the Control of Exit and Entry of Citizens 1985 (PRC)*\(^{1010}\) and the *Detailed Rules of the Implementation of the Law on the Control of Exit and Entry of Citizens (Amendment) 1994 (PRC).*\(^{1011}\) These laws are not designed to protect the right to return but to keep security and public order. Article 1 of *the Law on the Control of Exit and Entry of Citizens 1985 (PRC)* lays out that “the present law is enacted for the purpose of safeguarding the sovereignty and maintaining the security and public order of the PRC and facilitating international exchanges.”\(^{1012}\) With regards to these laws, Guofu Liu emphasizes the broad scope of discretion given to administrative authorities, particularly public security departments. They have discretion from the approval of an application to the choice of administrative punishment and enforcement measures which are not subject to judicial review.\(^{1013}\) For example, the Ministry of Public Security, the Ministry of Foreign Affairs, and the Ministry of Communications “formulate rules” (article 19 of *the Law on the Control

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\(^{1010}\) Guofu Liu, *The Right to Leave and Return and Chinese Migration Law* (Leiden: Martinus Nijhoff Publishers, 2006) at 106; *The Law on the Control of Exit and Entry of Citizens (PRC)*, *the Law on the Control of Exit and Entry of Aliens (PRC)* and their detailed rules of the implementation were made in 1985 and 1986. There are also two other important laws: the *Provisional Measures on the Control over Chinese Citizens Traveling for Private Affairs to or from the Regions of Hong Kong or Macao 1986 (PRC)*, and the *Measures on the Control over Chinese Citizens Traveling to or from the Region of Taiwan 1992 (PRC).* Guofu Liu, *ibid.* at 118.

\(^{1011}\) *Ibid.* at 118.

\(^{1012}\) *Ibid.* at 118, n. 78.

of Exit and Entry of Citizens 1985 (PRC). Chinese consular offices and provincial security departments are the government agencies that authorize residence permits to the Chinese returnees.\textsuperscript{1014} Public security departments have discretion to choose between a fine or detention, and decide the length of detention for punishment.\textsuperscript{1015}

Liu argues that the right to leave and return could easily be infringed by discretion, because enforcement measures are not subject to administrative review for efficiency, and are subject to judicial review on administrative decisions only in case that are clearly unfair.\textsuperscript{1016} He suggests that as discretion of the authorities of exit and entry authorities are greater, the right to leave and return becomes more susceptible to interference.\textsuperscript{1017} Furthermore, he asserts that “[o]fficials in charge of exit and entry administration who do not have a strong sense of legality and know little about the laws and rules related to exit and entry administration; they do not know how to deal with violations of the exit and entry administration.”\textsuperscript{1018}

The Chinese claims based on illegal departure in the U.S. have been denied for the reasons that those rules are applied in a lenient way, often with a fine or a brief period of detention which does not amount to persecution. While violators are treated as criminals in China, and are fined\textsuperscript{1019} or imprisoned for short periods under administrative laws, the courts have denied the Chinese claims to refugee status based on illegal departure. Although criminal sentencing term is less than one year in article 322, the courts do not appear to consider other circumstances as they did in the Rodriguez-Roman case. In Rodriguez-

\textsuperscript{1014} Ibid. at 282.
\textsuperscript{1015} Ibid.
\textsuperscript{1016} Ibid. at 283-284.
\textsuperscript{1017} Ibid. at 280.
\textsuperscript{1018} Ibid. at 283.
\textsuperscript{1019} Ibid. at 284.
Roman, the court looked at not only sentencing period but also social labeling as a traitor and prison circumstances. Additional factors such as social labeling, harsh treatment in prison, prison conditions, and administrative delay or detention must be brought into decision-making processes. The next section handles illegal departure cases in Canada, and some of the cases recognized that extralegal treatment more than law itself constitutes persecution in refugee determination.

6.5. ‘Illegal Exit’ Cases in Canada

6.5.1. Punishment for Illegal Exit

Illegal departure is termed “illegal exit” in Canada. The 1991 Valentin decision in Canada is the case that verifies the general rule that punishment for illegal departure itself is not persecution as indicated in US case of Li v. I.N.S. The punishment imposed by the exit law has the effect of a law of general application. Valentin v. Canada (Minister of Employment and Immigration) was set as a precedent regarding illegal departure cases.\textsuperscript{1020} In Valentin, the Federal Court held that “punishment for an illegal exit from a country is not in itself a basis for a well-founded fear of persecution, when punishment arises out of a law of general application.”\textsuperscript{1021} The case involves five appellants, Czechoslovak citizens, who claimed refugee status before the Immigration and Refugee Board (IRB).\textsuperscript{1022} They asserted that in the past they had been in trouble at school, work and in the military service because they were Catholics and did not want to join the Community Party.\textsuperscript{1023} Also, they alleged

\textsuperscript{1020} Valentin v. Canada (Minister of Employment and Immigration), [1991] 3 F.C. 390 (F.C.A.),
\textsuperscript{1021} Donboli v. Canada (Minister of Citizenship and Immigration) [2003] F.C.J. No. 1130.
\textsuperscript{1022} Ibid. at para. 2.
\textsuperscript{1023} Ibid.
that they had a fear of severe punishment under section 109 of the Czech Criminal Code. The section 109 states in article 1(i) and (ii) that any Czechoslovak citizen who stays abroad without an official approval “will be punished by removal of personal freedom for six months and up to five years of corrective measures.”

However, the Federal Court (FC) upheld the Board’s decision that the claimant’s fear of criminal punishment for overstaying exit visa does not constitute a well-founded fear of persecution. According to the FC, a mere isolated sentence without “repetition and relentlessness” does not constitute persecution. Also, there is no direct relationship between the sentence and political opinion. The FC further explained that section 109 has “a determining effect on the granting of refugee status” only in exceptional cases where the provision, either per se or in application, would add to discriminatory practices to which the claimant has been exposed based on one of the enumerated grounds of persecution in the 1951 Refugee Convention. Because there is no such connection in the case, the FC dismissed the appeals for judicial review. By referring to this case, the IRB has dismissed cases involving asylum seekers who had left the country without official authorization or had overstayed exit visa.

Castaneda v. Canada (Minister of Employment and Immigration) cited the Valentin case for its decision. This is comparable to the Rodriguez-Roman case in the US. Robert Martinez Castaneda, a Cuban citizen, claimed that while studying in Moscow, he expressed his opinion against a regime in Cuba, and was therefore banished by Russia after having been

\(^{1024}\) Ibid.

\(^{1025}\) Ibid. at para. 10; The FC explained that “the transgression was [not] motivated by some dissatisfaction of a political nature.” Ibid. at para. 8.

\(^{1026}\) Ibid.

\(^{1027}\) Ibid.

\(^{1028}\) Castaneda v. Canada (Minister of Employment and Immigration) [1993] F.C.J. No. 1090.
labeled as “a politically problematic student.”

The IRB decided that he had not been subjected to persecution in the past, and hence the illegal exit *per se* did not establish a well-founded fear of persecution. Castaneda applied for judicial review. He asserted that the IRB misapplied the *Valentin* case to the Cuban factual context. He distinguished his case from the *Valentin* case because “the illegal exit legislation [in Cuba] is inherently political and punishment would await any defector whether or not illegal exit legislation was in place.” Also, he claimed that the IRB did not consider “whether excessive punishment for an illegal exit could constitute a reasonable basis for fear of persecution.”

The Federal Court responded that the law in Czechoslovakia is not less political than the Cuban law in which penalties vary from fines to three years imprisonment for illegal exit. The FC concluded that this punishment for illegal exit in Cuba is not more excessive than the one in Czechoslovakia, and therefore there is no direct relationship between the sentence and political opinion. Rather, the FC pointed out that the IRB failed to consider “extra judicial punishment,” which is a reviewable error, and returned the case before the same IRB.

Both Castaneda and Valentin cases became precedents for subsequent cases involving Cuban citizens, such as in *De Corcho Herrera v. Canada (Minister of Employment and Immigration)* and *Galvez v. Canada*. In *Herrera*, De Corcho Herrera claimed refugee status on the basis that he expressed his opinion against a Cuban regime on Radio Marti after submitting an application for refugee status. The FC upheld the IRB’s decision that the

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1029 Ibid. para. 3.
1030 Ibid. para. 7.
1031 Ibid. para. 5.
1032 Ibid. para. 8.
1033 Ibid. para.11.
1035 *Herrera v. Canada*, *ibid.* at para. 3; He claimed refugee status on the way returning to Cuba after he obtained degree in Moscow. *ibid.* at para. 2.
applicant is not a bona fide refugee for his self-serving act to be a refugee. The FC also observed that the Cuban law is neutral because it was established for general application. In *Galvez*, Niurka Niebla Galvez claimed refugee status for overstaying her exit visa. She argued that the Cuban government perceives her as having a political opinion and membership of the social group – that is, “who do not want to join political parties.” The FC held that “[i]llegal exit was no longer considered a political crime resulting in incarceration,” and confirmed the IRB’s reasoning that the Cuban legislation was a law of general application. The application for judicial review was dismissed.

The *Castaneda* and *Valentin* cases establish a general rule that punishment imposed by a law of general application, with regards to unauthorized exit or overstay, does not constitute a well-founded persecution. In both cases, the FC failed to provide a barometer for “a reasonable basis for fear of” being persecuted to answer whether or not punishment is excessive. In *Valentin*, “repetition and relentlessness” were core components in determining “a reasonable basis for fear of persecution” or a proportionality of punishment. In *Castaneda*, the FC merely cited a phrase from the *Valentin* decision that “[t]he particularities of the Czech legislation […] do not seem to me to be really relevant,” and presumed that penalties for violation of the Cuban laws are less severe than punishment in Czechoslovakia. The FC did not examine whether the penalty is excessive; whether the domestic law complies with human rights standards in international law; and whether the application of the law is discriminatory (or persecutory). Disproportionately severe

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1036 *Galvez v. Canada*, supra at para. 17.
1037 Ibid. at para. 1.
1038 Ibid.
1039 In *Castaneda*, the claimant argued that the IRB did not question “whether excessive punishment for an illegal exit could constitute a reasonable basis for fear of persecution.” *Supra* note 1028 at para. 8.
1040 Ibid. at para. 4.
1041 *Supra* note 959 at para 57 and para. 59.
punishment constitutes persecution although penalties on unauthorized exit are not considered persecutory in a general rule.

6.5.2. Extra-Judicial Punishment as Persecution

Despite the exit law of general application, the Federal Court proposed an exception that applies to the factual situations giving rise to questions of extra-judicial punishment. In Castaneda, the FC stated that the IRB made a reviewable error because it did not consider extra-judicial punishment although evidence demonstrated that the claimant’s family was mistreated as a result of his desertion.¹⁰⁴² For example, his sick father was left vulnerable because he could lose his job to be allocated labor work in the fields. His mother was given a lower position and regarded as an “untrustworthy person” after his defection.¹⁰⁴³ The FC recognized the Cuban government’s treatment to family members in a direct link to the claimant’s illegal exit as evidence of “repercussions over and beyond the statutory sentence.”¹⁰⁴⁴ The FC held that this evidence satisfies an element of “repetition and relentlessness” as proposed in Valentin, and therefore the extra-judicial punishment amounts to persecution.

In Moslim v. Canada (Secretary of State), Mahdi Fraih Moslim, a citizen of Iraq and a Shiite Muslim, applied for judicial review for refugee status. In Iraq, Moslim denied his participation in the Baath Party of Sadaam Hussein, did not get an official authorization for his exit.¹⁰⁴⁵ He argued that he did not want to join in the Iran-Iraq war and the Persian Gulf war after returning to Iraq. The IRB did not grant him a refugee status on the basis that any

¹⁰⁴² Supra note 1028 at para. 12.
¹⁰⁴³ Ibid. at para. 14.
¹⁰⁴⁴ Ibid. at para. 15.
punishment that the applicant is likely to face upon his return to Iraq results from his violation of a law of general application.\textsuperscript{1046} However, the FC allowed the judicial review by considering the evidence of “severe extra-judicial treatment” to which the applicant would be subjected upon return. The IRB relied only on a law of general application, while it disregarded documentary and oral evidence of extra-judicial treatment being committed “at the hands of one of the most repressive, abusive regimes in the world.”\textsuperscript{1047} The FC remitted the case to the IRB for a new determination.

