

# REFORMING NORTH KOREA: LAW, POLITICS, AND THE MARKET ECONOMY

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*Since the economic crisis and famine years of the mid-1990s, there has been intermittent speculation that North Korea has reached a point where it will have to thoroughly reform its entire operational structure or face inevitable collapse. While most of this speculation has focused on political or economic pressures to induce the necessary measures of domestic reform, very little has focused on the murky maneuverings of North Korea's legal system. While North Korea's legal system is often dismissed as being a mere façade for a dictatorial state, and while the cantankerous ire of North Korea toward the general principles of international law is often cited as evidence for its status as a rogue state, the reality is that North Korea's legal system does have substantive elements that are essential to the proper functioning of the state and to the process of reform. The North Korean state has in fact engaged in several initiatives of legal reform, both in its domestic and international practice, since the mid-1990s. It is argued here that no program of political or economic reform can succeed without a simultaneous restructuring of the North Korean legal system, and that current initiatives toward legal reform in North Korea, in their domestic and international context, are insufficiently integrated to support a successful and sustainable political or economic transition. In other words, legal reform, far more than political or economic reform, may be the most important factor in ensuring North Korea's domestic stability and international reintegration.*

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## I. INTRODUCTION

Early in the morning of 11 July 2008, Pak Wang-ja went for a walk around the Geumgangsán<sup>1</sup> resort area on the eastern coast of North Korea.<sup>2</sup> Pak, a 53-year old South Korean housewife from Seoul, had no reason to be concerned, since the grounds of the Geumgangsán resort fell under the security provisions negotiated with the Democratic People's Republic of Korea (DPRK—otherwise known as North Korea) by the Hyundai Asan corporation, the South Korean conglomerate that built and still manages the resort area.<sup>3</sup> Geumgangsán is one of the very few places where South Koreans can experience a glimpse—albeit carefully controlled—of life in North Korea, though it is not North Korea proper but a localized South Korean enclave within the territory of North Korea, constructed by a peculiar arrangement with the North Korean government. The tourist project of Geumgangsán was meant to be mutually beneficial: to bring in much-needed revenue for the North, to provide a unique attraction to South Koreans who long for a glimpse of the long cut-off and isolated North, and to provide a symbolic link between the two Koreas that could establish trust and good will.<sup>4</sup> But Pak Wang-

<sup>1</sup> The Revised Romanization system will be used for all Korean terms rather than the older McCune-Reischauer system. The Revised Romanization system has the advantage of avoiding all diacritical marks (which are used in the McCune-Reischauer system), and also is far more standardized and consistent than the McCune-Reischauer system, which after several decades of existence has produced many variants. Exceptions are sometimes made for proper names that have become well-established in English (for example, Syngman Rhee instead of Yi Seungman).

<sup>2</sup> Blaine Harden, *S. Korean Tourist Is Shot Dead in the North*, WASH. POST, July 12, 2008, at A9.

<sup>3</sup> *Id.*

<sup>4</sup> See generally Samuel Seongseop Kim & Bruce Prideaux, *An Investigation of the Relationship*

ja's morning walk on that day in July ultimately became a tragedy that revealed just how legally peculiar and politically fragile this whole arrangement really was: after Pak pushed aside some barbed wire and crossed through a poorly marked boundary between resort property and North Korean territory, she was shot in the back and killed by a North Korean guard.<sup>5</sup>

Details of the incident were murky—there were questions of whether the North Korean guards gave sufficient warning before shooting, whether Pak knew she had crossed the boundary, and whether Pak was shot fleeing guards or heading back to safety.<sup>6</sup> What seemed at first like a straightforward case of mutual cooperation, where officials from North and South could conduct a joint investigation of the incident, quickly turned into a convoluted legal dispute over proper jurisdiction and investigative procedure. North Korean officials argued that the incident took place on North Korean soil and therefore South Korean officials were precluded from conducting an investigation; they also rejected requests for a cooperative investigation with shared jurisdiction based on the passive personality claim that the victim of the shooting was a South Korean citizen.<sup>7</sup> What had seemed like a clearly demarcated legal and political enclave established for the construction and management of the resort at Geumgangsán became an opaque and ill-defined parcel of land whose status was dependent more on political whim and circumstance than on any guiding legal principle.

Though this was the first incident of its kind at the Geumgangsán resort, it was not the first time that poorly defined legal and political boundaries led to Korean border incidents with tragic results. In June 2002, a naval skirmish in the West Sea at the disputed Northern Limit Line (NLL) between North and South Korea left five South Korean sailors dead and some 22 wounded, along with unconfirmed (and unconfirmable) reports of casualties from the North.<sup>8</sup> But there is a more fundamental issue lurking beneath all of this; the incident at Geumgangsán and the skirmish in the West Sea are just two specific examples of a

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*between South Korean Domestic Public Opinion, Tourism Development in North Korea and a Role for Tourism in Promoting Peace on the Korean Peninsula*, 27 TOURISM MGMT. 124 (2006) (finding that tourism development—even in hostile states like North Korea—can influence national and international policy by introducing non-market considerations to citizens' tourism decisions); Samuel Seongseop Kim & Bruce Prideaux, *Tourism, Peace, Politics and Ideology: Impacts of the Mt. Gungang Tour Project in the Korean Peninsula*, 24 TOURISM MGMT. 675 (2003) (finding that the Mt. Geumgang project to encourage North-South tourism "is the consequence of a political process aimed at rapprochement, not the genesis of the process.").

<sup>5</sup> Harden, *supra* note 2.

<sup>6</sup> *Id.*

<sup>7</sup> Hyung-Jin Kim, *North Korea Rejects Probe into Shooting Death*, USA TODAY, July 15, 2008, [http://www.usatoday.com/news/world/2008-07-15-246817720\\_x.htm](http://www.usatoday.com/news/world/2008-07-15-246817720_x.htm). Similar claims happened in reverse more recently with the sinking of the South Korean Naval Ship *ROKS Cheonan* on March 26, 2010, which killed 46 South Korean sailors. Amidst South Korean allegations that the sinking of the ship was a deliberate and hostile act by North Korea, North Korea demanded access to the ship and the environs to conduct an investigation of its own. South Korean authorities denied this request. See *Seoul Rebuts N. Korean Denials in Cheonan Sinking*, CHOSUN ILBO, May 31, 2010, [http://english.chosun.com/site/data/html\\_dir/2010/05/31/2010053101481.html](http://english.chosun.com/site/data/html_dir/2010/05/31/2010053101481.html). On the general challenges of jurisdiction disputes, see CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 75-76, 88-100 (2008) (discussing cross-border and extraterritorial jurisdiction issues).

<sup>8</sup> Don Kirk, *North and South Trade Charges over Naval Clash*, N.Y. TIMES, June 30, 2002, at A1; Jon M. Van Dyke, Mark J. Valencia, & Jenny Miller Garmendia, *The North/South Korea Boundary Dispute in the Yellow (West) Sea*, 27 MARINE POLICY 143 (2003); Kim Kang-nyong, *Sohae gyojeonggwa iriui anbonjeok taeueng* [West Sea skirmishes and our security measures], 2 TONGILJEOLLYAK [UNIFICATION STRATEGY] 9 (2002) (trans. by author).

general problem that affects every aspect of North Korean politics and its relations with the outside world. The architecture of North Korea's legal system, based as it is more on political expediency than legal consistency, can no longer address or support the needs of the state or the tasks for which it was designed. No amount of incremental internal reform or international assistance is likely to bring about meaningful political and economic reform unless it is accompanied by a serious and comprehensive reconstruction of the North Korean legal system. The stakes are as risky as they are high; some of the questions that persist in the murky space of North Korean law include pinning down the legal relationship of newly emergent markets to the state, of these markets to one another, of domestic markets to international markets and free trade zones, and determining whether North Korea has institutional "good faith" to carry out its international legal obligations. Everything from economic liberalization to stable regime transition is in some way dependent on meaningful North Korean legal reform, and yet, there has been little or no comprehensive examination by policy analysts or legal scholars of what this would entail. North Korea's legal system might appear to be a mere legal façade for an unapologetically authoritarian regime, but in fact there is not only real potential but also a real need for substantive legal reform if North Korea is to maintain any hope of enduring political stability and vibrant economic development.

## II. THE NORTH KOREAN LEGAL SYSTEM

It is necessary to preface any study of North Korea with some sort of caveat that the entire project is fraught with difficulty, uncertainty, and empirical peril. But there is good reason for such a disclaimer: much of the North Korean system of governance and its accompanying institutional arrangements, including the legal system, resists a clear and definitive mapping. This is in many ways intentional and structural, a sort of obfuscation by design, as the control of privileged information is one of the crucial factors that allow those in power to retain their power. Nevertheless, it is possible to make sense of the North Korean system; part of the process of legal reform in North Korea has been enhanced transparency of the law, making the information somewhat more reliable than in other areas of North Korean politics. Since so little is written about North Korean law, and since the process of legal reform is best elucidated in the context of discerning antecedent practice from transitional plan, it would be useful to outline the foundational elements of the North Korean legal system.

### A. *Constitutional Law*

As with everything else in North Korea, even something as straightforward as constitution and the law it generates requires a profound shift in perspective. North Korea has enacted five constitutions—in 1948, 1972, 1992, 1998, and 2009. It is possible to read each of them as indirect archives of the transformation of the relationship between law and political power in the North Korean state.<sup>9</sup> Each

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<sup>9</sup> Some commentators prefer to see these as five major revisions of the same constitution, rather

successive constitution is a textual map of legal reform, a document produced by the realization of North Korean political elites and party faithfuls that the requirements of political action had become incongruous with the power and authority vested in available legal instruments.

In socialist legal systems—in spite of its peculiarities, the North Korean legal system draws heavily from socialist legal tradition—a constitution's political status and functions are quite different from the status and functions of a constitution in a democratic political system. In democratic systems, the constitution constructs the legal foundation for the institutions of the state; for the most part, political policy and practice must work within the legal parameters established by the constitution and its generative institutions to be legitimate. In socialist systems, the constitution works in concert with other legal instruments to facilitate the implementation of political policy and practice by providing after-the-fact legitimization of party directives. Such a socialist constitution is only valid if it works within the political parameters established by the ruling party, and through it, the state itself. In more succinct words, in a democratic system, politics follows the law; in socialist systems, the law follows politics.

In spite of the official rhetoric of continuity and stability, the North Korean state has experienced repeated periods of political challenge and change. The outcome of these periodic struggles has been to restructure, either by necessity or by desire, various elements of the state and the instruments of political power. Each of the constitutions of North Korea has emerged out of transformative moments when cumulative political change necessitated a corresponding legal expression to legitimate and articulate the new orientation and outlook of the state. This is the essence of legal reform in North Korean politics.

### 1. *The Constitution of 1948.*

The foundational Constitution of 1948 is emblematic of the uncertainty and diffidence of the new state in its founding years.<sup>10</sup> It draws heavily from pre-existing socialist law, particularly from the constitutional principles of the Soviet Union. Like the Soviet Union, the new North Korean state wanted a document to implement and enforce party directives in the most efficient way possible. As such, the 1948 Constitution divides power among different institutions, ministries, and offices, but only to enhance the velocity of power from the party to the people and not to provide accountability or transparency. The constitution's derivation from the pre-existing template of socialist and Soviet law can also be seen in the provision that rather oddly grants rights to all of North Korea's ethnic minorities, of which there were approximately none at the time.<sup>11</sup>

Yet unlike the Communist Party in the Soviet Union, in 1948 the ruling

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than as five separate legal texts. See, e.g., Choe Sang-Hun, *New North Korean Constitution Bolsters Kim's Power*, N. Y. TIMES, September 28, 2009, <http://www.nytimes.com/2009/09/29/world/asia/29korea.html> (citing the 2009 document as a new constitution, but also citing analyst Kim Yong-hyun who refers to the document as a constitutional revision).

<sup>10</sup> 1948 JOSEON MINJUJUUI INMIN GONGHWAGUK SAHOEJUUI HEONBEOP [CONSTITUTION] (1948) (N. Kor.) [hereinafter 1948 DPRK CONST.] (trans. by author).

