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North Koreans Defectors in South Korea and Asylum Seekers in the United States: A Comparison

Emma Poorman*

North Korean defectors are considered citizens of South Korea under the South Korean Constitution, while others that flee violence gain the legal status of “refugee.” North Korean defectors, who attempt to escape one of the worst human rights crises in the world, find themselves in a unique situation. What benefits does this status have? How are refugees typically treated abroad, such as in the United States? This Comment will explore this unique status, how it differs from refugee status in the United States, and the challenges North Korean defectors face in South Korea.

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INTRODUCTION

We, the people of Korea, proud of a resplendent history and traditions dating from time immemorial . . . having assumed the mission of democratic reform and peaceful unification of our homeland and having determined to consolidate national unity with justice, humanitarianism and brotherly love. . . The Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the principles of freedom and democracy.¹

This text is from the first paragraph of the South Korean Constitution, and it refers to the aspirational reunification of South and North Korea.² Its inclusion in the Constitution of South Korea reveals what a foundational concept reunification is to the South Korean people.³ Despite South Korea's stance on reunification, the countries have remained divided for more than seventy years.⁴ Before 1905, the Korean peninsula was united for centuries, ruled by generations of dynastic kingdoms.⁵ Beginning in 1905, Japan occupied the land mass until the end of World War II.⁶ In 1945, the Soviet Union and the United States divided control over the Korean Peninsula, with a communist regime engineered by the Soviet Union in the north and a military government formed by the United States in the south.⁷

The violence of the Korean War, waged from 1950-1953, firmly established North Korea's adversarial relationship with the United States, which continues today.⁸ Relations between North and South Korea are unique compared to other

¹ DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] pmb1. (S. Kor.). *See also* Adam de Bear, *From Sunshine to Storm Clouds: An Examination of South Korea's Policy on North Korea*, 23 MICH. ST. INT'L L. REV. 823, 826 (2015).

² Adam de Bear, *supra* note 1, at 826.

³ *Id.* at 827.

⁴ Sarah Pruitt, *Why Are North and South Korea Divided?*, HISTORY.COM (Feb. 9 2018), <https://www.history.com/news/north-south-korea-divided-reasons-facts>. *See also*, *North Korea profile – Timeline*, BBC (Jun. 13 2018), <https://www.bbc.com/news/world-asia-pacific-15278612/>.

⁵ Sarah Pruitt, *supra* note 4.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

countries divided by Cold War tensions.⁹ For example, the extremely limited movement between North and South Korea's demilitarized zone (DMZ) effectively separated the two countries, a strikingly different result compared to East and West Germany.¹⁰

The Cold War division of the Korean peninsula has led to two very different States.¹¹ South Korea developed a robust economy and maintains strong ties to the West, including an ongoing U.S. military presence.¹² Meanwhile, North Korea remains economically underdeveloped and is a virtual police state run by a single family.¹³

I. THE CURRENT POLITICAL SITUATION – NORTH AND SOUTH KOREA

Following the 1945 division of North and South Korea, relations between the two countries have remained strained and, at times, become hostile. Despite political tensions, a majority of South Koreans support reunification with North Korea, but it may be waning.¹⁴ According to a 2017 Korea Institute for National Unification poll, 57.8% of South Korean citizens felt that unification was necessary.¹⁵ That number is even more extreme for South Koreans in their 20s; 71.2% of South Koreans in their 20s do *not* support reunification.¹⁶ It is unclear if public perception is shifting away from reunification, or whether this is a momentary change in response to South Korea's unstable political standing following the arrest of former President Park Geun-Hye. Future polls may reveal whether the recent changes in North and South Korean diplomacy will alter public perception.

Regardless, reunification has been a common theme of South Korea's foreign policy since the 1945 division of North and South Korea. The greatest example of this is South Korea's Sunshine Policy, developed under President Kim Dae-jung.¹⁷ The name comes from one of Aesop's fables, *The North Wind and the Sun*.¹⁸ The folktale tells of a competition between the North Wind and the Sun, who attempt to get a traveler to take off his cloak.¹⁹ When the wind blows, the traveler holds his cloak tighter. When the Sun shines, the traveler becomes too hot and takes off his cloak.²⁰ The story is widely interpreted to demonstrate the superiority of persuasion over a showing of force.²¹

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Choe Sang-Hun, *Olympic Dreams of a United Korea? Many in South Say, 'No, Thanks'*, N.Y. TIMES (Jan. 28, 2018), <https://www.nytimes.com/2018/01/28/world/asia/koreas-olympics-reunification.html>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Hyonhee Shin, *Vindication: Architects of South Korea's 'Sunshine' policy on North Say It's Paying Off*, REUTERS (June 10, 2018), <https://af.reuters.com/article/worldNews/idAFKBN1J60PJ>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

Launched in the 1990's, the Sunshine Policy pursued reconciliation with North Korea through dialogue and cultural exchange.²² The policy was praised by the international community.²³ In 2000, Kim Dae-jung was awarded the Nobel Peace Prize for instituting the policy. However, it was later branded a failure by critics due to the ongoing strained relations between the countries.²⁴

Since the division of North and South Korea, North Koreans have fled to South Korea and other nearby countries like China.²⁵ Some argue that North Korea is home to the largest human rights crisis in the world.²⁶ North Koreans flee because, under the totalitarian North Korean government, citizens are punished for "any alleged signs of defection."²⁷ North Korean citizens are punished by imprisonment without charge or trial in North Korea's internment camps, and may face torture, forced labor, starvation and even death.²⁸ Massive food shortages also force many North Koreans to flee to neighboring countries like China and South Korea.²⁹

This Comment will focus on the unique legal status that North Koreans possess as dual citizens and how this counterintuitively contributes to the hardships North Korean defectors face after fleeing North Korea. Specifically, this dual citizenship status, presumably intended to make the transition of North Korean defectors to life outside of North Korea as easy as possible, forces North Koreans underground when they arrive in other countries. I will then elaborate on protections asylum-seekers and refugees possess in the United States and how this compares to the treatment that dual citizens of North and South Korea receive upon their arrival in South Korea.