In \textit{Donboli v. Canada (Minister of Citizenship and Immigration)}, the FC held that the IRB erred in law because it did not examine whether the applicant would face “severe or extra-judicial treatment at the hands of a repressive regime.”\textsuperscript{1048} The FC set aside the IRB’s decision and remanded the case to the BIA for a new determination. Donboli, a 63-year-old citizen from Iran, claimed refugee status based on his political opinion. He argued that he was on a blacklist so that he left Iran without official permission. The FC held that despite the \textit{Valentin} decision, “where a proper evidentiary basis exists it is necessary to consider whether excessive or extra-judicial punishment for an illegal exit could constitute a reasonable basis for a well-founded fear of persecution.”\textsuperscript{1049} The FC referred to \textit{Castaneda v. Canada} and \textit{Moslim v. Canada}. The \textit{Donboli} case clarified that excessive or extra-judicial punishment for illegal departure is persecutory in cases where evidence is allowed. Therefore, while a general rule presides over decisions on illegal exit, it is required to examine disproportionate or extra-judicial punishment in refugee determination. Unlike the \textit{Rodriguez-Roman} case in the U.S., the FCs in Canada did not recognize that the exit law

\begin{footnotesize}
\textsuperscript{1046} Ibid. at para. 2.
\textsuperscript{1047} Ibid. at para. 4.
\textsuperscript{1048} \textit{Donboli v. Canada} (Minister of Citizenship and Immigration) [2003] F.C.J. No. 1130.
\textsuperscript{1049} Ibid. at para. 4.
\end{footnotesize}
itself is persecutory or examined whether punishment is disproportionately severe. Rather, the FCs emphasized the importance to consider the issue of “extra-judicial punishment” as a result of illegal exit other than the exit law in refugee determination.

6.6. Internal Flight Alternative and Illegal Departure

This section introduces the concept of the ‘internal flight alternative’ to link the analysis to cases of illegal departure from asylum seekers’ home countries. An internal flight alternative (or internal relocation alternative) refers to an alternative area of an asylum seeker’s home country where the individual does not have a well-founded fear of persecution or where the protection of the country of nationality is available. The legal approaches to the notion are located between the clauses, “a well-founded fear of being persecuted” and “unable […] or unwilling to avail himself of the protection of that country” in the Refugee Convention. The UNHCR states that both conditions, not necessarily conflicting, need to be considered in a holistic way in refugee status determinations. As international refugee protection is a surrogate to state protection, states do not have to recognize the refugee status of an applicant who has an internal protection alternative. At the same time, states have no duty to deny refugee status to applicants with internal protection. Increasingly, state parties use the analysis of an internal flight alternative to decline refugee status for the

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1051 Ibid.


1053 Ibid. at para. 7.
reasons that protection should or could have sought in other areas in the state of nationality.\footnote{Ibid. at para 3.}

As the use of the internal flight alternative challenges refugee protection, scholars made Michigan Guidelines on the International Protection of Refugees (Michigan Guidelines), an analytic framework for assessing the referential use of the internal flight alternative. One of the critical questions in Michigan Guidelines is “whether the asylum-seeker has access to meaningful internal protection against the risk of persecution.”\footnote{Ibid. at para. 13.} It proposes that an internal protection alternative should be a place where an asylum-seeker no longer has a well-founded fear of persecution, there exists no “additional risk of, or equivalent to persecution,” and the conditions meet the “affirmative standards” of internal protection.\footnote{Ibid. at para. 15 - 22.} Conditions such as famine or conflict in a proposed place of relocation, although not reaching the level of persecution, would give additional risk of persecution to the asylum-seeker.\footnote{Ibid. at para. 19.} Affirmative protection in the proposed place includes access to job, welfare, and education.\footnote{Ibid. at para. 22.} In considering whether the applicant would be subject to serious harm in the proposed place, the Code of Federal Regulations in the U.S. adds “administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties” into the factors of the “reasonableness of internal relocation.”\footnote{Aliens and Nationality, 8 C.F.R §208.13(b)(3)(2014), Electronic Code of Federal Regulation, online: U.S. Government Printing Office <http://www.ecfr.gov/cgi-bin/text-idx?SID=da087c367bf429cdbe4025bed332e8a0&node=8:1.0.1.2.11.1.1.13&rgn=div8>.}

The chapter suggests the use of the internal flight alternative for asylum seekers to establish a well-founded fear of persecution and state protection in the cases of illegal
departure. This contributes to the rationale of the internal flight alternative in a more constructive way for international refugee protection. As demonstrated in Chapter Two, socialist countries including North Korea and China have a registration system, which guarantees minimum welfare benefits, medical treatment, and education in a province where permanent resident status is registered.\footnote{1060} Without a residence permit, it is difficult to enjoy a range of welfare benefits including education and housing. For example, *hukou* in China is known as a “local citizenship” that sets up internal borders.\footnote{1061} It establishes permanent resident status so that children whose parents are ‘illegal’ migrants without *hukou* are restricted from state provided social service including education.\footnote{1062} A similar system exists in North Korea. North Korean citizens are also required to have a travel permit from a state authority to visit other areas.

Internal flight cannot be an alternative under the circumstances where an asylum-seeker does not have access to internal protection and entailing social provisions including job, education, and welfare benefits, and ‘illegal’ internal migration without a state permit is subject to administrative punishment. Where such conditions are not met the internal alternative does not satisfy the “affirmative standards” of internal protection. Also, the countrywide famine, which hit North Korea, has brought additional risks of persecution to an asylum seeker. In situations such as this, it would be difficult to assert that “the asylum-seeker has access to meaningful internal protection against the risk of persecution.”\footnote{1063} The chapter suggests that this framework question proposed by the *Michigan Guidelines* should

\footnotetext[1062]{Supra note 1060.}
\footnotetext[1063]{Supra note 1050 at para. 13.}
be used to support the evidence of the existence of a well-founded fear of persecution and lack of state protection in illegal departure cases. Therefore, I argue that administrative or criminal punishment for unauthorized departure from a registered residence as well as lack of access to internal protection construct the evidence of a well-founded fear of persecution, and unavailability of state protection such as in North Korea.

6.7. Conclusion

North Korean asylum seekers face a refugee border constructed by the definition of refugee in the Refugee Convention and immigration law. This engages the transnational context where both domestic and international law transcend national borders. The issue of dual nationality of North Koreans in South Korea has been considered in refugee determination, and examined in courts in the U.S. and Canada. The North Korean Human Rights Act added the sec. 302 to avoid a potential conflict with the South Korean Constitution for North Korean asylum seekers. But in In re K-R-Y- and K-C-S-, the interpretation of sec. 302 became limited so that the BIA did not recognize refugee status to the North Korean applicants who had firmly settled in South Korea. On the other hand, the Immigration and Refugee Board (IRB) in Canada has handled the issue of dual nationality of North Koreans based on Responses to Information Requests (RIRs), issued by the IRB in 2008. Kim v. Canada is the relevant case that will be discussed in Chapter Seven. It reflects how transnational law is constructed through the interactions between Canadian refugee law in Canada and South Korean laws regarding the legal status of North Koreans.

This chapter explores how internal and international migrations intersect in illegal departure cases. Illegal departure is at the intersection of emigration law and immigration
The chapter analyzes how courts in the U.S. (and Canada) have ruled in refugee cases involving illegal departure from other countries to find a possibility for North Korean asylum seekers. It argues that punishment for illegal departure in North Korea could be a legal ground for granting refugee or asylee status to North Koreans for the following reasons.

First, control over freedom of movement may constitute serious harm in Hathaway’s categories of rights. Hathaway includes the right to freedom of movement and the right to leave any country including one’s own as the second categories of the rights. It means that harm that violates this right is generally equivalent of persecution unless it is deprived in time of public emergency. Illegal emigration is punished by criminal law and practices and border crossers are often considered endangering the survival of the regime in North Korea. As investigated in Chapter Five, illegal border crossers shall be sentenced to up to two years of labor-training in localized detention, under the title of Illegal Border Crossing based on article 233 of the criminal code. In serious cases, the punishment is for five years of labor-correction. The person who betrays the forefather land and flees into other countries can be sentenced to life in prison, death penalty or confiscation of property in serious cases (article 62). Article 233 and 62 of the criminal code provide basis for sentencing for unauthorized departure.

Second, both Rodriguez-Roman and Castaneda cases in the U.S. and Canada dealt with the issue of the Cuban law, which imposes imprisonment for illegal departure. In the case of Rodriguez-Roman, the Court of Appeal in the U.S. concluded that a three-year sentence for illegal departure constitute persecution together with other circumstances such as prison conditions, welfare benefits, and social labeling. In the Castaneda case in Canada, the FC held that it is required to consider evidence of extra-judicial punishment such as
mistreatment to family members as a result of illegal exit.\textsuperscript{1064} In comparison between cases in the U.S. and Canada, the penalties, which are based on article 233 and article 62 of the criminal law in North Korea, are sufficient to rise to a level of persecution. Further, NGO reports that illegal emigration result in harsh treatment toward detainees along with criminal punishment. North Korean returnees go through an investigation process which includes body searches, removal of clothes, and inquiries on when and with whom they went to China, whom they met in China, whether they married to Chinese, whether they met South Koreans, or whether they went to church or met missionaries.\textsuperscript{1065} Therefore, punishment for illegal departure in North Korea and social labeling as a traitor should be considered in determining refugee status for North Koreans.

Finally, the chapter attempts to draw a link between illegal departure and the internal flight alternative. The analysis of the internal flight alternative proves that North Korean asylum seekers are unable to access “meaningful internal protection against the risk of persecution” in any circumstance in which it would be difficult to change one’s registered residence. In the case of illegal departure, this analysis strengthens the evidence to help North Korean applicants to establish a well-founded fear of persecution for North Korean asylum seekers. The dissertation now turns to North Korean refugee cases in Canada to examine what factors have played an important role in determining North Korean refugee cases which have been reviewed by Canada’s Immigration and Refugee Board.

\textsuperscript{1064} \textit{Supra} note 1028 at para. 12.  
7. Surrogate Protection in Canada and Potential Nationality in South Korea: Does a North Korean Asylum-Seeker have a “Genuine link” to South Korea?

7.1. Introduction

North Koreans are now migrating beyond China or South Korea to the United Kingdom, Germany, the United State, Canada, and other parts of world.\(^{1067}\) This transnational migration beyond the Korean peninsula and neighboring countries is a recent phenomenon. In South Korea itself, the number of North Korean migrants has rapidly risen since 2000. In 2011, 2,706 North Korean entered South Korea. As of December 2011, the total population of North Korean migrants reached 23,095 in South Korea.\(^{1068}\) Among receiving countries, the United Kingdom (UK) is most favored for North Korean asylum seekers. According to the UNHCR Statistics (Table 2), the UK accepted 603 North Koreans as refugees in 2011, 581 in 2010, 574 in 2009, 570 in 2008, 281 in 2007, 64 in 2006, 33 in 2005, and 17 in 2004.\(^{1069}\) After the UK, Germany shows relatively a higher number of North Korean refugees. In 2011, 193 North Koreans were admitted as refugees, and similar figures were reflected from 2002 to 2010.\(^{1070}\) Beginning in 2002 Germany began receiving significant numbers of North Koreans as refugees, far more than all the other countries combined. Although the United States enacted the *North Korean Human Rights Act* and extended it from 2008 to 2012, only 94 North Koreans out of 238 resettlement applicants

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\(^{1069}\) UNHCR, *supra* note 1067.

\(^{1070}\) *Ibid.*
arrived the US under the U.S. Refugee Admissions Program from 2005 to 2010, as of March 29, 2010.  