<sup>11</sup> *Id.* art. 31. This provision also guarantees to minorities the right to use their native language and develop their own national culture.

Korean Workers Party (KWP) in the nascent North Korean state was not yet in a position of unrivaled authority. Hence, the 1948 Constitution in North Korea also reflected a series of compromises and concessions with existing realities, such as the lack of an economic infrastructure, that made it appear as if the constitution was articulated through a process of negotiation with other powerful interests and actors.<sup>12</sup> Concessions were made to the private ownership of property and to the need for private enterprise, reflecting the early anxiety of the state over the adequacy of financial resources of the new state. For example, the constitution even required citizens of the new state to pay income taxes, at least in accordance with the socialist dictum of giving according to one's ability.<sup>13</sup>

The 1948 Constitution also granted a long series of guaranteed rights and privileges to citizens, such as the freedom of speech, the right to religious practice, and the right to be free from arbitrary arrest and detention,<sup>14</sup> but these only showed the gap between legal rhetoric and political reality in the North Korean state right from its very founding. The enumerated rights—and other forms of legal rhetoric in North Korean law—were not liabilities to the concentration political power by the KWP, since it gradually subordinated the constitution to its own needs and interests and never allowed power to be disbursed in a way that undermined the party's dominance.

In spite of the concessive nature of the early constitution, it is easy to see how the separation between constitutional legal rhetoric and the actual practice and expression of political power was from the start an intentional part of the institutional design of the North Korean state. For instance, the 1948 Constitution established the Supreme People's Assembly (SPA) as the highest organ of state power and authority, with extensive powers to appoint, monitor, and revise nearly all other personnel and administrative divisions within the government.<sup>15</sup> But the SPA was not perennially in session, and the day-to-day administration of the state machinery fell to the SPA Presidium, a group of approximately fifteen of the highest-ranking leaders of the KWP.<sup>16</sup> The Presidium had the power to initiate and implement nearly all of the acts of legislative, judicial, and executive control of the state.<sup>17</sup> Constitutionally the Presidium was subordinate to the SPA, but in reality, the SPA merely formalized and legitimated the precedent actions of the Presidium.<sup>18</sup> This all but ensured that the constitution, and all its institutional arrangements, remained firmly under the control of the KWP leadership. As discussed below, this bifurcation between legal rhetoric and political reality in North Korea, while convenient and perhaps even necessary to ensure KWP

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<sup>12</sup> YI GYE-MAN, *BUKHANUI SINSABEOPJEDORON* [NORTH KOREA'S NEW JUDICIAL SYSTEM] 44-45 (1998) (trans. by author).

<sup>13</sup> 1948 DPRK CONST. art. 5 (allowing ownership by private natural or juridical persons), art. 19 (granting freedom to citizens to run small and medium industrial enterprises), art. 29 (imposing a duty to pay taxes). The socialist dictum of paying according to one's ability is rendered in the 1948 Constitution as "according to one's economic circumstances" (*gyeongjejeok hyeongpyeone*).

<sup>14</sup> *Id.* arts. 13 (granting freedom of speech and press), 14 (granting freedom of religion), 24 (granting freedom from arbitrary arrest and detention).

<sup>15</sup> *Id.* arts. 32 (stating that the SPA is highest organ), 37 (enumerating the powers of the SPA).

<sup>16</sup> *Id.* art. 47 (stating that the Presidium is the highest organ of state power when the SPA is not in session).

<sup>17</sup> *Id.* art. 49.

<sup>18</sup> *Id.* art. 50 (making the Presidium of the SPA responsible to the SPA).

dominance, ultimately provides the greatest obstacle to the meaningful economic and legal reform that the North Korean state needs to recalibrate its political system.

## 2. The Constitution of 1972.

By 1972, the power of the KWP had overcome initial political uncertainties and the power of one person, Kim Il-sung, had become supreme and unchallengeable. No longer forced into a compromise position or worried about an immediate threat from any domestic enemies of the revolution, the more mature North Korean state needed a new constitution to reflect its new sense of security and power: this is precisely what the 1972 Constitution did.<sup>19</sup> There was a pronounced turn toward a unique North Korean style of socialism, represented by two particular features of the constitution: (1) the articulation of *juche* ideology as the guiding set of principles for North Korea, and (2) the elimination of elements from the 1948 Constitution that were clearly borrowed from other socialist legal systems, particularly from the Soviet Union. This was not a legal reform; rather, it was the formal restatement of the restructuring of state power that had taken place largely outside the realm of legally prescribed action of the previous constitution.

In the 1972 Constitution, power was centralized in specific state organs to increase and enhance the unidirectional velocity of political power from the state to the people. The Presidium of the SPA and the SPA itself were given clearly separate spheres of action and responsibility.<sup>20</sup> Private property and private ownership were abolished, as was the system of taxation, which was considered a "relic" or "hangover" of the old society (*nalgun sahoeui yumul*).<sup>21</sup> The extensive rights given to citizens in the 1948 Constitution were accompanied by a long list of duties and obligations toward the state.<sup>22</sup> Indeed, the principles of collectivism and collective responsibility, which the North Korean state extended even to the realm of legal culpability, were enshrined in the new document.<sup>23</sup> The somewhat superfluous principle from the 1948 Constitution protecting the rights of ethnic minorities disappeared, which was significant only in so far as it showed that the state was no longer willing to grant special rights to anyone.

The external reality of political power had also become greatly simplified, as the KWP was firmly in control of the process of governance and the KWP itself was increasingly under the control of just one person, Kim Il-sung.<sup>24</sup> Just as citizens were to collectively obey and follow the directives of the state through the

<sup>19</sup> 1972 JOSEON MINJUJUUI INMIN GONGHWA GUK SAHOEJUUI HEONBEOP [CONSTITUTION] (1972) (N. Kor.) [hereinafter 1972 DPRK CONST.] (trans. by author).

<sup>20</sup> *Id.* arts. 94 (stating that the president promulgates all laws and ordinances of the SPA), 95 (stating that president retains right of special pardon), 96 (stating that president ratifies and abrogates all treaties).

<sup>21</sup> *Id.* arts. 18 (stating that the DPRK owns the means of production), 19 (stating that the DPRK owns all resources with "no limit" (*jehani opsda*) to what the state can own), 33 (abolishing taxes).

<sup>22</sup> *Id.* arts. 56 (granting a right to work), 69 (imposing a duty to work), 71 (imposing a duty to increase revolutionary vigilance).

<sup>23</sup> *Id.* arts. 27 (imposing collective responsibility), 30 (describing the *daean* work system as collective labor), 68 (imposing a duty to display high degree of collectivist spirit).

<sup>24</sup> KIM JONGSU, JOSEON RODONGDANGUI WIGWAKDANCHE [THE SUBSIDIARY ORGANIZATIONS OF THE KOREAN WORKERS PARTY] 107 (2004) (outlining the ideological consolidation of Kim Il-sung's rule through the Korean Workers Party) (trans. by author).

constitution, they also would have to collectively obey and follow the directives of Kim Il-sung, whether those directives were present in the constitution or not. To reflect the dominance of Kim Il-sung's leadership and to give him some sort of ex post facto institutional legitimacy, the 1972 Constitution created the new Office of the President (*juseok*) as the head of state.<sup>25</sup> Clearly this dominant, permanent institutional position was created for Kim Il-sung, even though his name was not stated in the constitution, to entrench and legitimate his simultaneous control of party and state leadership.<sup>26</sup>

As with the 1948 Constitution, the bifurcation between legal rhetoric and political reality was not an obstacle to the functioning of the North Korean system, and there was never any constitutional crisis created by the many contradictions between codified law and political practice. For instance, the 1972 Constitution retained the supremacy of the SPA as the principal state organ, and even entrusted it with the power to elect the president or elect and recall other top leaders.<sup>27</sup> In theory, this would make the president accountable to the SPA.<sup>28</sup> But the reality, of course, was that the presidency was created for Kim Il-sung, and his "election" by the SPA was a mere formality; Kim Il-sung was accountable to no one. The enumerated powers of the president in the constitution were enormous and open-ended: the president promulgated all laws and ordinances of the SPA, ratified or abrogated all international treaties, and exercised the right of special judicial pardon.<sup>29</sup> The president was empowered to issue edicts (*myeongryeong*), beyond the institutional constraints of any other legislative or judicial body.<sup>30</sup> The president also served as the Chairman of another newly created state organ, the Central People's Committee (CPC), which while constitutionally subordinate to the SPA in practice became the dominant agency of state power, policy, and administration.<sup>31</sup> The CPC allowed for an interface between party directives and state enforcement, though it did so at the expense of the text of the constitution.<sup>32</sup>

Another important innovation of the 1972 Constitution was the articulation of *juche*—usually translated as self-reliance, though it encapsulates much more

<sup>25</sup> 1972 DPRK CONST. art. 89.

<sup>26</sup> YI SANG-U, BUKHAN JEONGCHI: SINJEONGCHEJEU JINHWAWA JAKDONG WEONRI [NORTH KOREAN POLITICS: THE EVOLUTION OF A THEOCRATIC REGIME] 125-130 (2008) (detailing the elements through which Kim Il-sung consolidated his absolute rule).

<sup>27</sup> 1972 DPRK CONST. arts. 73 (stating that the SPA is the highest organ of state power), 76.3 (giving the SPA the power to elect the president), 76.4 (giving the SPA the power to elect or recall any vice-president), 76.5 (giving the SPA the power to elect or recall any member of the SPA Presidium). It is important to note that the office of the president is the only office *not* subject to recall by the SPA.

<sup>28</sup> *Id.* arts. 90 (stating that the president is elected by the SPA), 98 (specifying that the president is accountable to the SPA).

<sup>29</sup> *Id.* arts. 94 (stating that the president promulgates all laws and ordinances of the SPA), art. 95 (stating that the president retains right of special pardon), art. 96 (stating that the president ratifies and abrogates all treaties).

<sup>30</sup> *Id.* art. 94.

<sup>31</sup> *Id.* art. 100 (creating the CPC), art. 101 (stating that the president heads the CPC), art. 106 (defining the accountability of the CPC to the SPA).

<sup>32</sup> For instance, while the SPA is described as the highest organ (*choegojugweongigwan*) of state power (art. 73) and CPC is described as the highest leadership organ (*choegojidogigwan*) of state power (art. 100), there is no clarification as to what the distinction is between sovereign (*jugweon*) power and leadership (*jido*) power in the text. Similarly, while the president retains the power to promulgate (*gongpo handa*) all laws and regulations and issue edicts (*myeongryeongul naenda*) (art. 94), the CPC has the power to adopt (*chaetaek handa*) laws and policies and issue directives (*jisilul naenda*) (art. 104); again, there is no clarification of these different acts in the text.



(such as the special calling of the North Korean state to preserve the essence of pure socialism)—as the guiding principle of the North Korean state.<sup>33</sup> This was perhaps the clearest sign that the North Korean state felt secure enough in its power to chart out its own ideological path, distinct from other socialist political systems. The 1972 Constitution stated that *juche* ideology was a particular variant and “creative application” (*changjeoguro jeogyong*) of Marxist-Leninist revolutionary ideology, one that was “national in form and socialist in content” (*minjokjeog hyeongsige sahoejuuijeog naeyong*).<sup>34</sup> The central idea behind *juche* was that the conditions that existed to give rise to the original ideological foundations of socialist revolution did not correlate to the unique circumstances of North Korean history and society, and hence North Korea would have to modify revolutionary principles to adapt to its own historical and social reality, and not the other way around.

Under the directives of *juche* ideology, the North Korean state quickly became antagonistic toward other socialist systems, particularly in the 1980s. As the Soviet Union began to reform its way out of existence under Mikhail Gorbachev and China began to embrace free market principles under the reforms of Deng Xiaoping, the North Korean leadership used *juche* to articulate a belief that North Korea was the only pure socialist state remaining, the only one not to sell-out to foreign ideas, and the only one left to protect the original promise of socialist revolution.<sup>35</sup> This sense of ideological purity and self-proclaimed superiority put the North Korean state in an awkward and somewhat precarious position when its economy began to collapse in the early 1990s, bringing about tremendous pressure for reform.<sup>36</sup> The need to create a solution that would allow for reform in practice and yet not compromise the deeply entrenched principles of *juche* (with all its legal concomitants) explains to a great extent the peculiar system that emerged in the North Korean state when confronted with the unprecedented economic strains and crises of the 1990s.