II. BACKGROUND ON DUAL CITIZENSHIP

The following Section of this Comment will examine the concept of dual citizenship. Part I of this Section defines dual citizenship. Part II delves into the requirements of dual citizenship. Part III describes the policy reasons underlying dual citizenship designations and how different countries handle the subject. To understand the reasoning for granting North Koreans dual citizenship with South Korea, one must first understand why dual citizenship exists and where North Koreans fit into the global standard for dual citizenship.

For the purposes of this section, I will use the phrase 'multiple citizenship,' because it encompasses those with rightful claims to citizenship in multiple countries. The citizenship status of a person is solely dictated by national laws. As

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Jane Kim, *Trafficked: Domestic Violence, Exploitation in Marriage, and the Foreign-Bride Industry*, 51 VA. J. INT'L L. 444, 455 (2010). See generally Rose Kwak, *Why so Many North Koreans Need to Reach Third Countries to Defect*, NK NEWS, (Jan. 16, 2018), <https://www.nknews.org/2018/01/why-so-many-north-koreans-need-to-reach-third-countries-to-defect/> (illustrating how many North Koreans flee from the North, entering through the (comparatively) more porous Chinese border, and then continue onto a third country).

²⁶ Kim, *supra* note 25, at 455-56.

²⁷ *Id.* at 456.

²⁸ *Id.*

²⁹ *Id.*

a result, these laws of citizenship in each country vary wildly and can be inconsistent with one another. Each nation makes a claim that the person in question is a considered a citizen of their country.

In many countries, the criteria for citizenship is based on two principles:³⁰ *jus sanguinis* is citizenship based on the nationality of the parent,³¹ and *jus soli* implies that a person born within a certain territory owes an allegiance to its government.³² These two categories form the basis for recognizing citizenship in countries across the world.

Dual citizenship is not without its critics and is perceived by many to create several challenges. These include challenges to national cohesiveness, creating the appearance of foreign allegiances and complications regarding military service.³³ Countries take varying stances on dual citizenship, with some actively discouraging it by not recognizing dual citizenship for all or certain countries. Some countries, like Australia and Switzerland, encourage multiple citizenship to promote travel and economic development.³⁴

As of 2010, South Korea grants only a limited number of people dual citizenship.³⁵ These dual citizens include overseas South Korean adoptees, foreign marriage migrants, and foreigners with outstanding talent.³⁶ North Koreans are also recognized formally as dual citizens by the South Korean Constitution.³⁷ This move is emblematic of South Korea's recent move from a historically homogenous society towards a more multicultural society.³⁸

The number of U.S. citizens who possess multiple citizenship are estimated to be over one million and could be many times higher than that.³⁹ In 1967, the Supreme Court struck down Section 401(e) of the 1940 Nationality Act, which revoked the U.S. citizenship of people who vote in other countries' elections.⁴⁰ The case arose when the State Department issued a new U.S. passport to a U.S. citizen who had voted in an election in Israel.⁴¹ This legal precedent in favor of supporting and upholding multiple citizenship continues in the United States today.⁴²

³⁰ James Brown Scott, *Nationality: Jus Soli or Jus Sanguinis*, 24 Am. J. Int'l L. 58, 64 (1930).

³¹ *Id.*

³² *Id.*

³³ David A. Martin, *Dual Nationality: TR's "Self-Evident Absurdity,"* UVA LAWYER (Oct. 27, 2004),

https://www.law.virginia.edu/static/uvalawyer/html/alumni/uvalawyer/sp05/martin_lecture.htm.

³⁴ Joe Myers, *Countries Where You Can Buy Citizenship*, WORLD ECONOMIC FORUM (July 28, 2016) <https://www.weforum.org/agenda/2016/07/countries-selling-citizenship/>

³⁵ Helen Lee & Sayuri Umeda, *South Korea: Permanent Dual Nationality Allowed After 60 Years*, LIBRARY OF CONGRESS (Aug. 24, 2010), <http://www.loc.gov/law/foreign-news/article/south-korea-permanent-dual-nationality-allowed-after-60-years/>.

³⁶ *Id.*

³⁷ DAEHANMINKUK, *supra* note 1.

³⁸ Elise Hu, *In Homogeneous South Korea, A Multicultural Village Hints At Change*, NPR (May 15, 2016, 5:23 AM), <https://www.npr.org/sections/parallels/2016/05/15/475232274/in-homogenous-s-korea-a-multicultural-village-hints-at-change>.

³⁹ The Times Editorial Board, *The Problem of Dual Citizenship*, L.A. TIMES (Dec. 26, 2014, 9:19 PM), <http://www.latimes.com/opinion/editorials/la-ed-dual-citizenship-20141228-story.html>.

⁴⁰ *Afroyim v. Rusk*, 387 U.S. 253, 267-68 (1967).

⁴¹ *Id.* at 254.