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Table 2 Refugees Originated from Dem. People’s Rep. of Korea (UNHCR Statistical Online Population Data)


\[1072\] The UNHCR table indicates that North Koreans have migrated to other part of world and more and more they have been accepted as refugees, although it does not accurately reflect the number of North Korean refugees. Supra note 1067.
Canada admitted 175 North Koreans as refugees from 2000 to 2011. In 2012 from January to September, Canada accepted 183 North Koreans out of 544 applicants on the basis of the IRB database according to Voice of America news.\textsuperscript{1073} The total number is still lower than the UK or Germany, but Canada is becoming an important destination for North Korean asylum seekers. The number of North Korean refugees in Canada has recently increased from seven in 2008 to sixty six in 2009, while those in the U.S. decreased from thirty-eight in 2008 to eighteen in 2009.\textsuperscript{1074} What brought this recent change about in Canada? Why is the Immigration and Refugee Board in Canada (IRB) making more favorable decisions about North Korean asylum seekers? Is this change associated with South Korean laws and procedures regarding admissions of North Koreans? Or is it related to interpretation of a refugee definition in Canadian law or international law? What are the possibilities of having South Korean citizenship handled in case law or IRB decisions? This chapter explores the refugee determination processes in Canada and attempts to explain the rise in successful claimants from North Korea. It takes into account country information, legal interpretation in international law and Canadian law, case law in Canada, and South Korean laws and procedures. This chapter reflects the interaction and intersection of legal regimes between South Korea and Canada, which produce legal meanings in refugee status determinations. With regard to the issue of dual nationality of North Koreans in South Korea, it is interesting to compare how differently the U.S. in Chapter Six and Canada in Chapter Seven approach the intersection between South Korean law and refugee law.

\textsuperscript{1073} Youngkwon Kim, “
\textsuperscript{1074} Jinhui Lee, “
\textsuperscript{1071} United States Government Accountability Office, \textit{supra} note 1071 at 49.
To conduct this study, in December 2010, I visited the Federal Court registrar in Vancouver to gather legal documents and exhibits for *Kim v. Canada* (2010) F.C.J. 870. On March 21, 2011, I requested statistics and information of North Korean refugees in Canada to the IRB under the *Access to Information Act*. After discussion with information and privacy officers at the IRB my request was narrowed down as follow:

For the period from 1990 to 2011, information and statistics relevant to North Korean refugee claims (from the Democratic People's Republic of Korea) in Canada. This relates to individuals who have filed applications for refugee status, and have been granted, rejected, or deported to North Korea. The records should be restricted to those created by IRB only. Personal information such as claimant's name can be erased from the information you provide.

a. For applications filed, please provide reasons for applications;
b. Where refugee status was granted, please provide copy of each decision;
c. Where refugee status was rejected, please provide copy of each decision;
d. Please provide statistics on the number of claims made/gender/principle claimants/accompanying partners/dependent children/dates of decision, etc.

On June 30, 2011, the IRB mailed a 289 page information package, after deleting personal information in IRB decisions pursuant to article 19(1) of *Access to Information Act*. This analysis in this chapter is based on this material and that from *Kim v. Canada*.

### 7.2. Statistics on North Korean Refugees in Canada

In 2000, the first North Korean claimant was granted refugee status in Canada when four claims were submitted.¹⁰⁷⁵ No North Korean applicants were admitted as refugees in 1997, 1998, 1999, 2001, 2002, 2004, and 2006. For example, in 1998 six cases were rejected

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244
and one case was abandoned out of the total seven claims.\textsuperscript{1076} In 2004, the IRB denied the two claims before it. In 2003,\textsuperscript{1077} 2005, and 2007 only one person was admitted. Table 3 below is derived from the IRB information taken from both the Radio Free Asia, a non-profit broadcasting organization, and the Canadian Council for Refugees (CCR), a non-profit organization.\textsuperscript{1078} In particular, the data from 1997 to 2006 is based on information from the Radio Free Asia.\textsuperscript{1079} The rest of the data from 2007 to 2011 is from the CCR, provided through Sean Rehaag’s Access to Information request to the IRB.\textsuperscript{1080}

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Table 3 Admissions of North Koreans as Refugees in Canada

The first admission of a North Korean as a refugee was in 2000, but the number remained small until 2009. Only a single North Korean was granted refugee status in 2005.

\textsuperscript{1076} Ibid.
\textsuperscript{1077} In 2003 one was accepted out of five claims: one was rejected and three were abandoned.
\textsuperscript{1078} Lee supra note 1076.
\textsuperscript{1079} Ibid.
and 2007. In 2009, 32 cases out of 36 North Korean claims were successful, an approval rate of 88.89 percent. In 2010, 19 out of 20 claims were successful (a grant rate of 95 percent) including one expedited positive decision. Finally, in 2011 there were 117 positive decisions out of 175 claims after 46 cases were withdrawn and abandoned. The proportion of positive decisions has been high since 2005 (Figure 14).

![Grant Rates](image)

Figure 14 Grant Rates

In fact, the number of North Korean individuals who have been admitted as refugees is higher than the number of positive decisions. For example, in 2009, 66 North Korean individuals were accepted as refugees in Canada consisting of 32 principal claimants and 34

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1081 United States Government Accountability Office, supra note 1071 at 49.
1084 The fast-track expedited process is used where claims can be decided without a hearing, but limited to claims from particular countries or certain kinds of claims. If the Refugee Protection Officer (RPO) recommends about a claim after an interview and the recommendation is approved, the claim is referred to a member of the refugee protection division (RPD) for a decision without a hearing. Immigration and Refugee Board of Canada, Process for Making a Claim for Refugee Protection, online: IRB <http://www.irb-cisr.gc.ca/Eng/brdcom/references/procedures/proc/rpdsrp/Pages/rpdp.aspx>.
partners and children (Table 4). The IRB database failed to count accompanying partners and dependent children, as Sean Rehaag points out. The IRB database only counts the principal applicants.

| North Koreans Applying for a Humanitarian Protection Status in Canada for Calendar Years 2000 to 2009 |
|-------------------------------------------------|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|
| Individuals filed                               | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 |
| Individuals granted                             | n/a  | n/a  | n/a  | 3    | 0    | 1    | 26   | 113  | 31   | 43   | 217  |
| Source: Office of the Director General, Refugees Branch, Citizenship and Immigration Canada |

Table 4 The Individual Number of Refugee Claims and Admissions of North Koreans in Canada

Table 4 above demonstrates the total number of individual admission decisions, which count accompanying partners and dependent children. The United States Government Accountability Office (GAO) obtained this data from the Citizenship and Immigration Canada (CIC). Figure 15 below compares the number of admitted principal applicants (the number of successful cases) and the total number of individuals, who were granted refugee protection.

Figure 15 shows that the admission of North Koreans for refugee protection is increasing even though there are fewer cases. In 2010, ten more North Koreans were accepted as refugees totaling 76 compared to 66 in 2009, while the number of cases dropped.

1086 Rehaag, supra note 1082; United States Government Accountability Office, supra note 1081 at 49.
1087 Rehaag, supra note 1080 at 342.
1088 United States Government Accountability Office, supra note 1071 at 49.
1089 Note below the Table in the GAO report states that “[d]ata reflects North Korean individuals and not case. All individuals filed claims within Canada. Asylum cases that are still pending in one year carry over to the next year.” Ibid.
from 32 to 19 (Table 2). It is worth noticing that overall admissions of North Koreans are on the rise in Canada compared to the United States, which enacted the North Korean Human Rights Act of 2004 and reauthorized the Act in 2008. The number in Canada rose from 7 in 2008 to 66 in 2009, while the number in the US declined to 18 in 2009 from 38 in 2008.

Figure 15 Admissions of North Koreans as Refugees in Canada: The Number of Cases and Individuals

Jack Kim, a representative of Hanvoice, suggests this surge is the result of a sudden increase in applications from North Koreans. 130 North Koreans have applied for refugee status in Canada since the end of 2006. Youngsil Kim, a minister in a Korean church in Ontario, also describes it as a result of a large number of North Koreans arriving in Canada after December 2006. At the same time, the processing claims took more than an

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1092 Lee, supra note 1079; United States Government Accountability Office, supra note 1088 at 49.
1093 The graph does not include the 2011 statistic of the number of individual admission.
1094 Hanvoice is a non-profit corporation based in Toronto, Ontario.
1095 Yang, supra note 1090.
1096 Lee, supra note 1092.
average 14 months after 2006, Stephan Malepart, a spokesman of the IRB said.\textsuperscript{1097}

In short, Canada has been accepting more North Korean refugees than before. In 2011 the number of cases including only principal clamant refugee reached 117.\textsuperscript{1098} As of June 30, 2011, 27 North Koreans including spouses and children were admitted to Canada according to the information provided by the IRB under the \textit{Access to Information Act} (13 positive cases with 2 negative and 3 abandoned ones).\textsuperscript{1099} It is expected that the IRB will make favorable decisions to North Korean asylum seekers on the basis of recent change of legal interpretations in South Korea and Canada. More than any other factors, the Responses to Information Requests (RIRs), issued by the IRB in 2008, and \textit{Canada (Minister of Citizenship and Immigration) v. Williams}, [2005] F.C.A. 126, a decision of the Federal Court of Appeal in 2005 should not be overlooked. I argue that they have contributed to the increasing acceptance rates of North Koreans by the IRB, which will be discussed further in the following sections.

\textbf{7.3. Dual or Multiple Nationality and “Theoretical Protection”}

An important legal question is whether the availability of South Korean citizenship obstructs North Koreans from seeking asylum in other countries. This question is associated to the “theoretical protection”\textsuperscript{1100} of article 3 of the South Korean Constitution, and a legal case, which recognizes a North Korean national as a South Korean citizen based on the


\textsuperscript{1098} Rehaag, \textit{supra} note 1085.

\textsuperscript{1099} The last decision among the data was made on March 25, 2011.

article 3. It may be problematic for North Korean refugee claimants since asylum seekers with dual or multiple nationality are not considered to meet the scope of the definition of refugee.

A refugee is defined in article 1 A (2) of the *United Nations Convention Relating to Status of Refugees* (hereinafter ‘Refugee Convention’), which entered into force in 1951.\(^{1101}\) The *Refugee Convention* defines a refugee as a person who, “owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country […]”. After this definition, article 1 A (2), paragraph 2 is followed in a “self-explanatory” sentence:

In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.\(^{1102}\)

Paragraph 2 intends to exclude persons with dual or multiple nationality from international refugee protection if they are able to avail themselves of protection of all of the countries of which they are nationals.\(^{1103}\) It is expressly stated that “national protection takes

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\(^{1101}\) The 1951 Convention relating to the Status of Refugees entered into force on April 22, 1954 and the 1967 Protocol on October 4, 1967. The definition of article 1A(2) is as follows: “[a]s a result of events occurring before 1 January 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events […]”.


\(^{1103}\) *Ibid* at para 106.

Canada has the same legal interpretation on dual or multiple nationality as a party to the Refugee Convention. On June 4, 1969 Canada ratified the Refugee Convention and the Protocol Relating to the Status of Refugees entering into force in 1967.\textsuperscript{1105} The definition of a Convention refugee is incorporated in section 96 of the Immigration and Refugee Protection Act:

A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.\textsuperscript{1106}

Section 96(a) of the Immigration and Refugee Protection Act (IRPA) requires the Convention refugee to be “outside each of their countries and is unable or, […] unwilling to avail themselves of the protection of each of those countries [Italics added].” In order to meet the definition of a Convention refugee, the person must have no alternative protection from each of the countries where he or she has dual or multiple nationality. Also, Canada v. Ward established the principle of surrogacy: international refugee protection is “surrogate or

\textsuperscript{1104} Ibid.
\textsuperscript{1105} As of 1 April 2011, the total number of state parties to the 1951 Convention is 144 and the one to the 1967 Protocol is 145. United Nations High Commission for Refugees, “States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocols,” online: UNHCR <http://www.unhcr.org/3b73b0d63.html>.
\textsuperscript{1106} Immigration and Refugee Protection Act, S.C. 2001 c. 27 [IRPA].
substitute” upon failure of national protection. In other words, in cases of dual or multiple nationality state protection is deemed available unless a person seeks state protection of each of the countries of which he or she is a national.

Does the “theoretical protection” for North Koreans from article 3 of the South Korean Constitution guarantee North-South Korea dual nationality? Article 3 states that “[t]he territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands.” It is interpreted in courts that the entire Korean peninsula comprises the territory of the Republic of Korea (ROK), and only the ROK has a legitimate government in the Korean peninsula. On November 12, 1996 the Supreme Court of South Korea confirmed this interpretation, and upheld the decision of the Court of Appeal. As shown in the decision, North Korea is part of the Korean peninsula under state sovereignty of the Republic of Korea, because the North Korean government is an illegitimate organization. The Supreme Court concluded that a plaintiff, who is a national of North Korea with a Foreign Resident Card from China, is also a South Korean citizen.