### 3. The Constitution of 1992.

The Constitution of 1992 can be seen as the succession constitution, since it put into place the necessary institutional arrangements to ensure that power would pass on in a secure and orderly manner after Kim Il-sung (none too soon, as Kim Il-sung died in 1994.) But there is much more to it than that. Like previous constitutions, it was largely a legal redaction that reflected changes that had already occurred. However, in the area of economic policy, the Constitution of 1992 tried to create a flexible and proactive disposition that anticipated the possibility of rapid economic change in the years to follow.

Aside from accommodating a new approach to economic development,

<sup>33</sup> CHOE JUNG-KO, BUKHANBEOP [NORTH KOREAN LAW] 589–90 (1996) (noting the ideological foundations of North Korean law) (trans. by author).

<sup>34</sup> 1972 DPRK CONST. arts. 4 (stating that *juche* is a creative variant of Marxist-Leninist thought), 45 (incorporating *juche* into a national and socialist form of culture).

<sup>35</sup> Grace Lee, *The Political Philosophy of Juche*, 3 STAN. J. E. ASIAN AFF. 105, 106–08 (2003).

<sup>36</sup> See Benjamin Habib, *North Korea's Parallel Economies: Systemic Disaggregation Following the Soviet Collapse* 44 COMMUNIST AND POST-COMMUNIST STUD. 149, 156 (2011) (explaining that regime bureaucrats complicated reform processes because they were steeped in *juche* ideology and lacked experience with innovation).

another significant institutional change outlined in the new constitution was the repositioning of the National Defense Commission (NDC) (*gukbangwiweonhoe*) as an independent component of the structure of governance and as the highest military leadership organ (*choegogunsajidogigwan*) of the DPRK.<sup>37</sup> This upgraded the power and prestige of the NDC and the authority of its chair, who was in charge of all of the armed forces of North Korea.<sup>38</sup> The constitution placed that upgraded and expanded power in a position that stood in some sense outside of the direct authority of the president; the chairman of the NDC not only controls and directs the military, but also has the independent authority to issue orders and edicts.<sup>39</sup> This shift in power did not expand the power of the military itself, only the power of the chair of the NDC. The chair of the NDC became the second most powerful person in the North Korean government; while still subordinate to the president, whose power was absolute and unassailable, the NDC chair was more powerful than any potential rival should there be any attempt at a power struggle during the succession. What would ostensibly appear to be a preliminary check or potential threat to the power of the president was in reality a constitutional endorsement of the order of succession, since the NDC chair was none other than Kim Jong-il, the son and heir of Kim Il-sung.<sup>40</sup> And with the full power of the military behind the chair of the NDC, no potential rival could hope to secure the support or concentrate the power necessary to challenge the order of succession.<sup>41</sup>

The constitutional framework worked exactly as planned: when Kim Il-sung died in 1994, there was no political confusion or constitutional crisis; the office of the president remained vacant and was eventually abolished in 1998.<sup>42</sup> Kim Jong-il never sought the office of president because he did not need to: as chair of the NDC, Kim Jong-il had an absolute block on any rival claimant to the presidency, making him the most powerful political figure in the country.

North Korea's choice to have a leader who derived his authority from a dominant military position was in contrast to the path taken by its neighbor South Korea, which by 1992 had emerged from a long period of military and authoritarian rule into a burgeoning democracy. As if to preempt this perceived threat, the North Korean Constitution of 1992 distanced itself from its past provocative and martial rhetoric by stating that "independence, peace, and friendship" (*jaju pyeonghwa*

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<sup>37</sup> 1992 JOSEON MINJUJUUI INMIN GONGHWA GUK SAHOEJUUI HEONBEOP [CONSTITUTION] (1992), art. 111. (N. Kor.) [hereinafter 1992 DPRK CONST.] (trans. by author).

<sup>38</sup> *Id.* art. 113.

<sup>39</sup> *Id.* art. 115. The word translated here as edicts (*myeongryeong*) is the same word used in the 1972 Constitution for declarations of Kim Il-sung, which would seem to equate the power of the head of the NDC with the head of state, thereby making an implicit preparatory structure for succession.

<sup>40</sup> In theory, both the President and the Chairman of the NDC are accountable to the SPA (art. 109 and art. 116 respectively), and the SPA retains the right to elect or recall the president (art. 91.5) or the chairman of the NDC (art. 91.7). But since any member of the SPA is also a member of the KWP, any member of the SPA willing to express concern about the leadership of the country would face censure and expulsion from the KWP, rendering that person incapable of retaining their seat in the SPA.

<sup>41</sup> 1992 DPRK CONST. art. 61. This article does not explicitly mention the possibility of a potential rival, but instead tries to eliminate the possibility by empowering the state to "strengthen military and mass discipline," to promote "unity among officers," and to strengthen "unity between the army and the people."

<sup>42</sup> *Post of Presidency Abolished*, KOREA TIMES, Sept. 6, 1998.

*chinseon*) were the main components of DPRK foreign policy.<sup>43</sup> While South Korea was not directly mentioned, as the two states were legally still at war, the 1992 Constitution's peaceful rhetoric was probably directed at South Korea. The Constitution of 1992 implicitly seemed to accept the existence of South Korea not as a threat and a rival but as a legitimate and coexistent entity.<sup>44</sup> There was even a commitment to promote the democratic rights (*minjuuuijeok minjokgweonri*) of overseas Koreans (*haewi issnun joseondongpodeul*) and to respect their rights as recognized in international law.<sup>45</sup> The motivations for this apparent change of heart were not explicitly stated. The optimistic and perhaps naïve view is that North Korea simply turned away from aggression and toward peace. The more pessimistic but perhaps more realistic approach is that North Korea, feeling a moment of vulnerability as China turned toward a market economy and the Soviet Union reformed itself out of existence, decided for a more pragmatic posture toward the increasingly prosperous South.

The 1992 constitutional revisions stressed bringing about prosperity for the DPRK—or at least the chance for prosperity—which is a significant change given the demand for ideological purity in earlier constitutions. Though North Korea lacked the ambition and vision of the reforms of Deng Xiaoping in China, it saw the utility of transforming at least some of the elements of the centrally-planned economy and experimented with a few preliminary steps at opening up the economy to free-market principles. The Joint Venture Act of 1984, which for the first time gave legal sanction to economic cooperation between North Korean industry and foreign corporations, was a predecessor to the constitutional revisions; under it, in 1991, North Korea set up the first of its free trade zones, the Rajin-Sonbong free trade zone known as Raseon, near the northwestern border with China.<sup>46</sup> By the standards of the Constitution of 1972, these types of actions would have been unconstitutional. Thus, the Constitution of 1992 gave new legitimacy to foreign trade and foreign investment, as well as to joint venture enterprises, and ensured that any economic laws already passed, or that would be considered in the future, would not be construed as opposing the interests of the state and would not appear as inexplicable contradictions in the exercise of state policy.<sup>47</sup>

As if to reassure foreigners who might want to do business in the DPRK, the legal rights and interests of foreigners in the DPRK were explicitly protected.<sup>48</sup> All foreign trade was undertaken by and through the state, precluding the possibility of autonomous and private marketization by individual DPRK citizens, and foreign trade was to be conducted on terms of complete equality (*wanjeonhan pyeongdeung*) and mutual benefit (*hohyeui weonchik*).<sup>49</sup> Constitutionally, at least, there was to be no possibility for the independent marketization of North Korea, nor

<sup>43</sup> 1992 DPRK CONST. art. 17.

<sup>44</sup> *Id.* art. 9. The stated general commitment to mutual respect, noninterference, and mutual benefit with all friendly countries, was likely intended to primarily benefit South Korea. This is especially noteworthy since the Korean War did not produce a legal peace, but rather only a truce; the two countries were and are still legally at war.

<sup>45</sup> *Id.* art. 15.

<sup>46</sup> *North Korea Sets Up Economic Zones, Opens Trade Ports*, JAPAN ECONOMIC NEWSWIRE, Dec. 30, 1991.

<sup>47</sup> 1992 DPRK CONST. art. 37.

<sup>48</sup> *Id.* art. 16.

<sup>49</sup> *Id.* art. 36.

would any element of economic transformation be allowed to spill over into a demand for political change.

Knowing the forces that could be set in motion by a more open economy, the Constitution of 1992 reaffirmed the state's sole ownership of the means of production, perhaps as an extra measure of security. Although the state and its cooperative enterprises (*hyeobdongdanche*) now shared ownership, the Constitution of 1992 also reaffirmed collectivism (*jibdanjuui*) as the basis for society.<sup>50</sup> It also elevated the ideology of *juche* to an exalted and exclusive influence in all matters of state practice, including culture, education, and the economy.<sup>51</sup> At the same time, the role and position of the Korean Workers Party was firmly established as the exclusive arbiter of all state activity.<sup>52</sup> Taken together, these constitutional elements ensured that whatever economic transformations occur must be done in a way that conforms to *juche* principles (meaning it should first and foremost benefit the state), and must remain under the firm control and guidance of the KWP. Change was to be accepted as the DPRK state committed itself to eliminating "outmoded" ways of life and building a new socialist way of life (*saeroun sahoejuuijeok saenghwal yangsik*), but the rights and duties of citizens under the Constitution of 1992 were now encumbered with additional restrictions to ensure that any opening to the outside world remained purely an economic experiment firmly in the hands of the state and not a pretext for political and legal change for DPRK citizens.<sup>53</sup>

#### 4. *The Constitution of 1998.*

Just as the Constitution of 1972 codified and legitimized Kim Il-sung's ascendancy to absolute power and control in the DPRK, the Constitution of 1998 enshrined Kim Jong-il as the undisputed leader of all aspects of governance in North Korea. In this constitution the office of the presidency, vacant since the death of Kim Il-sung in 1994, was abolished permanently and Kim Il-sung was elevated to Eternal President (*yeongweonhan juseok*), perhaps the strangest political position extant in global politics.<sup>54</sup> As the vacant office of Eternal President now had a constitutional mandate, Kim Il-sung in effect ruled posthumously over all of North Korea.<sup>55</sup> At the same time, the NDC, of which Kim Jong-il is still the chair, was elevated to the highest organ of military and political power, making him indisputably the supreme leader of the DPRK.<sup>56</sup> By the inherent logic of the

<sup>50</sup> *Id.* arts. 20 (requiring state and cooperative ownership of the means of production), 82 (stating that collectivism is the basis for society).

<sup>51</sup> *Id.* arts. 3 (*juche* as the ideological basis of the state), 26 (*juche* in the economy), 50 (*juche* in scientific research), 52 (*juche* in culture).

<sup>52</sup> *Id.* art. 11.

<sup>53</sup> *Id.* arts. 42 (eliminating outmoded ways and building a new socialist way of life), 68 (guaranteeing freedom of religion but explicitly removing that right in relation to bringing in foreign forces or challenging the interests of the state).

<sup>54</sup> 1998 JOSEON MINJUJUUI INMIN GONGHWAGUK SAHOEJUUI HEONBEOP [CONSTITUTION] (1998), pmbl. (N. Kor.) [hereinafter 1998 DPRK CONST.] (trans. by author).

<sup>55</sup> *Id.* Kim Il-sung is described in the preamble as the "sun of the nation" (*minjokui taeyang*) and the "moving force of reunification" (*joguktongilui guseong*). The word *guseong* can be read here in different ways, as "moving force," "organizer," or even "attractive force" (as in a magnetic lodestar).