⁴² *Dual Nationality*, TRAVEL.STATE.GOV, <https://travel.state.gov/content/travel/en/legal/travel->

According to the State Department, "U.S. law does not mention dual nationality or require a person to choose one nationality or another."⁴³ In turn, a U.S. citizen may naturalize in a foreign state without having to renounce his or her U.S. citizenship.⁴⁴ If a US citizen acquires foreign citizenship after the age of 18, then that person will only lose his or her U.S. citizenship through intentional relinquishment.⁴⁵ In its official guidance, however, the State Department notes the possible complications that can arise with multiple citizenship.⁴⁶ This includes situations where a dual-national's obligations to one country are in conflict with the laws of the other and the fact that "dual nationality may hamper efforts of the U.S. Government to provide consular protection to them when they are abroad," especially in the country of their second nationality.⁴⁷

III. THE STATUS OF NORTH KOREANS IN SOUTH KOREA COMPARED TO ASYLUM SEEKERS IN THE U.S.

This Section of the Comment focuses on the dual-national status of North Koreans as citizens of both South and North Korea. It provides an overview of the effect of that classification and instances where it is unable to empower North Koreans to smoothly transition into life outside of North Korea. Part I of this Section explains the process of North Koreans possessing dual citizenship with South Korea. Part II describes the hardship that North Korean defectors face in South Korea. Part III describes the challenges North Korean defectors face more generally in China and other countries after fleeing North Korea. Each section is also contrasted with the process that asylum seekers and refugees face when entering the United States.

How does the status of these different groups compare? Does dual citizenship lead to an improved status for North Koreans in South Korea? The comparison is apt because the United States defines refugees as "people outside of their country who are unable or unwilling to return home because they fear serious harm."⁴⁸ For North Korean defectors fleeing an oppressive regime known to torture citizens that are deported back to the country, this definition fits. The reason the refugee label does not apply is due to their dual citizen status with South Korea, which disqualifies them from the label of 'refugee' both in South Korea and internationally.

The Constitution of South Korea recognizes North Koreans as South Korean nationals.⁴⁹ Despite being entitled to South Korean citizenship, once North

legal-considerations/Advice-about-Possible-Loss-of-US-Nationality-Dual-Nationality/Dual-Nationality.html. (last visited Mar. 17, 2018).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Refugees and Asylum*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/humanitarian/refugees-asylum> (last visited Mar. 17, 2018).

⁴⁹ Choe Sang-Hun, *South Korean Court Rules Inheritance Crosses Border*, N.Y. TIMES (AUG. 1, 2013), <https://www.nytimes.com/2013/08/02/world/asia/court-rules-north-koreans-can-inherit-property-from-south.html>. See also Anna Fifield, *How to Escape North Korea: Ordinary North*

Koreans arrive in South Korea, a formal evaluation is launched to determine the individual's North Korean citizenship.⁵⁰ The process involves a thorough background check.⁵¹ Determining why the individual decided to leave North Korea is key.⁵²

The formal evaluation process of North Korean citizens is run by the National Intelligence Service (N.I.S.), the chief intelligence agency of South Korea, which was originally established as the Korean Central Intelligence Agency in the 1960s to catch North Korean spies.⁵³ The N.I.S. first brings defectors to a 'defector protection center.'⁵⁴ It is there that they face a painstaking probe.⁵⁵ North Korean defectors stay in the center anywhere from one week to one month.⁵⁶

If they are determined to be non-suspicious, the defectors are moved to Hanawon, a resettlement center in Ansong, where they stay for three months before their status as South Korean citizens is made official.⁵⁷ In Hanawon, defectors go through a three-month educational program on life in South Korea.⁵⁸ The lessons include how to take public transportation, how to open a bank account, and lessons on democracy and capitalism.⁵⁹ Some defectors even elect to do a homestay with a South Korean family to acclimate to the country.⁶⁰

The N.I.S. and the Hanawon educational program are not without their critics. N.I.S. dissenters have long accused the organization of "concocting fake spy cases to arrest and discredit dissidents and divert attention from domestic crises."⁶¹ In more recent years, there is increased scrutiny on the N.I.S. due to its involvement in discrediting President Park's political opposition as pro-North Korean leftists.⁶² Citizens of the United States may draw parallels between this controversy and "fake news" campaigns that were meant to sway the United States' 2016 presidential

Koreans are Risking Their Lives to Make a Perilous Journey Out of Kim Jong Un's Clutches, THE WASHINGTON POST (Sep. 9, 2017), http://www.washingtonpost.com/sf/world/2017/09/09/escaping-north-korea-we-had-already-decided-to-kill-ourselves-rather-than-be-sent-back/?utm_term=.5cf5d15d844f.

⁵⁰ Chi-Dong Lee, *S. Korea Reforming NK Defector Interrogation System*, YONAP NEWS AGENCY (Jul. 28, 2014), <http://english.yonhapnews.co.kr/full/2014/07/28/14/1200000000AEN20140728007800315F.html>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Sang-Hun Choe, *Film Shines Light on South Korean Spy Agency's Fabrication of Enemies*, N.Y. TIMES (Sep. 17, 2016), <https://www.nytimes.com/2016/09/18/world/asia/south-korea-spy-nation-nis.html>.

⁵⁴ Chi-Dong Lee, *supra* note 50.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Tara Francis Chan, *South Korea is Cutting the Time it Spends Interrogating North Korean Defectors to Just 3 Months*, BUSINESS INSIDER (Feb. 14, 2018 at 3:06 AM).

⁵⁹ *Id.*

⁶⁰ Hyonhee Shin, *Long Road Ahead to a New Life for Wounded North Korean Defector*, BUSINESS INSIDER, (Dec. 1, 2017), <https://www.businessinsider.com/r-long-road-ahead-to-a-new-life-for-wounded-north-korean-defector-2017-12>.

⁶¹ Choe, *supra* note 53.