However, the practical implications of article 3 of the Constitution are different in the determination procedure for recognition as a South Korean citizen. To explore how the “theoretical protection” has been brought to a practical level in South Korea, it is crucial to take two statutes into consideration: the Nationality Act and the Act on the Protection and Settlement Support of Residents Escaping from North Korea (hereinafter, ‘Act on the Protection and Settlement Support’). The two statutes play a crucial role in determining

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1107 In Ward the Court quotes James Hathaway in the Law of Refugee Status that “the refugee scheme as ‘surrogate or substitute protection,’ [and it is] activated only upon failure of national protection.” Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689 (CanLII).

1108 Supreme Ct. of Korea, 96Nu1221, 12 Nov. 1996.

South Korean nationality of North Koreans by creating substantive and procedural rules. As a result, there are circumstances in which a North Korean is not admitted as a South Korean citizen. In this situation, a person becomes *de facto* stateless.\textsuperscript{1110} This chapter explains the technical and fundamental reasons why some claimants have been denied protection from the South Korean government.

The United Nations High Commissioner for Refugees (UNHCR) recognizes that most North Koreans are excluded from refugee status on the basis of dual nationality in accordance with article 1 A (2), paragraph 2 of the *Refugee Convention*.\textsuperscript{1111} An extension of South Korean nationality to all North Koreans negatively affects North Korean claims to international protection.\textsuperscript{1112} The UNHCR provides that although North Koreans may avail themselves of “theoretical protection” from South Korea, in practice it is almost impossible to secure protection from the South Korean government in China or transit countries.\textsuperscript{1113} Section 5 explains why some North Koreans fail to seek protection from the South Korean government under the two statutes.

7.4. Responses to Information Requests (RIRs)\textsuperscript{1114}

Responses to Information Requests (RIRs) is one of the products of the research program under the IRB to satisfy the information need of the Refugee Protection Division in


\textsuperscript{1111} International Crisis Group, *supra* note 1100 at 35.

\textsuperscript{1112} *Ibid*.

\textsuperscript{1113} *Ibid*.

The processes of refugee determination. The Research Directorate uses open information in public, oral sources, or expert information to respond to the queries that are submitted. The RIR issued by the IRB on June 3, 2008 has made a significant impact on positive decisions for North Korean cases. It clarified the legal meaning of South Korean citizenship for North Koreans through an interview with a South Korean official. The RIR included the situations in which North Koreans sought protection from South Korean embassies in Canada or other countries. Also, it provided that North Koreans are not automatically admitted as citizens in South Korea together with information on procedures and ways to acquire citizenship.

The RIR cites the US State Department Country Reports on Human Rights Practices for 2007 and the New York Times (February 19, 2007). The sources indicated that articles 2 and 3 of the South Korean Constitution gave North Koreans entitlement to nationality. Agence France-Press (March 28, 2008) and the 2008 Human Rights Watch report are also used as reference material. However, it is clear that North Koreans do not automatically receive South Korean nationality. The main source of the RIRs is an interview with an official from the South Korean embassy in Ottawa on May 20, 2008. It has led to the most important change in the IRB decisions regarding North Koreans. Based on this interview the IRB learned:

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1117 Article 2 is as follows: “(1) Nationality in the Republic of Korea shall be prescribed by Act.  
First, North Koreans in a third country could receive temporary protection and assistance from the South Korean government to enter South Korea. Upon their arrival in South Korea, they undergo a process to determine eligibility for protection. This information was from the 2005 Unification Paper, a publication from the Ministry of Unification in South Korea, which was referred by an official.

Second, the official clarified that North Koreans do not automatically acquire South Korean citizenship. North Koreans must establish that they have the “will and desire” to reside in South Korea and show themselves to the South Korean embassy or consulate to apply for protection. In this process, the following categories of persons are excluded from acquisition of citizenship: “bogus defectors,” a person who lived in a third country for a considerable period of time, and a person who has committed crimes such as “murder, aircraft hijacking, drug trafficking or terrorism.”

Third, the South Korean government investigates the identification of North Koreans, and an official interview with a North Korean is required in the determination procedure. Identity documents such as North Korean citizenship cards and driver’s licenses are helpful in demonstrating North Korean identity.

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1118 Immigration and Refugee Board of Canada, supra note 1114.
7.5. Laws on South Korean Nationality for North Koreans

The Act on Protection and Settlement Support


The purpose of the *Act on the Protection and Settlement Support* is to provide protection and support to “North Korean residents escaping from the area north of the Military Demarcation line and desiring protection from the Republic of Korea, as quickly as possible to adapt themselves to, and settle down in, all sphere of their lives, including political, economic, social and cultural spheres”\footnote{Protection of Defecting North Korean Residents and Support of Their Settlement Act, supra note 1119.} (article 1). The Act defines “residents escaping from North Korea” as “persons who have their residence, lineal ascendants and descendants, spouses, workplaces, and so on in North Korea, and who have not acquired any foreign nationality after escaping from North Korea” (article 2). North Koreans, who have already obtained nationality from other countries, are excluded from protection.
The law is designed to support the settlement of North Koreans in South Korea, and those who are recognized as “residents escaping from North Korea” are entitled to receive subsidies and housing support. It also contains the procedure to decide who will be under special protection of the South Korean government on the basis of the principle of humanitarianism (article 3), and regulates administrative registration processes.

The Act is applied only to residents escaping North Korea who “have expressed their intention to be protected by the Republic of Korea” (article 3). A North Korean must be personally present to submit an application. Article 7 of the Act states that a North Korean who “desires to be protected under the Act, shall apply for it in person to the head of an overseas diplomatic or consular mission, or the head of any administrative agency.”

However, there are exceptions in which a person can apply for protection without personal presence. Three exceptional cases are listed in article 10 of the Presidential Decree enacted in 1997 and last amended in 2014. The Presidential Decree supplements article 7 of the Act on the Protection and Settlement Support. These are cases where a mentally or physically disabled applicant applies, a family member applies on behalf of other family members, or there is emergency need.

The Minister of Unification determines on the admissibility of the applications with the deliberations of the Consultative Council (article 8). In the case of a person who is likely to have an effect on national security to a substantial degree, the Director General of the

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1123 Supra note 1120 at 134.
National Intelligence Service decides on the admissibility.\footnote{Article 8 (Decision on Protection, etc.) (1) The Minister of National Unification Shall, when he receives such a notice as prescribed in article 7(3), decide on the admissibility of the application for protection following the deliberations of the Consultative Council: Provided, That in the case of a person who is likely to affect national security to a considerable extent, the Director General of the National Intelligence Service shall decide on the admissibility of the application [...]. \textit{Ibid.}} In addition, the Act specifies the criteria for whom to be excluded protection by the Minister of National Unification in article 9. The following subparagraphs in article 9 are the categories:

Article 9 (Criteria for Protection Decision)
(1) In determining whether or not to provide protection pursuant to the provisions of the text of Article 8(1), such persons as prescribed in any of the following subparagraphs may not be determined as persons subject to protection:
1. International criminal offenders involved in aircraft hijacking, drug trafficking, terrorism or genocide, etc;
2. Offenders of nonpolitical, serious crimes such as murder, etc.;
3. Suspects of disguised escape;
4. Persons who have for more than ten years earned their living in their respective countries of sojourn; and
5. Persons who do not apply within one year of their arrival
6. Such other persons as prescribed by the Presidential Decree as unfit for the designation as persons subject to protection.\footnote{In January 2009, the one-year filing deadline after the applicant’s arrival was added to subparagraph 5 of article 9(1).}

A person who has resided in another country for more than 10 years may be excluded from admissions. In January 2007, the length of a stay in other countries was changed from “a considerable period of time” to “more than ten years” in subparagraph 4 of article 9(1).\footnote{This phrase, “a considerable period of time,” had been used since 2001.} In unavoidable circumstances where the applicant was seized or detained against his or her will, where the applicant made an extended stay in a detention center, or where it was not possible to have ordinary or stable life in seclusion or on flight in countries of sojourn, a long period of a stay over 10 years does not prevent a person from being eligible for protection.
In other words, subparagraph 4 does not apply to exceptional cases (article 16 of the Presidential Decree). It also does not apply to equivalent circumstances that are approved by the Minister of Unification.\textsuperscript{1129}

In February 2008, subparagraph 6 was added to article 9(1) of the Act on the Protection and Settlement Support. The persons, who are “unfit for the designation as persons subject to protection” as prescribed by the Presidential Decree, may be denied protection. The Presidential Decree lists the persons as unqualified for protection in article 16(1).

1. The person, who is likely to cause politically and diplomatically great difficulty to the Republic of Korea;
2. The person, who committed violent acts causing substantial harm to personal safety of others, or who damaged [resettlement support] facilities during the period of temporary protection pursuant to Article 12 of the Act on the Protection and Settlement Support;
3. The person, who obtained the legitimate residence status in third countries after he or she had departed from North Korea\textsuperscript{1130}

Article 16(1) considers political and diplomatic national interests, security concerns, and legal residence status in other countries to determine unqualified applicants for protection.

In short, the Act on the Protection and Settlement Support empowers the Minister of National Unification to determine admissions with the Consultative Council (article 8). North Korean applicants who do not fall into the scope of the definition are not admitted as South Korean citizens. Since the Act was enacted in 1997, the definition of “residents escaping from North Korea” has been narrowed by amendments.

\textsuperscript{1128} These are listed in subparagraph 1-3 in article 16(2) of the Presidential Decree.
\textsuperscript{1129} It is stated in subparagraph 4 of article 16(2) of the Presidential Decree.
\textsuperscript{1130} It is my work to translate article 16(1) of the Presidential Decree into English.
Nationality Act

Although the Act on the Protection and Settlement Support fails to protect certain categories of applicants from North Korea, some who fall into these categories may still receive protection.\textsuperscript{1131} North Koreans are able to apply for nationality adjudication under article 20 of the Nationality Act, if they denied protection.\textsuperscript{1132} This adjudication procedure is designed for those cases “where it is unclear whether a person has attained or is holding the nationality of the Republic of Korea” (article 20).\textsuperscript{1133} It determines Korean nationality based on documents including the records of family lineage, overseas migration routes (immigration history), foreign nationality acquisition status, and other identification documents.\textsuperscript{1134} The administrative decision is made in the form that an applicant’s Korean nationality is determinable or undeterminable.\textsuperscript{1135} If it is determined that an applicant is Korean national (‘determinable’), his or her legal rights are protected as a citizen without further steps to obtain South Korean nationality. It is also possible to reapply for a nationality adjudication procedure even where it was declared that Korean nationality was “undeterminable.”\textsuperscript{1136}

A principle of nationality law in South Korea is based on \textit{jus sanguinis} (right of blood) that the nationality of one’s parents determines one’s citizenship (article 2).\textsuperscript{1137} So the proof of family lineage and an identity as a North Korean are important for nationality adjudication

\begin{flushleft}
\textsuperscript{1131} Chung, Lee, Lee and Park, \textit{supra} note 1110 at 25.  \\
\textsuperscript{1132} \textit{Ibid} at 24.  \\
\textsuperscript{1133} Article 20 (Adjudication of Nationality) of the \textit{Nationality Act} provides:  \\
(1) Where it is unclear whether a person has attained or is holding the nationality of the Republic of Korea, the Minister of Justice may determine such fact upon review.  \\
(2) Procedures for screening and determination under paragraph (1) and other necessary matters shall be determined by Presidential Decree. \textit{Supra} note 1109.  \\
\textsuperscript{1135} Chung, Lee, Lee and Park, \textit{supra} note 1110 at 24.  \\
\textsuperscript{1136} \textit{Ibid}.  \\
\textsuperscript{1137} \textit{jus soli} (right of the soil) is exceptional in cases where both parents are not known and do not have nationality, or where an abandoned child are discovered in the Republic of Korea (article 2).
\end{flushleft
for North Koreans. North Korean applicants should submit documents such as North Korean passports, a certificate of overseas Gongmin, records of family lineage at the time of birth, a certificate for his family relationships including relatives in South Korea, and so on.\textsuperscript{1138}

The majority using this procedure are the individuals who assert the identity of North Koreans.\textsuperscript{1139} On the basis of the information (as of June 2009) from the Ministry of Justice, Chung et al. found that six out of forty three individuals who applied for nationality adjudication in 2008 had been denied protection under the \textit{Act on the Protection and Settlement Support}.\textsuperscript{1140} One difference is that this nationality adjudication procedure is only limited to those who are in South Korea while the \textit{Act on Protection and Settlement Support} also allows North Koreans in other countries to apply for protection.\textsuperscript{1141} The Minister of Justice administers a national adjudication procedure, and has discretion to determine a claimant’s Korean nationality upon review of whether he or she is a North Korean.\textsuperscript{1142}

Chung et al. suggest that there are several types of North Koreans who are likely to receive a negative decision in nationality adjudication.\textsuperscript{1143} \textit{First}, they are North Koreans who entered South Korea with forged Chinese identity documents, or escapees from North Korea who have a Chinese (hwagyŏ in Korean)\textsuperscript{1144} mother or father or who are married to a Chinese (hwagyŏ).\textsuperscript{1145} \textit{Second}, Jogyo are likely to be denied Korean nationality. They are North

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{1139}] Ibid.
\item[\textsuperscript{1140}] Ibid at 25.
\item[\textsuperscript{1141}] Ibid at 24.
\item[\textsuperscript{1142}] Ibid. The Act empowers the Minister of Justice to determine on protection (article 20).
\item[\textsuperscript{1143}] Ibid at 26.
\item[\textsuperscript{1145}] \textit{Supra} note 1110.
\end{itemize}
\end{footnotesize}
Korean nationals who live abroad for a lengthy period time with a North Korean identity card and an alien resident document issued by the Chinese government.\footnote{Ibid.} Third, children who were born to North Korean undocumented migrants in other countries and do not have identity cards could remain without protection. The nationality adjudication procedure will be particularly difficult for the children whose parents are not recognized as a North Korean or who were separated from their parents.\footnote{Ibid.}\footnote{Supra note 1110 at 24.} Finally, North Koreans who have obtained Chinese citizenship may not be recognized.