<sup>56</sup> *Id.* art. 100 (expanding the mandate of the NDC to overall administration of national defense), art. 102 (specifying the Chairman as the person responsible for guidance and national defense as a

Constitution of 1998, Kim Jong-il is a caretaker leader, ruling with absolute power but in the capacity of being guardian and cultivator of the ideals and principles of the *juche* state as created by his father, Kim Il-sung.<sup>57</sup> This not only gave meaning to and offered respect for the office of Eternal President but also derived a powerful source of legitimacy for Kim Jong-il, since any opposition to his rule would be in effect opposition to Kim Il-sung, the *juche* ideal and the very essence of the North Korean state.<sup>58</sup>

As with previous constitutions, there were also a number of shifts and realignments in the institutional array of power; however these were not elements of constitutional or legal reform but rather necessary clarifications in the context of the new locus of power in the person of Kim Jong-il. Kim Jong-il certainly retained all of the major offices that served as the sources of real political and party power in the North Korean state—Chairman of the NDC, General-Secretary of the KWP, and Commander-in-Chief of the Korean People's Army—and the 1998 Constitution made it clear that the KWP always retained supreme authority.<sup>59</sup>

The few subtle changes and alterations might give the impression that this constitution was a new order of political authority, but it was designed to do little more than efficiently enforce the principles of the old order. For example, new powers were created for existing entities, and other powers were clarified or reassigned to other organs of governmental authority.<sup>60</sup> References to Marxist-Leninist thought were replaced by the “indigenous” *juche* ideology, which promised a newly revitalized form of socialism for the DPRK. Change without change, or revolution as restoration, was the essence of the Constitution of 1998.

The only potential element of real change in the 1998 Constitution appeared in those articles and sections that related to economic activity, a characteristic feature that first emerged in the Constitution of 1992.<sup>61</sup> There is an obvious and intentional expansion of economic rights and permissions to engage in autonomous economic activity, although full-fledged free-market principles do not gain explicit endorsement for individual citizens as private economic actors.<sup>62</sup>

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whole).

<sup>57</sup> KIM CHONG-IL, BUKHANBEOP KANGJWA: BUKHANBEOP UI TEUKSAEKKWA JUYOBEOPUL SEOLMYEONG HAESEOLSEO [LECTURES ON NORTH KOREAN LAW: AN EXPLANATORY HANDBOOK ON NORTH KOREA'S SPECIAL AND GENERAL LAW] 100 (2002) (noting that by the 1998 Constitution, Kim Jong-il rules by the guiding spirit (*yuhun tongchi*) of Kim Il-sung) (trans. by author).

<sup>58</sup> 1998 DPRK CONST. pmbl. The first sentence of the Preamble describes the DPRK as the “socialist motherland of *juche*” (*guhreonhan jucheui sahoejuui joguk*), and the last sentence describes the constitution as a legal expression of Kim Il-sung's “*juche*-oriented ideas on state-building” (*juchejeogin gukkageonseolsasang*). This may help to explain why so many of the murals and portraits of Kim Jong-il in the DPRK are not of him alone but in the company of Kim Il-sung. Individual portraits of Kim Il-sung are ubiquitous in North Korea; similar portraits of Kim Jong-il are noticeably more rare.

<sup>59</sup> *Id.* pmbl. (stating that the DPRK functions under the leadership of the KWP), art. 11 (stating explicitly that all state activities are conducted under the leadership of the KWP).

<sup>60</sup> *Id.* arts. 103 (empowering the NDC to declare war and mobilize the entire country), 91 (clarifying and restricting the specific powers of the SPA), 110 (clarifying and expanding the specific powers of the SPA Presidium), 126 (clarifying and expanding the specific powers of the SPA Presidium).

<sup>61</sup> Eric Yong-Joong Lee, *Development of North Korea's Legal Regime Governing Foreign Business Cooperation: A Revisit Under the Socialist Constitution of 1998*, 21 NW. J. INT'L L. & BUS. 199 (2000).

<sup>62</sup> 1998 DPRK CONST. art. 24 (defining the extent of private property for individual citizens and permitting income from legal individual economic activities).

Individual citizens could now earn money from private economic activities, and the fruits of their economic activities—including a form of intellectual property rights—acquired legal protections.<sup>63</sup> Non-state actors, such as collective organizations, were permitted to engage in foreign trade, and the rules and regulations governing DPRK trade with foreign countries and foreign countries' economic activities in the DPRK, were given constitutional endorsement.<sup>64</sup> Similarly, the rights of foreigners residing or trading in the DPRK and the rights of "overseas Koreans" were identified for special protection, presumably a constitutional nod to the possibility of expanding economic overtures with South Korea.<sup>65</sup> There was even a new article that granted citizens freedom of movement and travel, although it was not clear whether this was a general right or merely permission to travel and relocate for economic purposes only.<sup>66</sup>

In spite of the relatively short amount of time that transpired since the previous constitution—a mere six years—North Korea in 1998 was very different from what it was in 1992.<sup>67</sup> Aside from the shift of leadership from Kim Il-sung to Kim Jong-il, North Korea experienced a massively disruptive period of famine and flood in the mid-1990s that shook the edifice of the state and the control of the KWP to its very foundations.<sup>68</sup> There were skyrocketing mortality rates and a near-complete breakdown of the public system through which the state distributed food and other essentials, particularly in urban centers. Desperate North Korean citizens migrated in search of food or better opportunities, resulting in a massive dislocation of citizens (both as internally displaced persons and as refugees fleeing the country) that challenged the ability of the state to control citizens' movements and to provide the essentials necessary to keep them in place.<sup>69</sup> Many citizens engaged in spontaneous economic activity in either state-sanctioned local markets or newly emergent unregulated markets that were the result of uncontrollable migration, creating a sort of informal and unusual marketization in some certain parts of North Korea. Since this type of movement and activity would have been in contravention of the 1992 Constitution, the Constitution of 1998 was yet another post-hoc legal endorsement of changes that had already taken place, perhaps to give the appearance that the state had expected and encouraged such behavior all along. It is

<sup>63</sup> *Id.* art. 74 (specifying the state protection of copyright, inventions, and patents).

<sup>64</sup> *Id.* arts. 20 (specifying that the means of production are in the hands of the State and also cooperative enterprises), 36 (stating that foreign trade will be conducted by the state and by cooperative organizations), 37 (encouraging institutions and joint enterprises with foreign corporations and foreign individuals).

<sup>65</sup> *Id.* arts. 15 (noting that the DPRK will champion the democratic national rights of overseas Koreans), 16 (guaranteeing the legal rights and interests of foreigners in the DPRK).

<sup>66</sup> *Id.* art. 75 (ensuring freedom of residence and travel within the DPRK).

<sup>67</sup> See Dae-Kyu Yoon, *The Constitution of North Korea: Its Changes and Implications*, 27 FORDHAM INT'L L.J. 1289, 1300 (2004).

<sup>68</sup> See generally Daniel Goodkind and Loraine West, *The North Korean Famine and its Demographic Impact*, 27 POPULATION AND DEV. REVIEW 219 (2001) (assessing the mortality rates of the famine period 1995-2000); Mika Aaltola, *Emergency Food Aid as a Means of Political Persuasion in the North Korean Famine*, 20 THIRD WORLD QUART. 371 (1999) (arguing that the famine period was a humanitarian crisis but international and domestic responses were based on political needs rather than humanitarian sentiment).

<sup>69</sup> See generally MARCUS NOLAND, *AVOIDING THE APOCALYPSE: THE FUTURE OF THE TWO KOREAS* 171-194 (2000) (discussing the famine in North Korea); NICHOLAS EBERSTADT, *THE NORTH KOREAN ECONOMY: BETWEEN CRISIS AND CATASTROPHE* 221-244 (2007) (discussing signs of change in the pervasive issues delivering essential services to North Korean citizens).

also possible to interpret the 1998 Constitution as the product of a regime trying to impose retroactive control on these activities. One can see vestiges of this, for instance, in the constitutional reminders that collectivism would remain the basis of the economy, or that the right of freedom of religion now contained an open warning that such a right cannot be used to draw in foreign influence or ideas that might threaten the DPRK.<sup>70</sup> Realizing perhaps that it was simply not possible to end or suppress these activities, the North Korean state may have decided to tolerate or even encourage them, as long as the state got its share of the revenue or at least retained enforcement and regulatory rights over the economic actions that were taking place.

### 5. *The Constitution of 2009*

In April 2009, the SPA approved the text and content of a new DPRK constitution, a crucial step in cementing the legacy of Kim Jong-il and ensuring an orderly succession to the person most likely to be his self-chosen successor, namely his youngest son Kim Jong-un.<sup>71</sup> Kim Jong-il suffered a stroke in August 2008 and there was widespread speculation about whether he would be able to remain in power or whether he would be too weak to fend off challenges to his power.<sup>72</sup> The 2009 Constitution confirmed that Kim Jong-il was the undisputed leader of the DPRK state by declaring that the Chairman of the National Defense Commission was the Supreme Leader (*choegoryeongdoja*) of the DPRK.<sup>73</sup> Though Kim Jong-il's name was not mentioned, it is clear that since he was the Chairman of the NDC, he was therefore the Supreme Leader of the DPRK. The powers of the NDC were expanded and clarified from the 1998 Constitution, and now included the open-ended power to oversee and guide the overall affairs of the state and to issue edicts (*myeongryeong*) of any sort on any topic.<sup>74</sup>

The KWP was also reaffirmed as the ultimate arbiter of all state policy, meaning that the party remained the source of real power in the DPRK. The political principle of democratic centralism (*minjujuui jungangjipgweon*), in which central policy was rendered absolute and binding after putatively democratic debate was conducted by members of the party, was reaffirmed as the organizing and unifying principle of all state institutions.<sup>75</sup> The latter clarification in particular meant that if Kim Jong-un were chosen as the successor to Kim Jong-il, once the decision were made the state would be obligated to follow and obey that choice.

The institutional clarification was buttressed on a profound ideological

<sup>70</sup> 1998 DPRK CONST. arts. 22 (retaining the collective nature of the state and economy), 63 (retaining the collectivist principle "one for all and all for one" (*hananun jeonchelul wihayeo, jeonchenun hanalul wihayeo*) for state-society relations), 68 (guaranteeing freedom of religion but warning against the use of religion to bring in foreign influence).

<sup>71</sup> *N. Korea To Revise Constitution, Leader Present at Parliament Meeting: Report* YONHAP NEWS AGENCY, Apr. 10, 2009, available at <http://english.yonhapnews.co.kr/northkorea/2009/04/09/9/0401000000AEN20090409009300315F.HTML>.

<sup>72</sup> See *id.*

<sup>73</sup> 2009 JOSEON MINJUJUUI INMIN GONGHWAGUK SAHOEUJUI HEONBEOP [CONSTITUTION] (2009), art. 100 (N. Kor.) [hereinafter 2009 DPRK CONST.] (trans. by author).

<sup>74</sup> *Id.* arts. 103.1 (giving the NDC authority to guide the general affairs of the state), 104 (giving the NDC power to issue edicts).

<sup>75</sup> *Id.* arts. 5 (promoting democratic centralism), 11 (asserting the dominance of the KWP).

shift that was evident in the text of the new constitution. Just as one of Kim Il-sung's great legacies was the ideological principle of *juche*, the new constitution elevated to parity the principle of *seongun sasang* ("military first ideology," often shortened to *seongun*).<sup>76</sup> *Seongun* advocated a dual political and military role for the North Korean armed forces and unapologetically gave the North Korean military first priority in the allocation and consumption of state resources.<sup>77</sup> Conveniently, the articulation and implementation of *seongun* was constitutionally secured for the NDC by first entrusting the military with the duty to implement the *seongun* policy and protect the "leadership of the revolution" (*hyeokmyeongui sunoebu*), then identifying the Chairman of the NDC as the person that controls and directs all of the actions of the armed forces.<sup>78</sup> The political role for the military that is embedded in the *seongun* principle was reflected in the new constitution by specifically relocating several political and legal powers, such as the power to negotiate and abolish treaties or the power of special judicial pardons, in the person of the chairman of the NDC.<sup>79</sup> Consequently, by the terms of the 2009 Constitution, Kim Jong-il wields supreme power politically, militarily, legally, and ideologically.