⁶² Sang-Hun Choe, *Former South Korean Spy Chief Sentenced for Trying to Sway Election*, N.Y. TIMES (Aug. 30, 2017), <https://www.nytimes.com/2017/08/30/world/asia/south-korea-spy-chief-sentenced.html>.

election. Won Sei-hoon, former director of the N.I.S., was sentenced to four years in prison for ordering the campaign.⁶³

Over the years, the N.I.S. has also faced allegations of mistreating defectors.⁶⁴ In August 2013, a defector named Yu Wu-sung was acquitted on charges of spying for the North Korean regime and supplying it with information on fellow defectors living in South Korea.⁶⁵ Documents from the prosecution that alleged that Wu-sung traveled to North Korea through China on two occasions were determined to be forgeries.⁶⁶ Another point made by the prosecution was that Yu Wu-sung's sister told the N.I.S. that her brother was a spy.⁶⁷ During the trial, she claimed that she only did so under duress after being beaten by interrogators and held in solitary confinement for 179 days.⁶⁸ Ultimately, Yu Wu-sung was convicted of one crime: concealing his Chinese nationality when he came to South Korea.⁶⁹ While he was living in North Korea and before he arrived in South Korea, he was traveling freely to China for business as a Chinese national.⁷⁰ He was forced to pay back the government aid he received and had his South Korean passport revoked.⁷¹ The fallout for the N.I.S. came swiftly. Two of the N.I.S.'s counter agents were convicted of fabricating the documents against Yu.⁷²

A documentary on these events called "Spy Nation" premiered in South Korea in 2016.⁷³ The film brought attention to the sometimes severe interrogations that North Korean defectors face upon arrival in South Korea.⁷⁴ In the documentary, Yu's lawyer explained that "the problem with the [N.I.S.] Joint Interrogation Center is that there is no independent monitoring and control. For refugees who have no relatives in the South, there is no way of knowing whether they are held there. It is a facility where there is a high probability of human rights abuse and people can easily be framed as spies."⁷⁵ What actually occurs at the center is not widely known.⁷⁶ Defectors have told lawmakers that they were subjected to threats of deportation and violence in the center.⁷⁷ In 2011, the agency notified the public that a North Korean defector had committed suicide in the center after confessing to being a spy.⁷⁸

⁶³ *Id.*

⁶⁴ S.C.S., *Red-handed*, THE ECONOMIST, (Mar. 21, 2014), <https://www.economist.com/blogs/banyan/2014/03/south-korean-intelligence>.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Steven Borowiec, *The Spy Who Wasn't a Spy: A Tale of Two Koreas*, LA TIMES, (May 17, 2016), <http://www.latimes.com/world/asia/la-fg-south-korea-spy-20160517-snap-story.html>.

⁷⁴ *Id.*

⁷⁵ Choe Sang-Hun, *Convictions Deal Blow to South Korean Intelligence Service*, N.Y. TIMES, (Oct. 28, 2014), <https://www.nytimes.com/2014/10/29/world/asia/convictions-deal-blow-to-south-korean-intelligence-service.html>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

In response to public criticism of the N.I.S. and allegations of abuse, it was renamed the “Center for Protection of North Korean Refugees” as opposed to the “Joint Interrogation Center.”⁷⁹ The agency also committed to allowing visits by outside counsel and monitors.⁸⁰ Furthermore, in February 2018, the South Korean government announced plans to streamline the process of admitting North Koreans.⁸¹ The announced plan includes cutting the ‘interrogation period’ of North Korean defectors from 180 days to a mere 90 days as a part of its overall reform efforts.⁸² Earlier, the N.I.S. also vowed to end closed-door interrogations in order to enhance transparency and protect the human rights of defectors.⁸³ Most North Korean defectors are women (for reasons this comment will discuss later).⁸⁴ Therefore, as part of its reform efforts, the N.I.S. vowed to hire full-time female attorneys.⁸⁵

The Ministry of Unification is a South Korean governmental entity devoted to preparing for future reunification of South and North Korea.⁸⁶ As such, the Ministry of Unification oversees a large portion of North-South relation efforts.⁸⁷ The Ministry of Unification is the main organization that assists North Koreans in their transition to life in South Korea.⁸⁸

More than 30,000 North Korean defectors entered South Korea since the end of the Korean War.⁸⁹ The Ministry of Unification provides programs and support to North Korean defectors. The Ministry’s Hanawon Centers are regional offices located throughout the country that help defectors make a smooth transition to South Korean society.⁹⁰ Outside of government assistance, there are South Korean NGOs and non-profit organizations that address the needs of North Korean defectors.⁹¹ For example, Saejowi (“The Organization for One Korea”) provides medical support and job training to North Korean defectors.⁹²

While South Korea’s system for accepting North Korean defectors is shaped by South Korean laws and perception of nationalism, the U.S. policy is, in part, dictated by international law. The United States is obliged to recognize valid claims

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Chan, *supra* note 58.

⁸² *Id.*

⁸³ *S. Korea Reforming NK Defector Interrogation System*, YONHAP NEWS AGENCY (Jul. 28, 2014), <https://en.yna.co.kr/view/AEN20140728007800315>.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Calum MacLeod, *North Korean Defectors Learn to Adapt in South*, USA TODAY (Dec. 20, 2011), <http://usatoday30.usatoday.com/news/world/story/2011-12-20/north-korean-defectors/52131816/1>.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Policy on North Korean Defectors, MINISTRY OF UNIFICATION, https://www.unikorea.go.kr/eng_unikorea/relations/statistics/defectors/.

⁹⁰ *North Korean Defectors Take a Crash Course in Coping*, N.Y. TIMES (June 25, 2006), <https://www.nytimes.com/2006/06/25/world/asia/25korea.ready.html>,

⁹¹ See SAEJOWI, <http://www.saejowi.org/>, (last visited Dec. 10, 2017).

⁹² *Id.*

for asylum under the 1951 Convention Relating to the Status of Refugees.⁹³ A refugee is defined by the U.S. government as “any person who is outside his or her country of nationality or habitual residence . . . [who] is unable or unwilling to return to or seek protection of that country due to a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion.”⁹⁴ The difference between asylum seekers and refugees is where they apply.⁹⁵ Asylees do not enter the United States as refugees.⁹⁶ Asylum-seekers apply for asylum status when they arrive in the United States, whereas refugees begin the process abroad.⁹⁷ They may enter as students, tourists, businessmen, or even in undocumented status.⁹⁸ Asylum-seekers are arguably analogous to North Korean defectors for this reason, since the process to become recognized as South Korean citizens typically begins on their arrival; this will serve as our main point of comparison for this comment. North Koreans of course begin their defection ‘process’ earlier than that, oftentimes by engaging the services of human traffickers, but they are not formally recognized by the South Korean government until their arrival.