In summary, North Koreans who have been refused protection under the Act on the Protection and Settlement Support or who are not eligible for protection under the Act can apply for nationality adjudication. However, even after the nationality adjudication procedure, certain categories of North Koreans are not recognized as North Korean and are likely to remain \textit{de facto} stateless.\footnote{Kim v. Canada (Minister of Citizenship and Immigration), [2010] F.C.J. No. 870.} The chapter turns to the relationship between potential nationality of North Koreans in South Korea and refugee status in Canada.


\textit{Ward} establishes the principle of surrogacy that international refugee protection is preconditioned by no alternative state protection available to an asylum seeker. As a result, an asylum seeker with dual or multiple nationality is required to seek protection from one of their countries before making a claim for a refugee status in international law or Canadian law. The next legal question to settle is whether this principle is applicable to cases where an asylum seeker has \textit{potential} nationality in a country other than the country of his or her
current nationality: is the potential nationality regarded as dual or multiple nationality? This is directly linked to North Korean asylum cases if it is assumed that South Korea grants potential nationality to North Koreans.

In *Canada v. Williams*, the Federal Court of Appeal (FCA) dealt with whether s. 96(a) of the *Immigration and Refugee Protection Act (IRPA)* embraced “potential countries of nationality.”\(^{(1150)}\) Section 96(a) of *IRPA* was discussed in section 3. The FCA held that the Federal Court erred in finding that “potential countries of nationality” are not within the scope of countries of dual or multiple nationality. Such an interpretation of section 96(a) is inconsistent with the principle of surrogacy, which prevents forum shopping, since article 1A(2) of the *Refugee Convention* has to be interpreted in a restrictive manner.\(^{(1151)}\) The FCA opened the possibility that “each of their countries of nationalities” in 96(a) of the *IRPA* includes a potential country of nationality.\(^{(1152)}\) In other words, refugee protection can be denied due to the principle of surrogacy, if an asylum seeker has a potential status as a national of other countries. However, it does not mean that every potential nationality is counted as dual or multiple nationality: *Williams* provides a test.

Before going into *Williams’* test, it is noteworthy that a potential nationality is distinguishable from a pre-existing one.\(^{(1153)}\) *Bouianova v. Canada* provides an example of a pre-existing nationality.\(^{(1154)}\) It involved a refugee claimant, who was born in the former U.S.S.R. and had lived in Latvia for 14 years before she came to Canada. She claimed that she would be persecuted for discrimination against Russians in Latvia upon return. The Federal Court held that she could have a Russian citizenship by “merely asking for


\(^{(1151)}\) *Ibid* at paras. 22-25.

\(^{(1152)}\) *Ibid* at para. 20; *Ibid* at para. 25.


recognition of a pre-existing status,” and the Russian officials have no discretion on this matter in Russian law. As a result, it could not be said that she did not have a country of nationality because acquisition of citizenship can be completed by “a mere formality.” The pre-existing status as a citizen can be considered dual or multiple nationality.

Unlike existing citizenship, potential nationality needs to be examined because it does not necessarily lead to automatic acquisition of citizenship. Katkova v. Canada is a good comparison with Bouianova. In this case, a Jewish applicant had to take an administrative step to acquire citizenship in accordance with the Law of Return in Israel. Also, the Jewish applicant’s desire to live in Israel is an requirement to be a citizen while in Bouianova the desire to reside in Russia is not a precondition for citizenship. The Law of Return in Israel grants the Israeli Minister of the Interior discretionary power to deny applications for citizenship, especially for the matter of public health or national security. In Katkova, the applicant did not want to live in Israel so she did not satisfy the criteria for Israeli citizenship. The case was returned to the Board to determine whether all Jewish refugee applicants should be considered as having another country of citizenship. The answer can be given by applying Williams test to every individual case.

The FCA in Williams examined whether an applicant’s potential nationality was considered his or her “nationality of countries” under the refugee definition. The test is whether acquisition of citizenship is within the claimant’s control. The Federal Court embraced Justice Rothstein’s decision in Bouianova v. Canada and rephrased it as follows:

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1156 Tatiana Bouianova v. Canada at para. 8.
1157 Ibid at 3.
1158 Ibid at 7.
The true test […] is the following: if it is within the control of the applicant to acquire the country with respect to which he has no well-founded of persecution, the claim for refugee status will be denied.1159 […] While words such as ‘acquisition of citizenship in a non-discretionary manner’ or ‘by mere formalities’ have been used, the test is better phrased in terms of ‘power within the control of the applicant’ for it encompasses all sorts of situations […].1160

The test makes it possible to analyze the applicant’s situations in a concrete and comprehensive manner rather than just asking whether citizenship is acquired “in a non-discretionary manner” or it can be achieved “by mere formalities.”

Canada v. Williams has an important meaning to North Korean cases. In 2010, Williams played a crucial role in Kim v. Canada (Minister of Citizenship and Immigration).1161 This case involved a North Korean mother with her minor son who was denied refugee status by the IRB on October 26, 2009. The IRB explained that the evidence of an automatic award of citizenship outweighs the evidence of “the will and desire” to live in South Korea.1162 It went on to state that all the person needs to do is to ask for protection from the South Korean government. It means that acquisition of the citizenship is “within the control of the applicant,” which meets the criteria of the test in Williams.1163 The IRB concluded that South Korea is a potential country of nationality, and suffices as “a country of nationality” in sections 96 and 97 of the IRPA.1164

1159 In Bouianova v. Canada Rothstein J. states that “[i]n my view the status of statelessness is not one that is optional for an applicant. The condition of nothing having a country of nationality must be one that is beyond the power of the applicant to control” at par. 12. Williams uses Rothstein J.’s wordings to construct a test at par. 22.
1160 Ibid. (emphasis added)
1163 Ibid at para. 22.
1164 Ibid at para. 23.
In Kim, the Federal Court held that the IRB erred in considering evidence of whether North Korean is granted an automatic citizenship from South Korea.¹¹⁶⁵ The Federal Court cited Canada v. Hua Ma in which it held that an unbearable burden should not be imposed on a refugee claimant concerning the matter of acquisition of citizenship.¹¹⁶⁶ The case of Ma suggested that while an application for citizenship is within the control of a claimant, acquisition of citizenship can still be within the control of the government.¹¹⁶⁷ The Federal Court in Kim held that it was not clear whether the acquisition of South Korean citizenship is within the applicant’s control.¹¹⁶⁸ It concluded that this question should be answered with “an examination of the laws, jurisprudence, practice and politics” of South Korea.¹¹⁶⁹ The case was returned for redetermination.

Acquisition of the South Korean nationality is not a pre-existing right for North Koreans, although article 2 or 3 of the Constitution protect such an entitlement at least in theory. South Korean nationality may give a potential status to North Koreans, but the award of South Korean citizenship is not within a North Korean applicant’s control. The Act on the Protection and Settlement Support requires an applicant to intend to reside in South Korea in similar to the Law of Return in Katkova. The Minister of Unification has discretion to exclude certain types of persons from protection of South Korea such as North Koreans who live outside North Korea for more than ten years or international criminal offenders. The Director General of the National Intelligence Service can also preclude persons who are a

¹¹⁶⁵ Kim v. Canada, supra note 1161 at para 18.
¹¹⁶⁶ Ibid at para. 7; Canada (Minister of Citizenship and Immigration) v. Hua Ma, 2009 FC 779 (CanLII) at para. 119.
¹¹⁶⁷ Ibid at para. 7.
¹¹⁶⁸ Ibid at para. 19.
¹¹⁶⁹ Ibid at para. 8.
danger to national security. As a result, not every North Korean refugee case is included within the category of dual nationality in section 96(a) of IRPA.

Furthermore, the Federal Court in *Katkova* added one more factor to assess actual nationality. It asserted that there should be “a genuine link between the person and the state” to constitute nationality.\(^{1170}\) The Federal Court cited the *Nottebohm* case, which was decided in 1955 by the International Court of Justice (ICJ). The ICJ considered “a genuine link” an element of nationality in the case.\(^{1171}\) The range of components of a genuine connection include: “centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children he habitual residence” as well as his habitual residence, not to mention that of actual nationality based on factual affiliations between the person and the state.\(^{1172}\) The FC in *Katkova* questioned “whether the mere fact of being Jewish creates a ‘genuine link’ between any Jewish person and the State of Israel.”\(^{1173}\) The FC held that the applicant did not have a sufficient bond with the Israeli state. “[The applicant] has never set foot on Israeli soil. The only connection she has Israel is that she is a Jew.”\(^{1174}\) The Law of Return does not suggest that “every Jew should return to Israel.”\(^{1175}\) Similarly, the *Act on the Protection and Settlement Support* does not imply that every North Korean should “return” to South Korea. The relationship between any North Korean person and the State of South Korea is often assumed that they are closely linked to each other. In fact, most of North Koreans, who fled to other countries, have never been to South Korea. The only relationship to South Korea is that he or she is a Korean.

\(^{1170}\) *Katkova v. Canada, supra* note 1153 at 6.
\(^{1171}\) Oliver J. Lissitzyn, “Nottebohm Case (Liechtenstein v. Guatemala)” (1955) 49 *AJIL* 396, at 399-400.
\(^{1172}\) *Ibid.*
\(^{1173}\) *Katkova v. Canada, supra* note 1153 at 6.
\(^{1174}\) *Ibid* at 6.
\(^{1175}\) *Ibid* at 2.
7.7. IRB Decisions on North Koreans

The RIR issued by the IRB on June 3, 2008 has played a pivotal role in the decisions of the IRB and contributed to increasing admissions of North Korean refugees in Canada, particularly since 2009. The following two IRB decisions, which were made before and after June 3, 2008, reflect the impact of the RIR. In both cases, the determinative factor was whether North Koreans could acquire citizenship in South Korea. Both decisions were made in Toronto, Ontario. The first, on April 29, 2008, was negative, the second, August 27, 2008, was positive.

The negative decision relied on an information of country document that “the vast majority of North Korean defectors resettle in South Korea which accepts them.” The country document was an article, “Perilous Journeys: The Plight of North Koreans in China and Beyond Asia,” written by the International Crisis Group in October, 2006. The article indicated that “the constitution acknowledges their right to citizenship” and 95 per cent of North Korean migrants resettle in South Korea. As a result, the IRB concluded that application for South Korean citizenship was “a mere formality,” and that South Korean authorities do not have discretion to deny the application. The IRB cited Bouianova v. Canada for the proposition that if making an application to be a citizen is “a mere formality” and the officials have no discretion to deny it, then the applicant has a country of nationality to provide protection. As a result, the application for protection of Canada was denied for

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1176 Immigration and Refugee Board of Canada, “Reasons and Decision,” RPD File No.: TA7-15242 (29 April 2008).
1178 Ibid.
1179 Immigration and Refugee Board of Canada, supra note 1176.
1180 Tatiana Bouianova v. Canada, supra note 1158; Katkova v. Canada, supra note 1153.
the reason of the applicant’s “right to citizenship and protection in the Republic of Korea.”