There are two other significant changes and shifts in the 2009 Constitution. First, all references to communism and Marxist-Leninist ideology were expunged; socialism was retained, but any indication of its foreign origins was erased. The DPRK was officially a socialist state that operated according to its own internal ideologies of *juche* and *seongun*; the state in effect entirely internalized and indigenized socialism.<sup>80</sup> The retention of socialism was necessary because it allowed the state to explicate the principles of the centrally-planned economy in the constitution itself. By eliminating any references to communist or Marxist-Leninist ideology, it avoided having to address the awkward question of when the state might begin to wither away, as is essential to the dictates of communism and Marxist-Leninist thought.<sup>81</sup> Instead, the *juche*-infused state was referred to as the "most superior state and social system" (*gajang uweolhan gukkasahoejedowa jeongchibangsik*) as designed by Kim Il-sung, and the citizens of the *juche* state were collectively seen as a peculiar society-family hybrid united through *juche*.<sup>82</sup>

<sup>76</sup> *Id.* art. 3 (affirming that *juche* and *seongun* are simultaneously the guiding principles of the DPRK).

<sup>77</sup> See Ilpyong J. Kim, *Kim Jong-il's Military First Politics*, in *NORTH KOREA: THE POLITICS OF REGIME SURVIVAL* 59 (Young Whan Kihl & Hong Nack Kim eds., 2006); JAE-CHEON LIN, *KIM JONG IL'S LEADERSHIP OF NORTH KOREA* 153–55 (2009).

<sup>78</sup> 2009 DPRK CONST. arts. 59 (entrusting the military with carrying out *seongun* and protecting the leadership), 102 (giving the chairman of the NDC complete power over the military).

<sup>79</sup> *Id.* arts. 103.4 (granting the chairman of the NDC the power to ratify or abrogate all international treaties), 103.5 (granting the chairman of the NDC the power of special judicial pardon). The power of special pardon was formerly invested in the Presidium of the Supreme People's Assembly.

<sup>80</sup> In comparing the 2009 constitution with the 1998 constitution, for instance, the wording of article 40, which claims that the DPRK state shall train all workers, remained the same except for one crucial change. The 1998 version claimed that workers will be "builders of socialism and communism" (*sahoejuui, gongsanjuui geonseolja*), while the 2009 versions stated they will be only "builders of socialism" (*sahoejuui geonseolja*).

<sup>81</sup> 2009 DPRK CONST. art. 34 (stating that the economy is to be centrally-planned and that the DPRK state will design the plan in accordance with the development of a socialist economy). For the clearest expression of Marxism requiring the state to wither away, see FREDRICK ENGLES, *HERR EUGEN DÜHRING'S REVOLUTION IN SCIENCE* (1878) (known as the Anti-Dühring treatise).

<sup>82</sup> 2009 DPRK CONST. Preamble.



By blurring the lines between society and family, it no longer appeared exceptional or unusual that leadership would pass from Kim Il-sung to his son Kim Jong-il, and from Kim Jong-il to his son Kim Jong-un.

The second significant change was that the 2009 Constitution did not make any additions, emendations, or acknowledgements concerning the process of marketization and economic reform. The Constitution of 2009 showed quite clearly that the state was firmly in control—dispelling any rumors to the contrary—and that the military and Kim Jong-il were firmly entrenched in unassailable leadership positions; it also implicitly indicated that whatever marketization and economic change may occur would be in the service of state control and never the other way around. Thus, while the articles detailing the rights of overseas Koreans and of foreigners in the DPRK and asserting state control over the economy were retained, the expanded and enhanced powers of the state concentrated in Kim Jong-il as Chairman of the NDC made it clear that the state, not the people, will be the engine of economic change.<sup>83</sup>

The Constitution of 2009 left a central issue of constitutional law in North Korea unresolved: if the successive constitutions of North Korea were little more than legal restatements of official political principles and party directives, what is to keep the KWP from writing the next constitution in a way that reverses the permissive environment for free-market experiments and re-imposes a more constrained environment? If market trust is necessary for sustained economic growth and expansion, how can it evolve in a system that has little legal consistency? China addressed these issues by institutionalizing a new model for political office, moving away from the ruler-for-life model of Mao Zedong and Deng Xiaoping and toward a socialist version of term-limits.<sup>84</sup> The standardization of business and investment law isolated and segregated the Chinese markets from the vagaries of political change, constitutional law, and non-economic jurisdictions of domestic law.<sup>85</sup> The North Korean system has not responded in quite the same way. First, it has not standardized the top leadership of the party or the state in any recognizable way—North Korea remains essentially a hereditary socialist monarchy. In addition, while some elements of economic law related to business and investment have been greatly expanded and enhanced, they have not been separated from other elements of politics and law as they have been in China. As a result, North Korean economic law, in spite of the constitutional legitimacy that it has been granted, remains a jurisdictional nightmare that can only be corrected through extensive and meaningful legal reform.

### *B. The structure of the legal system*

The North Korean legal system does not clarify or resolve issues relating to the evolution of constitutional law and the successive changes in governance and

<sup>83</sup> *Id.* arts. 15 (rights of overseas Koreans), 16 (rights of foreigners in the DPRK).

<sup>84</sup> Yiu-Chung Wang, *Political Reform and Democratization in China under the Leadership of Hu Jintao and Wen Jiabao*, in *PUBLIC GOVERNANCE IN ASIA AND THE LIMITS OF ELECTORAL DEMOCRACY* 57 (Brian Bridges & Lok Sang Ho eds., 2010).

<sup>85</sup> Leng Jing, *Commercial Regulatory Reform in China during Transition: An Alternative Path to the Regulatory State*, in *LEGAL REFORMS IN CHINA AND VIETNAM: A COMPARISON OF ASIAN COMMUNIST REGIMES* 226 (John Gillespie & Albert H. Y. Chen eds., 2010).

policy. If anything, the application and enforcement of North Korean law through the courts only complicates those issues because the courts do not serve as institutions of legal arbitration or interpretation. Rather, their sole function seems to be to facilitate the exercise of power in the interest of the state. In essence, the state determines the parameters of justice and fairness, and the courts reinforce those parameters almost as a form of public pedagogy.<sup>86</sup> The courts inculcate what the state considers “right” thought and behavior through the application of the law.

The judiciary in North Korea is not independent and there is no possibility for judicial review. The SPA Presidium handles the task of legal interpretation and it is the duty of the courts to enforce those interpretations, rather than reinterpret or challenge existing legislation.<sup>87</sup> Members of the judiciary are criminally liable to the SPA Presidium if they fail to enforce SPA interpretations of existing law by rendering what the state sees as unjust judgments.<sup>88</sup> The security apparatus of the state can intervene in the judicial process at any time.<sup>89</sup> Important political cases are almost always removed entirely from the hands of the courts by the Ministry of People’s Security, which along with the Justice and Security Commission of the Central People’s Committee oversees the judicial system and refers issues directly to the Ministry of State Security.<sup>90</sup> This allows for legal decisions to be rendered with only a hearing before an Extraordinary Tribunal, since the Ministry of State Security is not a part of the judiciary and is not required to hold formal trials. Many political crimes in the DPRK—especially counter-revolutionary crimes or the crime of ideological divergence—that carry a mandatory death sentence are therefore frequently adjudicated and sentenced outside of the judicial system with almost no possibility for appeal.

The formal judicial system consists of two separate but interrelated elements: the courts (*jaepanso*) and the procuracies (*geomchalso*). The court system consists primarily of a three-tiered judicial system: at the top is the Central Court, followed by the provincial courts and the People’s Court.<sup>91</sup> The Central Court is the highest court in North Korea; it monitors and supervises all subordinate

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<sup>86</sup> 2009 DPRK CONST. art. 156.3 (noting that public prosecutors have the duty to protect the state by exposing criminals and all those who transgress the law); accord 1998 DPRK CONST. art. 150.3; 1992 DPRK CONST. art. 165.3; 1972 DPRK CONST. art. 144.3.

<sup>87</sup> 2009 DPRK CONST. art. 162.2 (requiring the courts to enforce the laws and struggle actively against class enemies); accord 1998 DPRK CONST. art. 150.2; 1992 DPRK CONST. art. 155.2; 1972 DPRK CONST. art. 136.2.

<sup>88</sup> 2009 DPRK CONST. arts. 158 (holding public prosecutors accountable to the SPA and the SPA Presidium), 168 (holding courts accountable to SPA and SPA Presidium); accord 1998 DPRK CONST. arts. 152, 162; 1992 DPRK CONST. arts. 167, 160; 1972 DPRK CONST. arts. 146, 142.

<sup>89</sup> 2009 DPRK CONST. art. 164 (noting paradoxically that trials are open to the public unless the law decides they should be closed to the public); accord 1998 DPRK CONST. art. 158; 1992 DPRK CONST. art. 157; 1972 DPRK CONST. art. 138; 1948 DPRK CONST. art. 86.

<sup>90</sup> This is what happened when the U.S. journalists Laura Ling and Euna Lee were caught and arrested for illegally entering North Korea. See, e.g., Justin McCurry, *North Korea sentences two US journalists to 12 years in jail*, THE GUARDIAN, June 8, 2009, <http://www.guardian.co.uk/world/2009/jun/08/north-korea-us-journalists>.

<sup>91</sup> See Koo-Chin Kang, *Machinery of Justice in North Korea*, 5 KOREAN J. COMP. L. 123, 124 (1977) (describing the structure of the North Korean judicial system). The main courts that exist outside of this three-tiered structure are the Military Courts and the Railroad Courts. *Id.* at 127. A separate organ also exists outside of the court system to adjudicate specific matters of family law and inheritance for North Korean citizens. See Eun-jung Lee, *Family Law and Inheritance Law in North Korea*, 5 JOURNAL OF KOREAN LAW 172 (2005).

courts.<sup>92</sup> The normal bench of the Central Court is composed of a Chief Justice and two People's Assessors (*inmin cheomsimwon*), although in appeals cases and in important cases of original jurisdiction (including certain types of trade cases), the bench can contain three judges.<sup>93</sup> The SPA appoints judges to five-year terms, the usual time span between national conventions of the SPA.<sup>94</sup> Below the Central Court are lower courts that work in parallel with the Central Court. There are twelve provincial courts, which serve as the highest courts of appeal and have original jurisdiction in each of the twelve provinces. At the lowest level are the People's Courts, which can vary in number depending on caseloads. At nearly every level of the court system, the most important criterion in appointing judges is not legal experience or legal education but rather political loyalty and ideological reliability.<sup>95</sup> The only area of law where experience and expertise are slowly being cultivated among judges is in the area of trade and economic law.

The procuracies—administrative bodies that apply the law of North Korea to individual cases—follow this three-tiered system with a separate chain of responsibility to the Central Procurator's Office, the highest procuracy in the DPRK.<sup>96</sup> The procuracies assign prosecutors and assessors to legal proceedings, and assign defense lawyers to the accused in certain criminal cases. As is the case with judges, legal experience and education are not necessary qualifications for appointment as a prosecutor, assessor, or lawyer. Loyalty to the system is far more important. There is no bar association that oversees or regulates legal assistance in either civil or criminal cases. Consequently, the judicial system and the legal practitioners who work within it, including defense lawyers, work for the interests of the state and not for the interests of individual citizens.<sup>97</sup> In more mundane aspects of civil law, such as divorce, this does not create noticeable difficulties, but it does in the realm of criminal law, where appeals are rare and acquittals even rarer.<sup>98</sup>

North Korea may be the only country in the world to enforce collective punishment for certain criminal violations, especially crimes against the state.<sup>99</sup> Collective punishment means that if one family member is found guilty of such a crime, the entire family becomes politically suspect and may experience a catastrophic decline of status and be denied access to things such as education,

<sup>92</sup> 2009 DPRK CONST. art. 167; *accord* 1998 DPRK CONST. art. 161; 1992 DPRK CONST. art. 160; 1972 DPRK CONST. art. 141; 1948 DPRK CONST. art. 89.

<sup>93</sup> 2009 DPRK CONST. art. 163; *accord* 1998 DPRK CONST. art. 157; 1992 DPRK CONST. art. 156; 1972 DPRK CONST. art. 137; 1948 DPRK CONST. art. 84 (though number of judges and assessors is not specified).

<sup>94</sup> 2009 DPRK CONST. art. 160; *accord* 1998 DPRK CONST. art. 154; 1992 DPRK CONST. art. 153; 1972 DPRK CONST. art. 134; 1948 DPRK CONST. art. 83 (though length of term is not specified).

<sup>95</sup> CHOI CHANG-DONG, 2 BEOPHAKJAGA BON TONGILMUNJE [KOREAN UNIFICATION FROM A JURIST'S PERSPECTIVE] 331–333 (2002) (trans. by author).