There are two kinds of asylum claims in the United States, “affirmative” and “defensive.”⁹⁹ The affirmative asylum process happens when an individual applies for asylum within one year of their arrival in the United States.¹⁰⁰ Defensive asylum is when asylum is raised as a defense by an individual who is facing forcible removal from the U.S.¹⁰¹

Asylum (whether it is defensive or affirmative) has three basic requirements.¹⁰² First, the applicant must fear persecution in their home country.¹⁰³ Second, the applicant must prove that he or she would be persecuted because of one of the five protected grounds: race, religion, nationality, political opinion, or social group.¹⁰⁴ The persecution must fit into one of these protected grounds since a threat of general violence is not enough. For example, a community organizer fearing for his life after publicly criticizing a local gang may apply for asylum (political opinion), while an individual who angered a local drug dealer on non-ideological grounds cannot. The third requirement is that either the asylee’s government is the entity

⁹³ *U.S. System for Refugee, Asylum Seekers Explained*, NBC NEWS, http://www.nbcnews.com/id/43442030/ns/us_news-life/t/us-system-refugee-asylum-seekers-explained/#.WrCs0JPwbBI (last visited Mar. 25, 2018).

⁹⁴ *See generally Who We Serve – Refugees*, OFFICE OF REFUGEE RESETTLEMENT (Oct. 2, 2012), <https://www.acf.hhs.gov/orr/resource/who-we-serve-refugees>.

⁹⁵ Ilona Bray, *Asylum or Refugee Status: Who is Eligible?*, NOLO, <https://www.nolo.com/legal-encyclopedia/asylum-or-refugee-status-who-32298.html> (last visited Mar. 25, 2018).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Eligibility for ORR Benefits and Services – Asylees*, HHS, https://www.acf.hhs.gov/sites/default/files/orr/orr_fact_sheet_asylee.pdf.

⁹⁹ *Obtaining Asylum in the United States*, USCIS, <https://www.uscis.gov/humanitarian/refugees-asylum/obtaining-asylum-united-states>.

¹⁰⁰ Bray, *supra* note 95.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

that is persecuting them, or the government cannot control nor stop the persecution.¹⁰⁵

Illegally crossing the border is generally a misdemeanor, but for those who declare a fear of returning to their home country when they first encounter border personnel, the affirmative asylum process is triggered.¹⁰⁶ When the asylum process is triggered, there is a protocol that is initiated where the person seeking asylum is referred to an asylum officer for an interview and processing.¹⁰⁷ Their claims are later heard in the civil immigration system.¹⁰⁸

For some asylum seekers, they are first processed at detention center, given a court date, and then, if they have family in the United States, released to their family with an ankle bracelet.¹⁰⁹ As they wait for their court date, asylum seekers are required to check in with Immigration and Customs Enforcement at regular intervals¹¹⁰ and they are barred from working during this initial period.¹¹¹

The court process for asylum-seekers in the U.S. is unique in a few ways. First, immigration courts are unique in that defendants do not have a right to government-funded public defenders.¹¹² This makes it more analogous to the United States' civil court system. Immigrants have the option to represent themselves, pay for a private attorney, or find a pro bono attorney.¹¹³ Asylum seekers fare much better if they are able to obtain legal counsel. Some advocates estimate that asylum seekers are five times more likely to win a case for asylum if they have legal counsel.¹¹⁴

Like South Korea, the U.S. government has its own federal programs devoted to the transition and support of asylum-seekers and refugees. The U.S. Department of State's Bureau of Population, Refugees, and Migration focuses on, in part, resettling refugees in the United States.¹¹⁵ The Office of Refugee Resettlement, a division of the U.S. Department of Health and Human Services, supports the economic and social integration of refugees, asylees, victims of human trafficking, and Cuban and Haitian entrants.¹¹⁶ Their programs include Microenterprise Development, which works to make refugees financially independent by helping them set up businesses, including microloans up to \$15,000 U.S. dollars and

¹⁰⁵ *Id.*

¹⁰⁶ Roque Planas, *Under Trump, Asylum-Seekers Increasingly Face Criminal Charges*, HUFFINGTON POST, (Jan. 8, 2018), https://www.huffingtonpost.com/entry/under-trump-asylum-seekers-increasingly-face-criminal-charges_us_5a6112d5e4b01d91b25420d7.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Samantha Balaban, Sophia Alvarez Boyd, & Lulu Garcia-Navarro, *Without A Lawyer, Asylum-Seekers Struggle With Confusing Legal Processes*, NPR, (Feb. 25, 2018), <https://www.npr.org/2018/02/25/588646667/without-a-lawyer-asylum-seekers-struggle-with-confusing-legal-processes>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *About PRM*, U.S. DEP'T OF STATE, <https://www.state.gov/j/prm/about/index.htm> (last visited Mar. 26, 2018).