About four months later, the IRB Panel made the opposite finding in granting refugee status to a North Korean applicant and her son. The determining issue was also whether North Koreans have a right to South Korean citizenship. In the decision, the IRB cited Williams v. Canada: the test is whether acquisition of the citizenship of a country is within the control of an applicant. The RIR informed the IRB that the South Korean government has discretion in admitting North Koreans to citizens. Because the applicant stayed outside North Korea for about four years, and has no “will or desire” to reside in South Korea, she could not satisfy a prerequisite to be a South Korean citizen. The applicant claimed that her relatives in North Korea would be treated like traitors if she entered South Korea. The IRB concluded that the “[p]ower is not within the control of the female claimant. Therefore, the claimants are not obligated to seek South Korea’s protection before they seek Canada’s.” The two cases reflect the change of the RIR in favor of North Korean applicants.


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1181 Immigration and Refugee Board of Canada, supra note 1176.
1182 Immigration and Refugee Board of Canada, “Reasons and Decision,” RPD File No.: TA6-12919 & TA6-12920 (27 August 2008).
1183 The RIRs informs that “persons who have resided in a third country for a extended period of time” can be precluded from having the South Korean citizenship. Immigration and Refugee Board of Canada, supra note 1114.
1184 The claimant stayed in China for two years and in Canada for two years.
1185 Immigration and Refugee Board of Canada, supra note 1182.
1186 Ibid.
Many of the cases recognized that the South Korean government has discretion and therefore that obtaining citizenship is not in the control of the applicant’s power. The IRB reviewed the information that the South Korean government examines applications with questions: first, whether an applicant is a genuine North Korean defector; second, whether the applicant has carried out a significant crime; and third, whether the applicant has resided in a third country for a lengthy period of time.

In addition, *Katkova v. Canada* was cited in two other cases: one positive (January 28, 2009) and one negative decision (April 29, 2008). The positive IRB decision quoted from *Katkova* that “someone cannot be compelled to live in a country if he or she does not wish to do so.”

Equally, a North Korean applicant cannot be forced to live in South Korea. On the other hand, in a negative decision the IRB emphasized “a genuine link” between the State and an applicant. The IRB determined “a genuine link” based on the fact of whether North Koreans have a right to the South Korean citizenship, in addition to cultural and linguistic commonality. It states that “there must be a genuine connection or link with that country. It has been established above that the claimant has a right to citizenship in South Korea.”

Nevertheless, the case was not successful, at least in part, because the IRB panel depended on the old country document, “Perilous Journey [...]”, and the IRB issued the updated information in 2008. When the IRB questioned why the female applicant came to Canada

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1188 Immigration and Refugee Board of Canada, “Reasons and Decision” RPD File No.: TB0-04641 (13 October 2010).
1192 Immigration and Refugee Board of Canada, *supra* note 1187 at 2.
instead of South Korea, it did not take into account the fact that she “has never set foot on
[South Korean] soil. The only connection she has is that she is a [Korean].”\textsuperscript{1194} The IRB
failed to regard her concern that North Koreans in South Korea would be put in danger if two
Koreas were unified, or determine whether she had relatives in South Korea, or how her
family members would be treated in North Korea if she chose to live in South Korea.

To summarize, the 2008 RIR and \textit{Williams v. Canada} (2005) have had a significant
impact on IRB decisions regarding North Korean applicants in Canada. This change was the
result of an accurate understanding of the South Korean laws and cases, legal interpretation
of dual or multiple nationality in the refugee definition in Canadian law and international law,
and the recent historical development of case law in Canada.

\textbf{7.8. Conclusion}

The dissertation explores the legal configurations of border-crossings beyond the
DMZ to respond to emigration from North Korea. The Korean peninsula has been divided
into North and South Korea for 67 years, and the partition also has separated people, places,
systems, and ideas. “Crossed Heaven’s Border,” a series of documentary films, introduces
stories about North Korean border crossers, who did not choose to go to South Korea because
of their different beliefs and values.\textsuperscript{1195} One of the stories is about two sisters who were
brought together in China for the first time after a separation of ten years. The older sister
had left North Korea and settled in South Korea. After a decade’s interval, the younger one
refused to go to South Korea with her sister because of her strong belief that she should not

\textsuperscript{1194} Immigration and Refugee Board of Canada, \textit{supra} note 1175 at 6.
\textsuperscript{1195} In Taek Jung & Hark Joon Lee & Eunjung Lim, \textit{천국의 국경을 넘다} [\textit{Crossing Heaven’s Border}] (Seoul:
Chosun Ilbo, 2008).
abandon her homeland to defend socialism. She has never been to South Korea. With tears, the older sister watched her teenage sibling return to North Korea where she did not even have her parents.

It has been pointed out that North Koreans are hardly recognized as refugees under the international refugee regime due to a potential status as a South Korean national. In fact, acquisition of citizenship requires an intention to reside in South Korea pursuant to the Act on the Protection and Settlement Support of Residents Escaping from North Korea. Recently, the RIR made it clear that South Korean nationality is not automatic for North Koreans. Before falling into the dichotomic pretext between South Korea and North Korea, it needs to be asked whether the person and South Korea could possibly have “a genuine link” in the refugee determination.

This is the context of transnational law in which North Koreans’ nationality in South Korea is disputed for refugee status at the port of entry in Canada. Domestic law and practices in South Korea have transcending effects toward refugee claims in Canada beyond the Korean peninsula. The interaction and intersection between two legal regimes between Canada and South Korea have constructed the legal meanig between the Immigration and Refugee Protection Act in Canada and the Act on Protection and Settlement Support in South Korea for North Korean asylum seekers. The next chapter deals with the relationship between limitations on women’s rights to leave their country and refugee status in international law.
8. The Right to Leave Her Own Country and the Definition of Refugee: The Case of North Korea

8.1. Introduction

North Korean women are on the move, crossing national borders, migrating to other countries. Good Friends, which interviewed 25,000 North Korean migrants in China from 1997 to 2001 and collected 3,005 testimonies, reports that 75.5% of North Korean migrants in north-east China are women. The Citizens Alliance for North Korean Rights, another South Korean NGO working for North Koreans, also reports that women constitute more than half the total population of North Korean migrants. However, these border crossings subject North Korean women to trafficking traps. Their statuses as “illegal” migrants makes them susceptible to trafficking in return for crossing a national border. The Center for North Korean Studies at Dongkuk University reports that eleven percent of the interviewees, North Korean migrants in South Korea, say that they have been trafficked in China and other countries, and twenty two percent report witnessing trafficking.

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1196 An earlier version of this chapter was published in Veronica P. Fynn, ed., Documenting the Undocumented: Redefining Refugee Status, Centre for Refugee Studies 2009 Annual Student Conference Proceedings (Boca Raton: Universal-Publisher, 2010) at 47-54.
In this chapter I look at the restrictions on the rights to leave a country in North Korea and endeavor to find a nexus between women’s rights to freedom of movement and the grounds for refugee status, as defined in the 1951 Convention relating to the Status of Refugees. I focus on the context in which women leave North Korea, and in which they are subject to gender-based persecution such as sexual assault, torture and forced abortions. I explore how the restrictions on the North Korean women’s rights to leave one’s own country fall under the scope of the definition of refugee in international law.

This chapter challenges the gendered boundaries in international law. The limited categories of the refugee definition in the Refugee Convention require re-interpretation of the definition to include gender-based persecution. In comparison with Chapter Four, Chapter Four explores the socio-legal context about how gender-based violence on frontiers is connected to the construction of gender in the principle of inner and outer. While Chapter Four provides how power is deployed on women’s bodies at national borders, Chapter Eight invokes a gender-sensitive interpretation of a refugee definition, and employs a term, “gender-based persecution” in international refugee law.

8.2. The Right to Leave One’s Own Country in International Law

The Right to Freedom of Movement and the Right to Leave in North Korea

The Universal Declaration of Human Rights (UDHR) sets out in article 13(1) that “[e]veryone has the right to freedom of movement and residence within the borders of each

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1201 Chapter Four reflects why contextual knowledge matters, and why human rights in the vernacular are crucial.
Article 13(2) of the UDHR also states that “[e]veryone has the right to leave any country, including his own, and to return to his country.” Similarly, the International Covenant on Civil and Political Rights (ICCPR) recognizes the right to movement and residence within state territory in article 12(1) and 12(2), and the right to leave any country in article 12(4). But the right to freedom of movement and the right to leave may be restricted when “provided by law, [and] are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant” in accordance with article 12(3) of the ICCPR.

The North Korean Constitution provides the right to freedom of residence and travel in article 75. However, North Korea has a legal system to control international and internal migration. North Koreans who want to go to other regions from their residences are required to get a travel permit from a state authority. The Department of Security plays a role of restricting internal movement within national territory by issuing the limited numbers of travel passes. One of its North Korean interviewees told Good Friends:

The number of travel certificates is limited-100 people, for example. But people who do not have power cannot obtain a certificate, and have to pay five times more to ride on a train. We just hope for the best. If we are caught traveling without the certificate, the policemen will drag us on the floor and swear at us.

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1203 Chapter Two in this dissertation provides detailed information on the “internal passport system” which polices internal borders in North Korea.

Moreover, North Korean law criminalizes those who crossed a border without permission for endangering the political system of the country. These provisions of the criminal law that I introduced in Chapter Five provide basis for sentencing for unauthorized departures, which violate mobility restrictions.

**The Principle of Non-discrimination**

The principle of equality or non-discrimination is inscribed in international law. This principle applies to the right to freedom of movement and the right to leave. General Comment No. 27, which provides a guideline on interpretation of the ICCPR, explains that it is a violation of the fundamental principles of equality or non-discrimination, if the rights to movement are restricted “on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”\(^{1205}\) The principle of equality is linked to the last clause in article 12(3) of the ICCPR, that the restrictions “are consistent with the other rights recognized in the present Covenant.” This last condition is invoked where limitations on the right to movement are imposed in a discriminatory way in violation of article 1 and article 3 of the ICCPR.\(^{1206}\) The restrictions on the freedom of movement in violation of article 1 and article 3 are not justified for the principle of equality. This applies even in time of public emergence according to article 4.

Article 3 of the ICCPR reflects the principle of equality between women and men; it states that “[t]he States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present

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\(^{1206}\) Hurst Hannum, *The Right To Leave And Return In International Law And Practice* (Dordrecht: Martinus Nijhoff Publishers, 1987) at 44.
Covenant.” There are situations where women are kept away from the freedom of movement and the right to leave the country without men’s consent or escort (General Comment No. 27). The Human Rights Committee in General Comment No. 27 points that these restrictive measures amount to a violation of women’s rights in article 12.1207 For example, a new Afghanistan law, reportedly signed by President Hamid Karzai in early April 2009, disallows Afghan Shi’a women the right to leave their homes without legitimate purposes.1208 This type of discriminatory law which violates the right to movement is not justifiable by the exception clause of article 12(3) of the ICCPR.

The relationship between the right to movement and the principle of equality is also supported in article 15(4) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), that “States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.” As state party to the CEDAW, North Korea is obligated government to ensure equality before the law in the matter of freedom of movement. In addition, the North Korean Constitution has an equality provision in article 77 that women have equal social positions and rights with men. However, a woman’s residence is systematically determined as a member of the family unit in North Korea. In the cases of internal exile women are subject to their husbands’ exile orders. Jini Choi describes how her family was expelled from Pyongyang where she was born, when her husband got an exile

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1207 Supra note 1205.
order for failing to educate his son in a proper way.\textsuperscript{1209} Under this family unit system, her individual right to choose residence is restricted to the locations in which male household members are officially registered to reside.

Furthermore, women’s rights to leave are restrained by criminalizing emigration; female border crossers are subject to criminal penalties in a discriminatory manner. There are reported cases in which pregnant women in detention are forced to get abortions, and sentences are sometimes aggravated for the women who have had marital relations in China.\textsuperscript{1210} Although the imposition of criminal penalties for unauthorized exit in North Korea is of general application, the practices are discriminatory on the ground of gender. The practices are disproportionate to women who do not comply with the restrictive policies on exit from the country, and constitutes a violation of the principle of non-discrimination. Therefore, these punitive measures for deterrence of leaving a country do not fall within the scope of the exception clause of article 12(3) of the ICCPR.