<sup>96</sup> 2009 DPRK CONST. art. 155; *accord* 1998 DPRK CONST. art. 149; 1992 DPRK CONST. art. 164; 1972 DPRK CONST. art. 145; 1948 DPRK CONST., art. 92.

<sup>97</sup> CHOI, *supra* note 95, 353–57.

<sup>98</sup> While acquittal is rare, pardon is always possible, under exceptional circumstances. For lesser sentences, the state determines conditions of parole, which tend to be harsh. See KWON JAEYEOL ET AL., BUKHAN UI BEOPCHEGYE [THE NORTH KOREAN LEGAL SYSTEM] 276–78 (2004) (trans. by author).

<sup>99</sup> LIM SOON-HEE ET AL., WHITE PAPER ON HUMAN RIGHTS IN NORTH KOREA 97–101 (Korea Inst. for Nat'l Unification, 2006).

public distribution of food, and employment.<sup>100</sup> Such families are often relocated to marginal areas of the country, to reflect their marginal status, and it is nearly impossible for someone from a politically suspect background to marry into a "good" (politically reliable) family.<sup>101</sup> No one from a family with a politically compromised past background may live in Pyongyang.<sup>102</sup>

### 1. *The emergence of exceptional law*

There has never been any comprehensive program of meaningful legal reform in North Korea; if the law proves inadequate or inefficient in delivering the type of justice required by the state, the KWP simply rewrites the law to assimilate the new demands and prerogatives of state power and party leadership.<sup>103</sup> This type of response provides a cautionary precedent to those in the present who may advocate substantive reform in North Korea's legal precedent. In the past two decades or so, however, there has been a steadily expanding body of new legislation that collectively constitutes an exception to the usual practice of merely rewriting, updating, or reconstructing various elements of existing legislation. This new legislation addresses aspects of the expansion and transformation of the North Korean economy, especially in the context of interacting with foreign markets and enterprises. As this new legislation does not replace or reform any existing pieces of state legislation or constitutional law, and because the new areas of economic expansion and regulation occur largely outside the strict context of state-society relations in North Korea, this newly emergent body of law can properly be called "exceptional law."

Exceptional law is in some sense generated by the need for the state to engage in economic expansion and transformation while also controlling the process through which this expansion and transformation occurs. Some of this legislation is a formalized statement of state measures to regain control of private marketization that occurred in the mid-1990s as a result of floods, famines, and demographic dislocation.<sup>104</sup> As Stephan Haggard and Marcus Noland described it:

Reform should not necessarily be interpreted as an effort to liberalize the

<sup>100</sup> *Id.* at 87–95. For a fictional account based on interviews with North Korean refugees residing in Seoul, see HYEJIN KIM, *JIA: A NOVEL OF NORTH KOREA* (2007).

<sup>101</sup> LIM SOON-HEE ET AL., *supra* note 99, at 114.

<sup>102</sup> See *Pyongyang Elite Key to Regime's Survival*, CHOSUN ILBO, January 4, 2012, [http://english.chosun.com/site/data/html\\_dir/2012/01/04/2012010400633.html](http://english.chosun.com/site/data/html_dir/2012/01/04/2012010400633.html).

<sup>103</sup> For example, the new Criminal Code of 1987 may have replaced the more authoritarian and draconian Criminal Code of 1974, but not because the old code was in need of reform; rather, it was done because the posture of the DPRK state had changed and the new laws reflected the new disposition of state and party toward the citizens of North Korea. See CHOE TAL-GON, *BUKHANBEOP IMMUN* [Introduction to North Korean Law] 316–320 (1998) (comparing the 1974 and 1987 criminal codes); Soo-Am Kim, *THE NORTH KOREAN PENAL CODE, CRIMINAL PROCEDURES, AND THEIR ACTUAL APPLICATIONS* 8–9 (2006). The same is true for later revisions in 1999 and 2004, neither of which undermined the supremacy of politics (via the KWP) over law. On the 2004 revision, see In-Sup Han, *The 2004 Revision of Criminal Law in North Korea: A Take-Off?*, 5 SANTA CLARA J. INT'L L. 122 (2006).

<sup>104</sup> ANDREW S. NATSIOS, *THE GREAT NORTH KOREAN FAMINE: FAMINE, POLITICS, AND FOREIGN POLICY* 89–121 (2001); HAZEL SMITH, *HUNGRY FOR PEACE: INTERNATIONAL SECURITY, HUMANITARIAN ASSISTANCE, AND SOCIAL CHANGE IN NORTH KOREA passim* (2005).

economy. Rather, it can be interpreted as an effort to control a process of decentralization and marketization that emerged out of the ashes of the PDS [Public Distribution System] and was seen as a threat to the state's political as well as economic control.<sup>105</sup>

While the constitutions of 1998 and 2009 contain elements that permit individual entrepreneurial activity, the bulk of exceptional law creates semi-autonomous spaces in which high-volume international trade can occur in North Korea in a manner that generates much needed revenue for the state and at the same time allows the state to minimize or manipulate the impact of this trade on the domestic markets.

The history of these types of arrangements and the exceptional law that has been produced as a result can be traced back to the Joint Venture Law of 1984, the first law that changed the country's economic practice and allowed for the North Korea state to engage in direct economic enterprise in partnership with private foreign entities.<sup>106</sup> The 1984 law created a rudimentary foundation for economic potential and opened up new possibilities for economic reform on the model of China's economic reforms during the 1980s under Deng Xiaoping.<sup>107</sup> But it was only in 1991 that exigent circumstances, such as the progressive opening of China, North Korea's largest trading partner, forced North Korea to take concrete action and create the Rajin-Seonbong free economic trade zone known as Raseon.<sup>108</sup> However, whatever promise Raseon may have held in the beginning was quickly undone by two factors: (1) its remote location in the northeastern part of North Korea near the border with Russia, which made any linkage effects with the rest of the domestic economy nearly impossible, and (2) the economic dislocation caused by natural disasters in the mid-1990s, which made it impossible to create or cultivate any kind of economic momentum. It was only in the late 1990s that North Korea turned, out of necessity and perhaps desperation, to the process of systematic economic reform and to the drafting of exceptional law.<sup>109</sup>

In August 2000, the South Korean conglomerate Hyundai entered into an agreement with North Korea to establish the Gaeseong Industrial Complex (GIC), an agreement that came to fruition with the official establishment of the GIC in June 2003.<sup>110</sup> In September 2002, North Korea announced plans to establish

<sup>105</sup> STEPHEN HAGGARD & MARCUS NOLAND, *FAMINE IN NORTH KOREA: MARKETS, AID, AND REFORM* 52 (2007).

<sup>106</sup> Doowon Lee, *North Korean Economic Reform: Past Efforts and Future Prospects*, in *REFORMING ASIAN SOCIALISM: THE GROWTH OF MARKET INSTITUTIONS* 328 (John McMillan & Barry Naughton eds., 1996).

<sup>107</sup> On the Chinese economic reforms, see, for example, GREGORY C. CHOW, *CHINA'S ECONOMIC TRANSFORMATION* 46–62 (2002) (detailing the political motivations for and contents of the reforms initiated by Deng Xiaoping); YASHENG HUANG, *CAPITALISM WITH CHINESE CHARACTERISTICS: ENTREPRENEURSHIP AND THE STATE* 85–108 (2008) (detailing the economic policies that drove the early stages of reform); JINGLIAN WU, *UNDERSTANDING AND INTERPRETING CHINESE ECONOMIC REFORM* 57–73 (2005) (detailing the intent of incremental reform under Deng Xiaoping).

<sup>108</sup> See Chin Kim, *North Korean and Chinese Joint Equity Venture Laws: A Comparison*, 2 *TRANSNAT'L LAW* 531 (1989) (detailing the origins of North Korean experimentation with legal reform to permit investment modeled after China's reforms).

<sup>109</sup> Brendon A. Carr, *Ending the Hermit Kingdom's Belligerent Mendicancy*, 6 *ASIA PAC. L. REV.* 29 (1998) (detailing the circumstances that necessitated internal reform and external assistance).

<sup>110</sup> *Construction for Kaesong Complex Kicks Off*, KOREA TIMES, July 1, 2003.

another free trade zone at Sinuiju, in the northwestern part of the country near the border with China.<sup>111</sup> It also took the unusual step of appointing Yang Bin, an accomplished, savvy, and extraordinarily wealthy entrepreneur of ethnic Chinese descent and Dutch nationality, to coordinate the planning and policy of Sinuiju.<sup>112</sup> Aside from the GIC and Sinuiju, North Korea also entered into a cooperative economic arrangement with South Korea for a number of other projects, such as the repair and restoration of the Donghae-Bukbu and Gyeongui railway lines that connect North and South Korea, and the Geumgangsán resort as well as the transportation infrastructure leading from South Korea to Geumgangsán.<sup>113</sup>

As if to anticipate the exceptional law that these ventures and initiatives would require, in 1999 Kim Il-sung University in Pyongyang established its first Law Faculty, mostly to concentrate on the drafting of economic law, and even invited foreign legal experts to lecture on specialized aspects of international law such as tax and bankruptcy law. In 2002, Kim Il-sung University published a compendium on international law that, perhaps surprisingly, provided actual useful information rather than unproductive propaganda, potentially a sign that North Korean attitudes toward international law were undergoing revision.<sup>114</sup> In September 2003, the DPRK re-established the national Tax Collection Agency, which had been abolished by the Constitution of 1972. All of these developments indicated that North Korea was moving toward some type of meaningful economic reform and exploring the potential of buttressing it on some type of consistent legal framework.

And yet, in spite of all these initiatives and efforts, consistency and coherence have proven elusive in North Korea's efforts at reform. While North Korea's economic changes may appear to be part of a broad program of comprehensive economic reform, all of the initiatives within this program have been separate experiments, as if North Korea is really trying several different approaches to see which model provides maximum economic returns with minimal political and legal restructuring.<sup>115</sup> Each discrete experiment has been accompanied

<sup>111</sup> *Pyongyang's Capitalist Dream*, S. CHINA MORNING POST (H.K.) Sept. 28, 2002, at 14.

<sup>112</sup> This plan was derailed when China arrested Yang Bin in 2002 on charges of tax evasion, for which he was convicted and sentenced to 18 years in prison in 2003. See Henry Chu, *China Snarls North Korean Reform*, LOS ANGELES TIMES, Oct. 5, 2002, <http://art.latimes.com/2002/oct/05/world/fg-yang5>; Jia Heping, *The Three Represents Campaign: Reform the Party or Indoctrinate the Capitalists?*, 24 CATO J. 261, 270 (2004) (detailing the political environment that led to the arrest of Yang Bin and others).

<sup>113</sup> These railways are located in the eastern and western parts of the demarcated boundary between North and South Korea. The links were severed after the Korean War, and then their repair and reconstruction became a part of South Korean investment in North Korea. The lines were briefly and symbolically opened in 2007, but were almost as quickly shut down due to souring political relations. See Choe Sang-Hun, *Korean Train Crossing Seen as Sign of Progress*, N.Y. TIMES, May 17, 2007, <http://www.nytimes.com/2007/05/17/world/asia/17cnd-korea.html>.

<sup>114</sup> Sahoekwahakwon beophakyeonguso [Academy of Social Sciences Institute of Legal Studies], GUKJEBEOP SAJEON [DICTIONARY OF INTERNATIONAL LAW] (2002) (trans. by author). On North Korea's change in relation to international law, see Lee Jang-Hie, 6.15hu bukhaniui gukjebeope daehan taedo byeonhwawa jeonmang [Change and Prospects Regarding North Korea's Attitude on International Law after June 15] in 6.15IHU BUKHANBEOPUI BYEONHWAWA JEONMANG [AFTER JUNE 15: CHANGE AND PROSPECTS IN NORTH KOREAN LAW] 65 (Lee Jang-Hie ed., 2003). The reference to June 15 is in relation to the changes produced by the Joint Declaration between North and South Korea on June 15, 2000.