¹¹⁶ *Divisions – Resettlement*, OFFICE OF REFUGEE RESETTLEMENT (Oct. 3, 2012), <https://www.acf.hhs.gov/orr/resource/divisions-community-resettlement>.

training and technical assistance in areas such as bookkeeping and marketing.¹¹⁷ The Office of Refugee Resettlement also works with local "ethnic community-based organizations" to help refugees connect with critical services and to assist with integration into American Society.¹¹⁸ The United States has historically led the world in refugee resettlement.¹¹⁹ In the fiscal year 2016, the United States resettled 84,944 refugees.¹²⁰ In the fiscal year 2015, the United States granted asylum to 26,124 individuals.¹²¹

Thousands of North Koreans, typically crossing through China, take up permanent residence in South Korea every year. As of March 2016, more than 29,000 North Korean defectors are settled in South Korea.¹²² This group makes up 0.06% of the country's total population.¹²³ Upon arriving in South Korea, North Korean defectors receive government subsidies.¹²⁴ In 2004, this support was cut significantly in response to the large number of North Koreans arriving in China.¹²⁵ The northern part of North Korea was plagued by famine, causing a number of North Koreans to flee to China.¹²⁶ The South Korean government stated that the measure was meant to prevent ethnic Koreans living in China from entering the South, as well as stop North Koreans with criminal records from gaining entry.¹²⁷

The concern over the influx of people seeking permanent residence in South Korea led to a tightening of resources. Screening for individuals claiming to be North Korean defectors became more stringent and the amount of money given to each defector was cut from 28,000,000 won (now equivalent to \$24,180.08 U.S. dollars) to 10,000,000 won (now equivalent to \$8,635.743 U.S. dollars).¹²⁸ Many human rights groups argued that South Korea agreed to tighten the regulations only under severe pressure from both China and North Korea as South Korea sought reconciliation.¹²⁹ When asked about the change, Ko Gyoung Bin, director-general of the Unification Ministry's Bureau of Social and Cultural Exchanges, stressed that Chinese cooperation was necessary to get "one North Korean" to South Korea.¹³⁰

The United States adopted a more conservative stance to refugees and asylum-seekers under President Trump's administration. Former Attorney General

¹¹⁷ *About Microenterprise Development*, OFFICE OF REFUGEE RIGHTS (Oct. 24, 2017), <https://www.acf.hhs.gov/orr/programs/microenterprise-development/about>.

¹¹⁸ *About Ethnic Community Self-Help*, OFFICE OF REFUGEE RIGHTS (Oct. 24, 2017), <https://www.acf.hhs.gov/orr/programs/ethnic-community-self-help/about>.

¹¹⁹ Jie Zong & Jeanne Batalova, *Refugees and Asylees in the United States*, MIGRATION POLICY INSTITUTE (Jun. 7, 2017), <https://www.migrationpolicy.org/article/refugees-and-asylees-united-states>.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Byung-Yeon Kim and Seong Hee Kim, *Effects of Human Capital on the Economic Adjustment of North Korean Defectors*, 29 *Seoul J. of Econ.* 505, 505 (2016).

¹²³ *Id.*

¹²⁴ *Id.* at 506.

¹²⁵ Don Kirk, *North Korean Defectors Face New Challenges on Journey to South*, THE CHRISTIAN SCIENCE MONITOR (Dec. 29, 2005), <http://www.csmonitor.com/2004/1229/p07s01-woap.html>.

¹²⁶ Kim, *supra* note 25, at 457.

¹²⁷ Kirk, *supra* note 125.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

Jeff Sessions argued that the current system is overwhelmed with fraudulent asylum claims by Central Americans.¹³¹ In response, the Trump Administration is trying to change asylum laws.¹³² There have been more ideological changes as well. The Department of Homeland Security's office of United States Citizenship and Immigration Services, which is a federal agency that issues green cards and grants citizenship to people from foreign countries, has stopped characterizing the United States as "a nation of immigrants" in its mission statement.¹³³

In early 2018, the federal government announced plans to fast-track recent asylum requests.¹³⁴ While South Korea's changes are ostensibly meant to improve the process for defectors, the United States appears to be motivated by stopping supposed abuse of the asylum system.¹³⁵ In the U.S., newer requests will be prioritized over older ones in order to tackle the backlog of asylum claims.¹³⁶ The move has been criticized by immigration rights groups as a strategy meant to discourage people from seeking affirmative asylum.¹³⁷ The agency argues that the backlog allows people to exploit the system, because asylum seekers are able to obtain work authorization after the six-month mark passes.¹³⁸ Activists also are concerned that the fast-track approach could expedite the removal of people who have legitimate asylum claims.¹³⁹

In addition to reports of more arrests for illegal border crossing, there are accusations that U.S. border officials may be illegally turning asylum-seekers away at the border.¹⁴⁰ This may create a situation where asylum-seekers are not even given the chance to initiate the asylum process under the rumored changes.¹⁴¹ There are reports of foreigners seeking asylum being blocked from reaching U.S. asylum officials at the border.¹⁴²

Once they receive approval to live in their host country, whether permanently or until their court date, both asylum seekers in the U.S. and South Korea face economic challenges. The average monthly income of North Koreans defectors in South Korea is about half the national average.¹⁴³ In 2005, nearly a

¹³¹ Balaban, *supra* note 109.

¹³² *Id.*

¹³³ Miriam Jordan, *Is America a 'Nation of Immigrants'? Immigration Agency Says No*, N.Y. TIMES (Feb. 22, 2018), <https://www.nytimes.com/2018/02/22/us/uscis-nation-of-immigrants.html>.

¹³⁴ Julián Aguilar, *Immigrant Rights Groups Say Federal Policy Change Will Dissuade Some Asylum Seekers* (Feb. 2, 2018 2:00 PM), <https://www.texastribune.org/2018/02/02/change-asylum-processing-aimed-stamp-out-fraud-officials-claim/>.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Joshua Partlow, *U.S. Border Officials are Illegally Turning Away Asylum Seekers, Critics Say*, THE WASHINGTON POST (Jan. 16, 2017), https://www.washingtonpost.com/world/the_americas/us-border-officials-are-illegally-turning-away-asylum-seekers-critics-say/2017/01/16/f7f5c54a-c6d0-11e6-acda-59924caa2450_story.html?utm_term=.a769a55a1650.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Jung, Marianne, *Self-Employment Among North Korean Migrants*, Vienna J. of East Asian Studies 59, 64 (2018).