\section*{8.3. The Refugee Definition for Female Border Crossers in North Korea}

The Definition of a Refugee in the 1951 Refugee Convention

The 1951 United Nations (UN) Convention Relating to the Status of Refugees (hereinafter the Refugee Convention) and the 1967 Protocol define a refugee in article 1A(2) as a person who:

\begin{itemize}
\item \textsuperscript{1209} Jini Choi, \textit{국경을 세번 건넌 여자} [Woman Who Crossed a National Border Three Times] (Seoul: Bookhouse, 2005) at 9.
\item \textsuperscript{1210} Yeongok Baek, “중국내 탈북 여성실태와 지원방안에 관한 연구” [Research on the Circumstances of Female Escapees in China and the Support Program] (200) 6:1 Journal of Study on North Korea, at 253.
\end{itemize}
as a result of events occurring before 1 January 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.\textsuperscript{1211}

This definition is created based on the limited five grounds that are “race, religion, nationality, membership of a particular social group or political opinion.” Economic grounds are not included in these five grounds of the refugee definition. According to this definition a North Korean woman seeking refugee status is required to show that she has a well-founded fear that she would be persecuted owing to any of the five grounds, should she return to North Korea. It is considered persecutory if there are serious harm and a lack of state protection. An applicant has the burden of proof that there exists a likelihood of persecution upon return.

North Korean returnees could be held for up to two years of ro-dong-dan-lyeon-hyeong in localized detention centers or five years of ro-dong-gyo-hwa-hyeong in political detention camps based on article 233 of the criminal law, once they were sent back to North Korea.\textsuperscript{1212} The Criminal Code \textit{per se} violates the right to freedom of movement and the right to leave any country including one’s own, which are within a category of the second rights in the UDHR and the ICCPR. Heavy criminal penalties amount to persecution while prosecution is not considered persecution, as provided in Chapter Six. The criminalization of border

\textsuperscript{1211} The 1967 Protocol Relating to the Status of Refugees removed a phrase, “as a result of events occurring before 1 January 1951.”

\textsuperscript{1212} Chapter Five provides comprehensive information on criminalization of emigration in North Korea.
crossings in North Korea falls into the definition of refugee in the *Refugee Convention* on the basis of a political opinion or in combination with other grounds.

**Gender-Based Persecution**

The Canadian Guideline entitled “Women Refugee Claimants Fearing Gender-Related Persecution” (hereinafter the Canadian Guideline) list rape, infanticide and forced abortion as female-specific experiences that give rise to a fear of persecution along with genital mutilation, bride-burning, forced marriage, domestic violence, or compulsory sterilization.\(^{1213}\) These gender specific harms are included as forms of persecution in the Canadian Guidelines. Audrey Macklin sees these examples as threatening the first category of the rights which are the right to life and security of person, and the right to bodily integrity, citing Hathaway’s categories of the rights.\(^{1214}\) She says that violations of the first and second categorical rights occur widely and frequently.\(^{1215}\) In deciding whether female claimants need protection the Canadian Guidelines states that international human rights instrument gives an objective standard.

This gender sensitive approach is applicable to the cases of female border crossers who face being repatriated to North Korea. According to testimonies, they would be exposed to a high risk of gender-based persecution such as sexual assault and forced abortions, once they are detained for investigations after being caught by border guards. Investigators in

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\(^{1215}\) *Ibid.*
detention centers called People’s Security Agency inquire into the matters related to whether they are married to Chinese men or they were caught in sex trade. Sexuality is employed as a strategy to humiliate them and break down their identities during investigations. Narratives of sexual attack, rape and battering are repetitive and sustained in the NGOs’ reports which recorded their voices. A North Korean testifies that a guard checked her body including her vagina to see if she was hiding something inside. The Investigation Report on the North Korean Human Rights, which finds data through testimonies, states that three percent of the interviewees experienced forced abortions upon repatriation to North Korea, and twenty one percent witnessed that forced abortions occurred. Hawk reports that “[i]f less than three to four months pregnant, the women detainees were subjected to surgical abortions. If more than four months pregnant, female detainees were given labor-inducing injections.” His report also includes the cases of infanticide.

Rape has been recognized as a form of torture in international law. The definition of torture includes sexual aggression along with beating, burns, shock, suspension, suffocation, and exposure to excessive light or noise in detention or psychiatric institutions according to

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1219 *Supra* note 1197 at 62.
1221 *Supra* note 1216 at 65.
the U.N. Special Rapporteur on Torture in the 1986 report. In 1998, the U.N. Special Rapporteur on Violence against Women in her report mentions rape as one recognized form of torture. These gender specific forms of torture breaches article 5 of the UDHR and article 7 of the ICCPR, that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” In addition, they violate the right to life, liberty and security of the person in article 3 of the UDHR and article 9 of the ICCPR.

Torture and sexual assault including rape and forced abortions in detention are sufficient to give rise to a well-founded fear of persecution for a North Korean woman who was about to be repatriated to North Korea. It is difficult to expect her to have state protection for those detainees in circumstances where the agent of persecution is a state. Although articles 293 and 294 of the criminal law are laid out to punish rape crimes, the North Korean government has failed to implement the laws, particularly for women in detention. After interviewing North Korean female migrants, Soon-kyung Cho, a scholar in South Korea, found that the notion of sexual harassment is not established and there are no institutional instruments to prevent women from sexual harassment.

In General Recommendation 19, the Committee on the Elimination of Discrimination against Women (CEDAW) defines discrimination to include gender based violence which

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1222 The 1986 report was written by the U.N. Special Rapporteur on Torture, who was invited by the Commission on Human Rights, and the 1998 report was completed by the U.N. Special Rapporteur on Violence against Women.


embraces “acts that inflict physical, mental or sexual harm or suffering.” North Korea, a party to the CEDAW, has failed to “take all appropriate measures to eliminate discrimination against women” in article 2 (e) of the CEDAW. This evidence of a failure of state protection would support the requirement of feared persecution.

**Grounds of Persecution**

Unlawful emigration results in criminal penalties and harsh treatment toward detainees according to the NGOs’ reports. Once North Korean migrants are sent back to North Korea, they go through an investigation process. Body searches are conducted during investigation: they are often asked to remove their clothes.\(^\text{1226}\) North Korean repatriates get questions such as: when did you travel to China and with whom did you meet in China, did you meet South Koreans, or did you go to church or meet missionaries.\(^\text{1227}\) Any contact with South Koreans is viewed as treason of the country.\(^\text{1228}\) Those who have attempted to go to South Korea are sentenced to a minimum of 5 years of gyo-hwa-hyeong.\(^\text{1229}\) These acts are considered to be acts of ideological contamination. Thus, a political opinion would be imputed to those who attempt to leave North Korea without a permit. This can be viewed as the offence of Republikflucht. An imputed political opinion is recognized in *Canada (Attorney General) v. Ward*.\(^\text{1230}\) The Supreme Court of Canada held that there were many cases where the claimant’s beliefs are perceived from his or her conduct. In these circumstances the political opinion imputed to the claimant satisfies the ground for well-

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\(^{1226}\) Good Friends, *supra* note 1197 at 62.
\(^{1227}\) *Ibid.* at 63.
\(^{1228}\) *Ibid.* at 63.
\(^{1229}\) Good Friends: Center for Peace, Human Rights, and Refugees, *오늘의 북한, 북한의 내일* [Today’s North Korea, North Korea’s Future] (Seoul: Jungto Press, 2006) at 139.
founded fear of persecution. The Court held that the lack of expression of political voice would not exclude the claimant from refugee protection.

A repatriated woman may also have a well-founded fear of persecution not only because of her own political opinion but also a political opinion imputed to her. The Canadian Guideline recognizes the imputed political opinion that “[i]n a society where women are ‘assigned’ a subordinate status and the authority exercised by men over women results in general oppression of women, their political protest and activism do not always manifest themselves in the same way as those of men.” 1231 Female repatriates could be subject to persecution because she is a member of a family, 1232 which is classified as a hostile group such as rich farmers, landowners of post-August 15 1945, expelled members of party, or anti-revolution persons. 1233 She would be perceived to have a political opinion simply because she belongs to a certain group of a family. 1234 In this case, a family as member of a particular social group is another ground for persecution in her claim.

Furthermore, her act of border-crossing gives rise to an imputed political opinion because it is considered a danger to security. For an imputed political opinion, national security needs to be interpreted in a gender-sensitive way. Where a state is a nation and women are “reproducers and bearers of the nation,” 1235 the conduct of border-crossings can be read as a transgression of sexual boundaries, which is dangerous to the idea of the “pure” fatherland. 1236 Tobias Hübinette argues that “[s]exuality is intimately intertwined with nationalist ideology when female bodies are fetishised as boundary makers of the nation, and

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1231 Immigration and Refugee Board, supra note 1213.
1232 Supra note 1223 at 99.
1233 Good Friends (2004), supra note 1197 at 43.
1234 Supra note 1223.
1235 Hübinette, supra note 1200, para. 3.
1236 In the socio-legal approach, Chapter Four analyzes the context in which punishment for border-crossings are gendered.
male power is set to protect and recover their purity and sanctity.**1237 In fact, North Korean female repatriates get questions from investigators such as; whether they have a de facto marriage in China, they were trafficked to sex trade, or they earned money by prostitution.**1238 Because national dignity is identified with “the chastity of woman,” sex-trafficking is seen as “insulting the prestige of their nation state.”**1239 The symbolic meaning of purity is transferred to their babies through women’s bodies as biological reproducers of the nation. A guard in Yodok political camp said to a pregnant woman: “how can a counter-revolutionary and an enemy of the people such as yourself dare to bear a child?”**1240 Her baby becomes an infected part of her.**1241 This explains the context in which forced abortions occur in detention centers. Therefore, she is not only sexually immoral but also politically dangerous to the collective present and future of the fatherland simply because she crossed a border. In these cases, the act of border-crossings has to be interpreted as an imputed political opinion.

In addition to a political opinion, membership of a particular social group would be a reason to be persecuted in the North Korean context; gender and family provide the basis of being a member of a particular social group. The Canadian Guideline states that gender is “an innate characteristic and it may form a particular social group” although gender is not one of the enumerated grounds for persecution.**1242 Testimonies of North Korean migrants provide information that a woman, who faces repatriation to North Korea, would be subject

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1237 Ibid. para. 2.
1239 Ibid. at 63.
1241 Agger, supra note 1218 at 78.
1242 Supra note 1213.
to persecution because she is a woman or she belongs to a family which is categorized as a hostile group. These claims also should be admitted in consideration for her refugee status.

8.4. Conclusion

This chapter focuses on restrictive practices on women’s freedom of movement, and applies a gender sensitive interpretation of the definition of refugee to North Korean cases. The boundaries of international refugee law have been challenged because the definition of refugee fails to reflect gender-based persecution or persecution because she is a woman. Audrey Macklin suggests a reinterpretation of the definition of refugee rather than the addition of gender to the Refugee Convention. She argues that the addition of gender will reduce “every persecution of women” into “persecution on grounds of gender.” The feminist methodology has transformed “from simply adding women into existing schemes of knowledge into more fundamental reconstructions of the concepts, methods and theories of the disciplines.” This chapter incorporates a feminist perspective into the right to freedom of movement and the right to leave one’s own country in the face of the gendered boundaries of international law. A gender-sensitive interpretation of a refugee definition is critical for North Korean asylum seekers, because sexual assault including rape and forced abortions in detention centers or political camps is sufficient to give rise to a well-founded fear of persecution for North Korean women who face repatriation to North Korea. The punitive practice amounts to a violation of the principle of non-discrimination which is “the other rights recognized in the present covenant” as defined in article 12(3) of the ICCPR.