<sup>115</sup> For early assessments, see, for example, Haksoo Ko, *Foreign Investment in North Korea: An Assessment of Recent Laws and Regulations*, 38 VA. J. INT'L L. 221 (1998); Bryan Greyson et al.,

by an equally discrete set of laws, with little attention given to the need for consistency among the legal regimes that govern the economic activity within the separate regions and projects.

Moreover, there is little if any linkage between the specific economic reforms that address domestic economic issues, such as the reforms of summer 2002 that liberalized the price of rice in domestic markets and introduced a form of rent for housing and user-pay models for utilities, and the reforms of the grander experiments that opened up selected parcels of the domestic economy to foreign economies and investors, and with them, foreign laws and regulations for doing business. The result is a haplessly confused jumble of overlapping and unclear jurisdictions, under opaque and at times contradictory legal regimes. As necessary as these economic reforms and economic restructuring were for North Korea's present and future viability, they have reached their limits and exhausted their potential under the current legal framework. North Korea stands in need of real legal reform. Before any of North Korea's plans for economic reform and reconstruction can succeed, North Korea must first engage with comprehensive legal reform, of the type and to the degree that may even force a fundamental restructuring of the political regime, or at least of those elements that relate to the interface between legal and political institutions. There is some risk involved, of course, but it is an unavoidable risk; quite literally, North Korea cannot afford to ignore the need for comprehensive economic and legal reform much longer. There are two primary reasons for this: (1) the current legitimacy of the North Korean regime is heavily dependent on its ability to deliver sustained economic growth, particularly in the aftermath of the economic crises of the mid-1990s; and (2) the future stability of the North Korean regime, particularly in relation to the eventual transition to the next successor (most likely Kim Jong-un), is heavily dependent on ensuring institutional continuity. Without a coherent plan for sustained economic growth, and without a consistent institutional framework to encourage and protect sustained economic growth, the legitimacy and the stability of the North Korean government will be seriously, and perhaps irreparably compromised.

### *C. Unresolved elements in the context of reform*

Consistency is one of the most important characteristics for any regime of economic reform and restructuring, especially one that hopes (or in this case, needs) to draw in foreign investment and outside partnerships. Investment and manufacturing are long-term commitments, and any potential participant wants to know that the laws and regulations that are in place to attract the initial entry into the market will still be in place years later when the enterprise in question begins to yield profits and dividends.<sup>116</sup> Aside from the fact that the legal regimes that govern each of the separate economic experiments in North Korea do not work together in

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*Foreign Investment Laws and Regulations of the Democratic People's Republic of Korea*, 21 *FORDHAM INT'L L.J.* 1677 (1998).

<sup>116</sup> This claim is central to institutional theories of law and investment. See, e.g., M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 69–79 (3d. ed. 2010) (detailing the parameters of insecurity in foreign investment); ALAN D. MORRISON & WILLIAM J. WILHELM, JR., *INVESTMENT BANKING: INSTITUTIONS, POLITICS, AND LAW* 65–95 (2008) (outlining the institutional theory to investment banking).

functionally consistent ways, there are also elements of the larger institutional edifice of the North Korean state that preclude the possibility for the type of meaningful legal reform that is necessary for the economic restructuring to succeed.

State succession, for instance, must be legally stable and predictable. As discussed above, North Korea has a long history of repudiating existing laws or simply rewriting them to fit new political campaigns or to address the enhanced power arrangements of the state at the directive of the KWP. This characteristic undermines any sense of faith in a stable market ruled by a consistent legal regime, since at any point the existing rules and regulations seem liable to revision or reconsideration. It is not by sheer coincidence that China, in the process of reform, began to institutionalize its legal system, moving away from the ruler-for-life models of Mao Zedong and Deng Xiaoping and toward the more fixed-term style of leadership initiated by Jiang Zemin and institutionalized in the succession of Hu Jintao.<sup>117</sup> By contrast, there is absolutely nothing in the North Korean Constitution about the process of succession. It has often seemed a matter of intense guesswork to determine who will eventually succeed Kim Jong-il, let alone to discern whether his successor will be committed to meaningful reform or will retrench the ideological rigors of the past and jeopardize current economic initiatives and enterprises.

Most of the current legal regimes governing the exceptional economic sectors in North Korea are purely domestic law, not international law; those that are not are certainly peculiar at best.<sup>118</sup> Eventually, however, if North Korea wants to continue to expand its economic initiatives in the area of foreign investment and partnership, it will need to introduce some type of legal arrangement that would be considered of full standing in international law.<sup>119</sup> This raises the question of how realistic it would be that North Korea would actually enforce such an arrangement, given its past haphazard and inconsistent adherence to the rules of international law. There is also the more procedural question of how international treaties are incorporated into North Korea's legal system. Such a process would have to be transparent to external observers to provide a guarantee that it happened, and if it were to have any legal significance at all, it would also need to be protected from

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<sup>117</sup> See generally Donald Clarke, Peter Murrell, and Susan Whiting, *The Role of Law in China's Economic Development, in CHINA'S GREAT ECONOMIC TRANSFORMATION* 375 (Loren Brandt and Thomas G. Rawski eds., 2008) (detailing the institutionalization of legal structures during the period of economic reform and restructuring); Hochul Lee, *Political Institutionalization as Political Development in China*, 19 J. CONTEMP. CHINA 559 (2010) (arguing that the goal of institutionalization was to facilitate economic growth); Andrew J. Nathan, *Authoritarian Resilience*, 14 J. DEMOCRACY 6 (2003) (noting how institutionalization of political offices in China does not necessarily lead to democratization).

<sup>118</sup> Indeed, South Korea had to make several legal exceptions in creating economic relations with North Korea simply due to a lack of mutual legal recognition of each other's legal sovereignty. This made it difficult to consider North-South agreements as formal treaties in international law. Most important among these exceptional legal statements are the four agreements: Buknamsaiui tujabohoe gwanhan habuiseo [Agreement on Investment Protection between the South and the North] (2000) (trans. by author); Buknamsaiui cheongsangyeoljee gwanhan habuiseo [Agreement on Account Settlement between the South and the North] (2000) (trans. by author); Buknamsaiui sodeuke daehan junggwasebangji habuiseo [Agreement on the Prevention of Double Taxation of Income between the South and the North] (2000) (trans. by author); and Buknamsaiui sangsabunjaenghaegyeoljeolchae gwanhan habiseo [Agreement on Procedures for Resolution of Commercial Disputes between the South and the North] (2000) (trans. by author).

<sup>119</sup> Sang-Jick Yoon, *Critical Issues on the Foreign Investment Laws of North Korea for Foreign Investors*, 15 WIS. INT'L L. J. 325 (1997).



the type of political revisions that have been so prevalent in North Korea's legal system. North Korea certainly has the right to choose the treaties by which it will be bound, as does any sovereign nation-state, but once bound, especially in the realm of international economic law, North Korea will need to move toward placing these treaties beyond political revision—in essence putting the international treaties above the state and party in a way that does not currently occur. North Korea will also have to diminish its current predilection for using treaty denunciation and unilateral revision as a tactic of coercion for more favorable terms, as it has done in the past with the Non-Proliferation Treaty (among others).<sup>120</sup> It has served North Korea well in terms of international politics at times, but it is disastrous in its capacity to undermine the type of trust and consistency required to build an open economy.

While much has been written about the potential for actual marketization in North Korea, much less has been written to discern how much of this marketization generates or is reliant upon extra-legal behavior. Markets certainly exist in North Korea, but many of them are illegal and continue to operate only because local officials, themselves often in dire economic straits, are susceptible to bribery and other corrupt activities in exchange for not enforcing the law.<sup>121</sup> Even in legal markets, often merchants must buy their way into the market by bribing or giving gifts to officials to maintain a space at the market and the right to trade there, or to guarantee against harassment or arbitrary detention during periods of crackdown on illicit activity.

Corruption is obviously not unique to North Korea, but in an uncertain legal climate the problem is greatly compounded. China has dealt with the issue of corruption by expanding its anticorruption laws, ratcheting up the punishments, then enforcing them with a periodic ruthlessness that pushes anticorruption enforcement into a potential human rights violation.<sup>122</sup> In comparison, North Korea's anticorruption actions seem unpredictable and politically motivated.<sup>123</sup> Given the persistence of black market activities associated with corruption in North Korea, including counterfeiting, human trafficking, and narcotics, it is clear that enforcement is open to negotiation in ways that seem to circumvent any recognizable system of legal procedure.<sup>124</sup>

There are other legal questions that arise out of the uncertainty and opacity of the North Korean legal system that militate against further economic expansion. For instance, what is the status of an executive order in North Korea? In spite of all of the rules and regulations that exist in North Korea, a tremendous amount of

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<sup>120</sup> SEONG HO AN, BUKHANUI WIGI, GIHOE GEURIGO SEONTAEK [CRISIS, CHANCE AND CHOICE OF NORTH KOREA] 123-126 (2009) (trans. by author) (detailing North Korea's exploitation and manipulation of international law and weapons of mass destruction). See also Choung Il Chee, *Diversion of the Han River by North Korea in International Law*, 16 KOREAN J. COMP. L. 28 (1988) (detailing unilateral revision and abrogation of international treaties in constructing a dam and diverting water on a shared river between North and South Korea).

<sup>121</sup> See Kongdan Oh and Ralph Hassig, *North Korea between Collapse and Reform*, 39 ASIAN SURV., 287, 290 (1999).

<sup>122</sup> But see Guoguang Wu, *China in 2009: Muddling through Crises*, 50 ASIAN SURV. 25, 34-36 (2010) (discussing how China's recent forceful anticorruption campaigns were also partially tainted by political motivations).

<sup>123</sup> Byung-Yeon Kim, *Markets, Bribery, and Regime Stability in North Korea*, (E. Asia Inst. Working Paper No. 4, 2010) (detailing corruption based upon interviews with North Korean refugees).

<sup>124</sup> *Id.*

policy decisions come down to Kim Jong-il's directives. Do his executive orders and directives have immediate binding force in law? Do they trump any existing law or regulation, even in the constitution or in areas of exceptional law? Practice indicates that such orders and directives are absolute and binding, but the lack of procedural or institutional clarity makes this another area that needs to be addressed by any comprehensive program of legal reform in North Korea.

### III. THE REGIMES OF EXCEPTIONAL LAW IN THE DPRK

A survey of the different legal regimes that are comprised under the general rubric of exceptional law highlights many of the inconsistencies and instabilities that are embedded in much of North Korean law. In a general sense, the corpus of exceptional law can be broken down into two categories: (1) *common exceptional law*, which consists of laws that generally address the expansion of marketization and international trade in North Korea and are applicable uniformly throughout North Korea; and (2) *specific exceptional law*, which consists of the laws and regulations that apply only to specific areas and projects and delineate the boundaries of permissible action and constrained jurisdiction that pertain only to those areas and projects. In a consistent regime of exceptional law, the specific set of law would address or clarify relevant issues or textual ambiguities to facilitate or enable the economic activity in question.<sup>125</sup> This is not the case in North Korea, where a good portion of the laws and regulations that constitute specific exceptional law are either exemptions from the general rules or simply different regimes that at times override or even contradict the common body of exceptional law. Since there is little or no jurisprudence in the DPRK on how to resolve issues that relate to the conflict of laws, it remains unclear whether these exemptions have substantive legal resonance or are granted as an act of political comity that can be revoked.