quarter of North Korean defectors in South Korea reported loneliness and isolation.¹⁴⁴ Most North Korean defectors in South Korea work low-paid and low-skilled jobs.¹⁴⁵ North Korean defectors are prone to frequently change jobs and have conflicts at work.¹⁴⁶ However, 60.5% are happy with their life in South Korea.¹⁴⁷

There is also a struggle for asylum-seekers and refugees in the United States. In particular, asylum-seekers face different challenges than do refugees. Unlike refugees, asylum-seekers are not pre-screened by the government in their home countries and connected with federal assistance immediately upon their arrival.¹⁴⁸ Asylum seekers are ineligible for most government benefits during the application period.¹⁴⁹ Homelessness is an issue many face while others rely on nonprofits for housing.¹⁵⁰

IV. NORTH KOREAN DEFECTIONERS ABROAD

To fully understand the difference of dual citizenship for North Korean defectors, it is important to look at how defectors fare in countries other than South Korea. Most commonly, North Koreans will cross over the border to northeast China.¹⁵¹ From there, many continue on to a third country, commonly South Korea, due to the close diplomatic relations between China and North Korea.¹⁵² North Koreans in China face deportation back to North Korea if discovered by Chinese authorities.¹⁵³ Upon return to North Korea, they may face charges of treason and be punished with imprisonment, torture, or death.¹⁵⁴ This provides North Koreans with an incentive to relocate outside of China due to China's friendly diplomatic relationship with North Korea. Despite the danger, tens of thousands of North Koreans who are unable to travel to South Korea remain in China.¹⁵⁵

As of 2008, two-thirds of the North Korean population living in China were women.¹⁵⁶ Women are more commonly trafficked in China than men for several reasons. Perhaps the most important reason women are trafficked more commonly than men is due to the advanced profitability of selling North Korean women.¹⁵⁷ Many are forced to marry, enslaved in commercial sex exploitation, or forced into

¹⁴⁴ *Id.* at 63.

¹⁴⁵ *Id.* at 64.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 63.

¹⁴⁸ Ted Hesson, *Why So Many Asylum Seekers Come to America and Wind Up Homeless*, VICE NEWS (May 11, 2016 at 11:00 PM), https://www.vice.com/en_us/article/exqjn4/why-so-many-asylum-seekers-end-up-homeless.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Kim, *supra* note 25 at 454.

¹⁵² *Id.* at 463.

¹⁵³ *Id.* at 458, *citing* Comm. for Human Rights in North Korea, *Lives for Sale* 17, 11-17 (2009).

¹⁵⁴ *Id.* at 456, *citing* David Hawk, U.S. COMM. FOR HUMAN RIGHTS IN N. KOR., *The Hidden Gulag: Exposing North Korea's Prison Camps* 24 (2003).

¹⁵⁵ *Id.* at 455, *citing* Yoonok Chang et al., *Migration Experiences of North Korean Refugees: Evidence from China* 8 (Peterson Institute, Working Paper No. WP 08-4) (2008).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 455, *citing* Lee Tae-hoon, *Female North Korean Defectors Priced at \$1500*, KOREA TIMES NATION, May 14, 2010, <http://tinyurl.com/32r3pj9>.

labor.¹⁵⁸ Due to the secretive nature of human trafficking, the estimates of North Korean trafficked women vary wildly. For example, some sources estimate that 70 to 80 percent of North Korean female defectors in China are victims of human trafficking.¹⁵⁹ One aid worker estimated in 2010 that women make up 80 percent of North Korean refugees in China and that more than 90 percent of North Korean refugee women become victims of trafficking.¹⁶⁰

A second factor that contributes to the outsized number of North Korean women to men in China is that women are more likely to survive famine and continuous food deficit than men.¹⁶¹ In other words, women are more likely to survive deadly food deprivation than men. In addition, the northernmost provinces in North Korea (the provinces closest to the border with China), the Hamgyŏng provinces, are disproportionately female-headed.¹⁶² Economic opportunities for North Korean women are scarce and this may further influence women to flee for China to support their families.¹⁶³

Despite this, stability is extremely difficult for North Korean defectors to obtain once they arrive in China. There is no avenue for North Korean defectors to apply for or be granted asylum in North Korea; defectors are not recognized as refugees in China.¹⁶⁴ Due to their diplomatic relationship with North Korea, the Chinese government actively works to stop and discourage North Korean defectors from entering China.

North Korean and Chinese law enforcement patrol the North Korea–China borderlands and shoot fleeing North Koreans or arrest and deport them.¹⁶⁵ Fleeing North Korea is seen as an act of treason by the North Korean government,¹⁶⁶ therefore deported North Korean defectors face prison time in North Korea’s ‘gulags’ or internment camps.¹⁶⁷ North Korean women face a number of additional dangers upon deportation that men do not face, including forced abortion, infanticide, or separation from older children.¹⁶⁸ The North Korean government denounces marriages between North Korean women and Chinese men and may prevent entry of Chinese-Korean children.¹⁶⁹

¹⁵⁸ *Id.* at 444.

¹⁵⁹ *Id.* citing U.S. CONG. EXEC. COMM’N ON CHINA, 110TH CONG., ANNUAL REPORT 118, 121 (2008).

¹⁶⁰ *Id.* at 455, citing Lee Tae-hoon, *Female North Korean Defectors Priced at \$1500*, KOREA TIMES NATION, May 14, 2010, <http://tinyurl.com/32r3pj9>.

¹⁶¹ *Id.* at 457, citing Yoonok Chang et al., *Migration Experiences of North Korean Refugees: Evidence from China* 8, 17 (Peterson Institute, Working Paper No. WP 08-4, 2008).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 458.

¹⁶⁵ *Id.*, citing Ser Myo-Ja, *Aid Groups Say North Is Heading for Major Famine*, JOONGANG DAILY, May 27, 2008, <http://tinyurl.com/2a9ptjf>.