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Testimonies show that North Korea is unable and unwilling to protect these female detainees from gender-based harm, which threatens the right to life, liberty and security of the person. Woman’s political opinion can be imputed because the act of border-crossings is considered to jeopardize the “pure” fatherland through ideological and moral contamination. Furthermore, North Korean women would be persecuted because she is a woman or because she belongs to the family, which is classified as a hostile group in the North Korean society. Gender and family should be taken into consideration as particular social groups in the assessment of the reasons for persecution.
9. Conclusion

“Not the last station from the South, but the first station forward the North”

Figure 16 Dorasan station

(© 2006 Tae-Youl Kim, adapted by Joon Young Roh with permission)

‘Border Station’ on the North and South Korea

Dorasan station in Figure 16 is a railroad station located in the Civilian Control Zone, Paju, Gyeonggi province, South Korea, which once linked North and South Korea. As the photo in Figure 16 shows, the sign on the wall at Dorasan station reads: “Not the last station from the South, but the first station forward the North.” This ‘border station’ was built in early February 2002. On New Year’s Day (February 12, 2002), the South Korean government ran a train called the “special train for bowing from a distance (to the direction of one’s ancestral graveyard)” (mangbae yŏlch’a 望拜列車) across the Imjin river, which rises from Mount Duryu in South Hamkyong province, North Korea, and flows through the DMZ to the Yellow Sea in South Korea. Fifty-two years had passed since the trains stopped
running between North and South Korea. This special train was arranged for displaced persons (sirhyangmin 失郷民), which means literally a person who lost hometown. In the Korean context, it refers primarily to North Koreans who left North Korea but cannot return to their hometowns because of the division between two Koreas. There has been a ritual for North Korean sirhyangmin to visit Dorasan or Imjingak near the DMZ to perform ancestor memorial services on New Year’s Day. In 2005, the Korail Korea Railroad and Hyundai Group ran a package tour to Mt. Geumgangsan by a New Year’s mangbae train and bus as they gave a priority to sirhyangmin. From May 17, 2005 to November 28, 2008, under the so-called Sunshine Policy freight trains were operated to Kaesong station located in Kaesong, North Hwanghae, North Korea. Trains were used to transport materials to the Kaesong industrial complex adjacent to the DMZ, which was established under the Economic Cooperation Act between North and South Korea.

In November 2008, North Korea closed border crossings after the Lee Myung-bak government took a harsher stand toward North Korea. The relation between North and South Korea had already worsened since July 2008, when a South Korean female tourist who was travelling Mount Geumgang was shot and killed by a North Korean soldier. As long as the Korean peninsula remains divided, the political relations between two Koreas and geopolitics around the Korean peninsula will play a critical role in opening and closing the

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1246 Ibid.
1247 Park Byeongnam, “북으로 가는 첫번째 역: 분단의 애환이 깃든 도라산역을 만나다” 행복 Plus 630 (November 2011) online: Korail <http://blog.naver.com/PostView.nhn?blogId=korailblog&logNo=10126320346&categoryNo=121&viewDate= &currentPage=1&listtype=0&from=postList>.
borders. Dorasan station became the last station from South once again, and *mangbae* trains are now run between Dorasan station and Imjingak station for North Korean *sirhyangmin* in South Korea. The two Koreas have restricted mobility rights for security reasons but border control has changed according to political circumstances in the domestic and global arena. The trains that came to a standstill at Dorasan station represent the context of injustice where the partition between North and South Korea is still present.

Transnational law and practices have produced diverse situations of injustice in and beyond the Korean peninsula and reinforced the multiple layers of borders and boundaries between South and North Korea, center and frontier, the inner and outer, the internal and international. The situations of multiple domination call for transnational justice in local and global contexts. In this dissertation, I conducted transnational multi-sited research that tracks people, laws, customs, ideologies, symbols, and bodies to explore the relationship between law and borders in the Korean peninsula and beyond. By deploying ‘tracking strategies’ as a methodology, the dissertation visits inter-nation/state borders, the Korean Demilitarized Zone (the DMZ) between North and South Korea; intra-state borders between a capital city, Pyongyang and Seoul, and between provinces; and inter-state borders between North Korea and other countries.

Transnational law reflects the context where internal, national and international borders intersect and interact, and fills up the gaps between different regulatory regimes as “a methodological project” as it includes custom, regulations, domestic law, and international law as well as the practices beyond the dichotomies between the private and public, between

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law and non-laws, and between law and the state or society.\textsuperscript{1251} Eve Darian-Smith propounds that “[l]aw at the global/transnational level, laws at the federal/state level, and laws at the domestic/local level should all be viewed as elements of an interconnected and unfolding global legal system.”\textsuperscript{1252} The topic of this dissertation covers transnational interaction, intersection, and interconnection between laws, which contribute to the formation of symbolic, geographical, and political borders and boundaries. Internal borders are also one of the critical elements of “an interconnected and unfolding global legal system” to explore transnational nature of border-crossings.\textsuperscript{1253} The dissertation begins with the internal passport system in North Korea, which has policed internal borders, and prevented people from moving beyond national borders. Refugee regimes in the U.S. or Canada have not fully recognized an internal migratory or registration system in socialist countries such as North Korea, and it has been recently understood in refugee determination processes that the citizenship of North Koreans in South Korea are not necessarily awarded. By exploring multiple border sites, the dissertation demonstrates that transnational legal relations between and within borders are mutually exclusive as well as interconnected.

\textit{‘Transnational’ Law and Borders}\textsuperscript{1254}

This dissertation straddles a theoretical foundation of transnational law and a field of border studies. Philip Jessup defines the term transnational law as including “all law which

\begin{itemize}
\item \textsuperscript{1252} Eve Darian-Smith, \textit{Laws and Societies in Global Contexts: Contemporary Approaches} (New York: Cambridge University Press, 2013) at 10.
\item \textsuperscript{1253} \textit{Ibid}.
\item \textsuperscript{1254} ‘Trans’ literally means “across,” or “beyond,” or “surpassing” or “transcending.”
\end{itemize}
regulates actions or events that transcend national frontiers." He points out a transnational situation in which a person whose passport or travel documents is in dispute at frontiers. Jessup’s use of “frontiers” in transnational law is intersected by border studies that are represented by Gloria Anzaldúa’s *Borderlands, La Frontera: The New Mestiza*. The dissertation recognizes that “[a]t the heart of ‘trans’ studies is a respect for pluralism.” It encompasses domestic law and international law that transcend national borders, and challenges the distinctions between law and non-law and the private and public to articulate the constructions and performances of borders and boundaries. The interdisciplinary field of socio-legal studies draws a line between law and borders, and raises questions about the role of law in borders and borderlands. This dissertation explores the relationship between law and borders in the Korean peninsula and beyond.

What is the law’s relation to borders? Law interacts with borders. The law as a material reality, a metaphor, an ideology, or a technology interprets, reinforces and (re)constructs borders and boundaries. Law as a technology, which maps internal and national borders, is part of the art of governing to police internal borders and enables state surveillance over migrant population. This dissertation investigates how governmentality in socialist North Korea is associated with a centralized planned economy characterized by food rations, housing, work, and residence, and how it disciplines mobility and polices the

1256 Ibid.
1258 Ibid. at 1.
population. Production is central and fundamental to the socialist government, which operates the public distribution system through workplaces in North Korea. The internal passport system is complementary to the public distribution system, and has the effect of regulating migration. The restriction of freedom of movement and residence is conditioned for economic and social entitlements to food, housing and other welfare benefits. The individual right to freedom of residence and travel potentially conflicts with the centrally planned economy. This is different from freedom of movement as a negative right in liberal states that has been in an alliance with idea of a free market (laissez faire). Under socialist governmentality, restriction of mobility is a precondition for the socialist economy while labor mobility is essential to the capitalist economy within a national territory.

Law also shapes identities along the boundaries. This dissertation understands borders and boundaries not as a natural consequence or a fixed by-product of politics and legality, but rather as a process. Politics and legality produce borders and boundaries at the macro and micro levels, and the border politics perform themselves in extralegal practices. The law as a metaphor is associated with micro-politics, which penetrate every part of daily life, and (re)produces gender in the family structure. This dissertation explores the relationship between a capital city and national identity in Pyongyang and Seoul as well as the construction of gender in the principle of the inner (nae) and outer (oe). It argues that both Seoul and Pyongyang have established the location of a capital city as a spatial norm through socio-legal narratives, which construct the capital as a symbolic form of national identity. Law and practices, including written and customary constitution, play a role as gatekeepers in the boundaries of Pyongyang and Seoul.

The dissertation reveals how gender is constructed in an ambiguous dichotomy between public and private law, and how socio-legal narratives contribute to the process of gendering in the family metaphor in North Korea. The boundaries between the private and public operate on the frontiers, and are expressed in the form of violence. This dissertation also considers how reproduction is policed in a cross border context under the metaphor of a “Socialist Big Family.” The spatial connotation of a gender norm, which was formed under the principle of the inner and outer for the hereditary family system during the Chosŏn period, is expanded to border practices for the socialist big family in socialist Chosŏn: North Korea. The mechanism embedded in the principle of the inner/outer operates in returned bodies along the discursive lines of purity/impurity and danger/security on frontiers. This study translates the normative spatial boundary of gender from the principle of the inner and outer into state violence on frontiers.

Law on transitional borders is both “settled and unsettled,” “backward- and forward-looking” and “continuous and discontinuous.” After the unification of Germany, the courts in border guard cases approached East German laws and practices in both a retrospective and prospective manner. Chapter Five addresses the context of injustice where the divided Germany and Korea are similarly situated. It visits the German border guard cases where domestic law intersects with international human rights laws, and laws between East and West Germany are at odds. It also discusses the principle of proportionality to weigh in on the necessity of use of firearms on frontiers. In similar cases, the transitional context of the unified Korea could inquire into a provision of the criminal code in North Korea, which is interpreted as the principle of proportionality. The dissertation emphasizes

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the importance of the existing law and practices for transitional justice as a process for the re-
unification of Korea as it was contested in the border guard cases in the unified Germany.

Transnational borders are shaped by the relationships between laws in South Korea and North Korea, between law in the two Koreas and immigration law in the U.S. and Canada, between internal and international laws, and between retrospective and prospective laws. This dissertation attempts to interpret criminalization of illegal departure in North Korea as persecutory under the definition of refugee in immigration law and international law. Chapter Six analyzes how courts in the U.S. (and Canada) have ruled on refugee cases involving illegal departure from other countries, including whether exit law itself or extra-
judicial punishment constitute persecution, to find out whether these cases are applicable to North Korean asylum seekers. It also emphasizes the implication of the analysis of the internal flight alternative in illegal departure cases, which supports the establishment of a well-founded fear of persecution.

Chapter Six and Seven reflect how the interaction and intersection of legal regimes between South Korea and the US/Canada produce legal meanings and interpretations in refugee determinations. With regard to the issue of dual nationality of North Koreans, the North Korean Human Rights Act in the U.S. added a provision to prevent a potential conflict with article 3 in South Korean constitution and grant refugee and asylee status to North Koreans. In re K-R-Y- and K-C-S- made it clear that this provision would not protect the North Korean asylum seekers who firmly settled in South Korea. In Canada, the IRB’s interview with an official from the South Korean embassy in Ottawa clarified the legal issue on dual nationality for North Koreans in South Korea. This was reflected in Responses to Information Request and has resulted in positive decisions toward North Korean asylum
seekers. The IRB and court decisions recognize transnational legal aspects in refugee determinations by finding the existing difference between theoretical and practical state protection in South Korea.

The gendered boundaries in international law require a gender-sensitive interpretation of the definition of refugee. Chapter Eight incorporates a feminist perspective into the right to freedom of movement and the right to leave one’s own country for North Korean asylum seekers. The dissertation argues that a violation of women’s right to leave a country should be considered a persecution in refugee determination processes if a state fails to comply with article 12 of the ICCPR.

Law and practices in transnational contexts often reinforce “a situation of multiple domination”¹²⁶² through the border regimes and institutions of the existing states. The unification trains that came to a standstill at Dorasan station represent the context of injustice in the Korean peninsula where the division system between North and South Korea are present. People are not passive recipients of a dominant ideology of law, but structure is likely to win over agency in the divide between structure and agency.¹²⁶³ A constant flow of North Koreans across the national border signals the urgent need for transnational justice that interconnects a variety of settings and contexts across the borders and boundaries.

¹²⁶³ “The interaction between structure and agency pays regard to the distinctness of each side but then settles and agency pays regard to the distinctness of each side but then settles the divide in favor of the structural.” Peter Fitzpatrick, “Missing Possibility: Socialization, Culture and Consciousness,” in Austin Sarat, Marianne Constable, David Engel, Valerie Hans, and Susan Lawrence, eds., Crossing Boundaries: Traditions and Transformations in Law and Society Research (Evanston: Northwestern University Press, 1998) at 195.
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