¹⁶⁶ *Id.*, citing David Hawk, U.S. COMM. FOR HUMAN RIGHTS IN N. KOR., *The Hidden Gulag: Exposing North Korea’s Prison Camps* 24, 26 (2003).

¹⁶⁷ *Id.* citing U.S. CONG. EXEC. COMM’N ON CHINA, 110TH CONG., ANNUAL REPORT 118, 121 (2008).

¹⁶⁸ *Id.* citing David Hawk, U.S. COMM. FOR HUMAN RIGHTS IN N. KOR., *The Hidden Gulag: Exposing North Korea’s Prison Camps* 24, at 7, 11, 14, 46, 51, 60, 62, 66, 67, 69 (2003).

¹⁶⁹ *Id.*

China's treatment of North Korean defectors is widely criticized by the international community. China's actions may be considered a direct violation of the United Nations Convention Relating to the Status of Refugees.¹⁷⁰ Many argue that, under the Refugee Convention, North Koreans should be classified as refugees, entitled to asylum, safe haven, and protection anywhere in the international community.¹⁷¹ In addition, China's actions violate the United Nations Convention Against Torture (CAT), which prohibits deportation when torture is a likely consequence.¹⁷²

China's deportation policy is exploited by human traffickers.¹⁷³ Traffickers use the fear of torture and internment camps that await deported North Koreans to recruit, transport, transfer, sell, and even recapture and resell North Korean women into prostitution, forced labor, and forced marriages.¹⁷⁴ "Brokers" that facilitate the sale of North Korean bride-slaves receive anywhere between \$120 and \$1890 (USD) to complete the forced sale of a North Korean woman.¹⁷⁵

CONCLUSION

Defectors from North Korea have a unique legal status as dual nationals of North Korea and South Korea. Upon fleeing North Korea, North Korean citizens are immediately recognized as South Korean citizens by the South Korean government. At first glance, this appears wholly positive. For many fleeing violence and exploitation in their home countries, formal recognition by another country is exactly what they seek. However, this classification creates unique challenges as defectors flee North Korea to nearby countries such as China or try to rebuild their lives in South Korea.

If North Korean defectors are able to reach South Korea, they are connected with social services through the South Korean government.¹⁷⁶ As evidenced by the dramatic difference in income and employment between North and South Koreans living in South Korea, adaptation continues to be a challenge for North Korean defectors in South Korea.¹⁷⁷ Economic hardship also affects asylum seekers in the United States.¹⁷⁸ Beyond economic challenges, North Korean defectors face incredible psychological challenges after defecting.

¹⁷⁰ See generally *Convention and Protocol Relating to the Status of Refugees*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, <http://www.unhcr.org/3b66c2aa10.pdf> (1951).

¹⁷¹ Kim, *supra* note 25 at 458.

¹⁷² *Id.* at 458-459, *citing* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, *opened for signature* Dec. 10, 1984, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987).

¹⁷³ *Id.* at 459 *citing* COMM. FOR HUMAN RIGHTS IN NORTH KOREA, *LIVES FOR SALE* 17 (2009).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 459 *citing Id.* at 458, *citing* Comm. for Human Rights in North Korea, *Lives for Sale* 17, 11-17 (2009). See also Int'l Crisis Group, *Perilous Journeys: the Plight of North Koreans in China and Beyond* 11 (2006).

¹⁷⁶ *Id.* *supra* note 83.

¹⁷⁷ Kim, *supra* note 122 at 506.

¹⁷⁸ Hesson, *supra* note 148.

This leads to a phenomenon known as double defectors.¹⁷⁹ This group is made up of North Koreans who fled the North Korean regime only to return to North Korea once they could not adapt to South Korean life. The North Korean regime also targets struggling North Korean defectors in South Korea to use as tools for propaganda.¹⁸⁰ A Reuters investigation found that North Korean security agents have been known to visit the families of defectors, telling them that it is safe for their family members to return to North Korea.¹⁸¹ There are also unconfirmed reports of agents of the North Korean regime infiltrating South Korea and offering defectors up to \$45,000 (USD) to appear on North Korean television to speak about the ‘horrors’ of living in South Korea.¹⁸²

The Korean Institute for Reunification only recognizes 13 instances of double defection.¹⁸³ However, it is possible that the number may be much higher. A government official, speaking off the record, stated that about 100 defectors fled back to North Korea through China in 2012.¹⁸⁴ Of the thousands of North Koreans living in South Korea, nearly 800 were unaccounted for, perhaps driven underground through illegal work or able to exit through China back to North Korea. While thousands are unable to make it to South Korea after crossing the border into China, those that are able to make the journey continue to face hardship despite their South Korean citizenship.

Under the Refugee Convention, countries are expected to grant temporary asylum or humanitarian status to refugees who are entitled to international protection until the Office of the United Nations High Commissioner for Refugees (UNHCR) can arrange for their resettlement in a third country.¹⁸⁵ If North Koreans were classified as refugees, that would mean that China would grant temporary asylum until the defectors are relocated to South Korea.

The current system of dual citizenship provides North Koreans with a unique process, if they can access it, which functions as an almost pseudo-asylum process when compared to countries like the United States. As both countries implement reform efforts, with the United States implementing a more conservative system and South Korea moving towards a more transparent system, they may continue to diverge. Regardless, the dual citizenship status gives North Korean defectors a pathway that provides unique benefits and challenges.

¹⁷⁹ Justin McCurry, *The Defector Who Wants to Go Back to North Korea*, THE GUARDIAN (Apr. 22, 2014), <https://www.theguardian.com/world/2014/apr/22/defector-wants-to-go-back-north-korea>.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Kim, *supra* note 25 at 458. *See generally* Convention and Protocol Relating to the Status of Refugees, United Nations High Commissioner for Refugees, <http://www.unhcr.org/3b66c2aa10.pdf> (1951).