In addition to the inconsistencies between common and specific exceptional law, each of the legal regimes established through the enactment of specific exceptional laws are also idiosyncratic and non-transferable from one specific zone or project to the next. Even the political motivations for these zones and their constituent projects are different. For example, the Raseon and Sinuiju free trade areas were founded as general free trade areas to attract general foreign investment; by contrast, the Gaeseong Industrial Complex and other cooperative ventures between North and South Korea, such as the Geumgangsansan resort, were economic aspects of a larger political initiative to improve and strengthen North-South relations. But these different motivations only compound the problems. Where the laws for one zone or project have become unproductive or dysfunctional, or have met with disfavor due to political vicissitudes, the laws still tend to remain on the books, coexistent with newer laws written to avoid similar problems or to

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<sup>125</sup> Note that the legal and jurisdictional obfuscations of the North Korean system, and also the idiosyncratic nature of the legal relationship between North and South Korea, utterly confounds the operative legal principle of *lex specialis derogat legi generali*. In the North Korean system, *lex generalis* always overrides *lex specialis*, and claims to the contrary are nearly unenforceable in North Korean courts. This is not due to a definitional fault in specific contexts, as described for instance by Erich Vranes, *The Definition of 'Norm Conflict' in International Law and Legal Theory*, 17 EUR. J. INT'L L. 395 (2006) (arguing through WTO jurisprudence that strict definitions of norm conflicts preclude the proper application of *lex specialis* and *lex posterior*). Rather, it is a systemic problem created by the peculiar relationship between institutions of law and politics in the DPRK state.

accommodate more recent political campaigns or initiatives. This leaves uncertainty as to which laws are in place at any specific point in time or which laws can be applied or invoked in which situations. Legal and political uncertainty and ambiguity may have served the regime well over the years. But in the area of exceptional law, there is simply no way to sustain any type of meaningful economic reform and expansion directed at external actors if it is positioned atop a textual foundation of inconsistent, contradictory, and ambiguous legal doctrines. The legal infrastructure of North Korea's economy is every bit as important as the physical infrastructure.

This section will first analyze the structure of common exceptional law in the DPRK, and then will analyze each of the regimes of specific exceptional law. The intent is to show the weaknesses in exceptional law, both common and specific, by arguing that the inconsistencies, ambiguities, and contradictions, accompanied by unclear terrains of jurisdiction, collectively represent a fundamental flaw in the process of economic restructuring that will continue to preclude effective economic reform without a concomitant and comprehensive program of legal restructuring and reform.

#### A. Common Exceptional Law in the DPRK

The common exceptional law includes all of the elements and specializations that one would expect to find in any body of trade and investment related law: laws of contracts, copyrights and intellectual property, torts, foreign exchange, bankruptcy, and so on. The details and peculiarities of this legislation, however, undermine the juridical coherence of exceptional law and weaken its ability to sustain meaningful economic reform.<sup>126</sup> In the Regulations on the Naming of Foreign-Invested Enterprises, for instance, there is a standard prohibition on naming any business with "names that are contrary to the sound life-style of the state and society" or "names that may deceive or mislead the masses."<sup>127</sup> There are no listed standards by which potential names may be vetted; clearly this is a blanket concession to the power of the DPRK state to intervene. These types of concessions, in explicit or implicit versions, are ubiquitous in much of the common exceptional law in the DPRK.

#### B. Case Study: Foreign Investment Law (1992)

Aside from the Joint Venture Law from 1984, another comprehensive piece of legislation that governs the actions of foreign actors and enterprises conducting business in North Korea is the DPRK Law on Foreign Investment.<sup>128</sup>

<sup>126</sup> See, e.g., SUNG CHULL KIM, NORTH KOREA UNDER KIM JONG IL: FROM CONSOLIDATION TO SYSTEMIC DISSONANCE 157-159 (2006) (detailing the entrenched preference for short term contracts given the lack of trust in property rights and other economic institutions).

<sup>127</sup> *Uigukintujagiop myeongchingjejeong gyujeong* [Regulations on the Naming of Foreign Invested Enterprises], 1999, art. 8.1 (barring names "contrary to the sound life-style" [*geonjeonhan saenghwalgipung*]), art. 8.4 (barring names that "deceive or mislead the masses" [*daejungul giman hageonna daejungege rihae*]) (N. Kor.) (trans. by author).

<sup>128</sup> *Uigukintujabeop* [Law on Foreign Investment], 1992 (N. Kor.) (trans. by author). Two other crucial pieces of legislation were passed in the same year, namely the *Uigukingieopbeop* [Law on

This law defines foreign investment and foreign enterprise and delineates the protective rights that apply to the foreign enterprise and related actors and actions, rules on employment and taxation, and dispute resolution mechanisms, among other things. The Law states that foreign-owned enterprises "may be set up and operated in designated areas," but it does not specify what or where these designated areas are, with the exception of expressing a preference for Raseon and other special economic zones.<sup>129</sup> The Law also states that it is the responsibility of the DPRK state to "protect the legal rights and interests of foreign investors and foreign-invested businesses" and to "provide conditions for their management activities," but the wording is somewhat opaque.<sup>130</sup> It seems that the DPRK state is empowered with legal authority to protect foreign companies, but without spelling out what protection means the law potentially provides a legal loophole to curtail the autonomy of foreign economic actors in the designated autonomous economic zones.

Similar forms of opacity appear elsewhere in this legislation, as is common throughout all common exceptional law in the DPRK. Foreigners may conduct business in North Korea and the state promises to make immigration procedures "convenient" (*pyeonri*) for them, but only in specially designated zones.<sup>131</sup> Since these zones can only be reached through inconveniently located border crossings with China, Russia, and South Korea, which are subject to periodic and unpredictable border closures based upon the foreign policy preferences of the DPRK regime, or through domestic travel via Pyongyang, which is difficult to get entry into in the first place, usually on North Korea's outmoded and unreliable domestic train service, it is unclear how this provides any sort of tangible advantage. Similarly, the law permits "overseas Koreans" (*haewi joseon dongpo*) to invest in North Korea, but it is unclear who is included in this category, giving the DPRK state considerable discretion to restrict investment to groups and person it deems appropriate.<sup>132</sup> As with the law on names, specific categories of identity are covered, but the contents or definition of those categories is nowhere provided in any consistent or transparent manner.

Regulations of financial transactions directly related to or necessary for foreign actors to conduct of business in North Korea are equally convoluted and open to conflicting interpretations and jurisdictions. All foreign investors and foreign-invested businesses must pay income tax, turnover tax, property tax, and other taxes, but without standardized domestic tax rates it is unclear what these taxes would be or if they would be consistently applied.<sup>133</sup> The obligatory nature of the taxes seems open to negotiation, as foreign actors can be given some tax

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Foreign Enterprise], 1992 (N. Kor.) (trans. by author) and the Hapjakbeop [Law on Contractual Joint Venture], 1992 (N. Kor.) (trans. by author).

<sup>129</sup> Law on Foreign Investment, *supra* note 128, art. 3 (designated areas), art. 9 (preference for economic zones).

<sup>130</sup> *Id.*, art. 4.

<sup>131</sup> *Id.*, art. 10. Given the early timing of this law, only Raseon is specifically mentioned as a special area. Standard regulations regarding entry of foreigners in the DPRK, which can be quite extensive and demanding, are found in the Chulipgukbeop [Immigration Law of the DPRK], 1996, ch. 3, arts. 19–30, ch. 4, art. 31–44 (trans. by author).

<sup>132</sup> Law on Foreign Investment, *supra* note 128, art. 5. See also SON HUI-DU, BUKHAN UI GUKJEOKBEO [NORTH KOREAN CITIZENSHIP LAW] 58–59 (1997) (noting the legal ambiguity of "overseas Koreans" in North Korean citizenship law) (trans. by author).

<sup>133</sup> Law on Foreign Investment, *supra* note 128, art. 17.

incentives for setting up operations in any of the specialized economic zones.<sup>134</sup> All of these taxes, as with all transactions in general, must be conducted in North Korean currency (DPRK won), the exchange rate of which is determined by the DPRK regime and which fluctuates according to non-standardized and non-internationalized measures and trends. Remittance of after-tax profit and income is permitted, subject to the Law of the DPRK on Foreign Exchange Control, which requires all currency to be converted into North Korean won and all transactions to channel through the DPRK's Foreign Trade Bank, which also determines fees and exchange rates.<sup>135</sup> The Law on Foreign Exchange Control also requires foreign investors and enterprises to employ North Korean labor, but since there are strict laws regulating the interaction of foreigners and DPRK citizens, this labor is actually governed by a contract with a government labor exchange agency.<sup>136</sup> Yet the Law does not specify which party determines wage rates, or who is legally liable for paying salary enhancements or subsidies such as unemployment, health insurance or compensation for work-related accidents.

Lastly, there is a security element that is involved with these arrangements which makes it very difficult for foreign investors and companies to engage in economic operations in the DPRK in compliance with the guidelines set forth in the Law. North Korea is trying to attract foreign investment not only to provide much needed income for its struggling economy; but probably also to attract the latest forms of investment-related technology in the hopes that it will be able to appropriate both the technology and the skills necessary to operate this technology self-sufficiently. Thus, the Law specifies specific sectors of investment that are open to foreign investment and explicitly spells out several "priority sectors" (*tujabumun*) which are given top priority and preferential treatment, such as exemption from all taxes.<sup>137</sup> Coupled with the requirement to use DPRK labor and the reserved right that nationalization and expropriation may occur if "unavoidable circumstances" (*bulgapihan sajeong*) require it, potential investors should be aware that any advanced technology risks ending up directly in the hands of the DPRK regime.<sup>138</sup> It is important also to remember that the Constitution of 1998 formalized the "military first" (*seongun*) policy, which means that any technology appropriated

<sup>134</sup> *Id.*, art. 9.2 (stating that "no income tax shall be payable for 3 years from the first profit-producing year and income tax may be reduced for up to 50 percent for the following two years."). It is unlikely that tax credits would cover property taxes, which would most likely be based on a negotiated land-lease value, as foreigners can lease land in designated areas for periods "up to" 50 years.

<sup>135</sup> Uihwagwanribeop [Law of the DPRK on Foreign Exchange Control], Jan. 31, 1993, *amended* 2004, art. 4, 6-7 (N. Kor.) [hereinafter Law on Foreign Exchange] (trans. by author). If after-tax profits are reinvested in North Korea, then income tax is waived on all reinvested funds. In the special economic zone of Gaeseong, exchange rates between international hard currencies are supposed to be determined by international exchange markets, but this does not apply to any transaction that involves North Korean currency. See Gaeseong Gongjeop Jigu uihwa gwanri gyujeong [Regulations on Management of Foreign Currency for Gaesong Industrial Zone], Feb. 25, 2004, arts. 6, 8 (N. Kor.), available at <http://eng.unikorea.go.kr/CmsWeb/tools/board/downloadAttachFile.req?fileId=F10000102066>.

<sup>136</sup> Law on Foreign Exchange, *supra* note 135, art. 16.

<sup>137</sup> Law on Foreign Investment, *supra* note 128, art. 7 (delineating priority sectors), art. 8 (specifying preferential treatment for priority sector enterprises). Priority sectors are defined as sectors "conducive to the introduction of high technology and other advanced technology, manufacturing of international competitive products, exploitation of natural resources, infrastructure construction, scientific research, and technological development." *Id.*

<sup>138</sup> *Id.*, art. 16 (requirement to use DPRK labor), art. 19 (right of nationalization or expropriation). The DPRK authorities unilaterally determine standards of compensation.

or nationalized by the DPRK regime would likely be available to the North Korean military. Taken together, the reserved right of nationalization and expropriation and the military first policy mean that foreign partners in any North Korean joint venture risk the real possibility of losing proprietary knowledge and technology, and of violating UN or other bilateral sanctions currently in place against North Korea.<sup>139</sup>

### *C. General Elements of DPRK Common Exceptional Law*

Most of the laws and other regulations that collectively compose the common exceptional law of the DPRK have default clauses that cover scenarios not addressed by the articles of the law in question. This is not unusual, nor is it unique to DPRK law. What makes it problematic in this context is the fact that the exceptional law is housed within and subservient to a larger political framework that is itself obliged to carry out the needs and requirements of the Korean Workers' Party. When one comes across a phrase such as "matters not covered by this Law shall be subject to the relevant law and regulation of the DPRK,"<sup>140</sup> a statement found consistently in most of the common exceptional law, then the state assumes jurisdiction by default, forcing contractors, foreign investors, and other economic actors to negotiate the vagaries and politics of the party-government interface of the DPRK system. The same holds true for nearly all the dispute settlement clauses of North Korean exceptional law, which usually offer limited options in the case of a dispute.<sup>141</sup> As an example, the Regulations on the Implementation of the Law on Foreign-Invested Banks reads:

Any dispute concerning banking business shall be resolved through consultation. In case of failure in consultation, it shall be settled by arbitration or legal procedures provided by the DPRK. A dispute may, by agreement of the parties, be referred to the court or arbitration organ of a third country for settlement.<sup>142</sup>

In other words, if North Korea wanted to assume jurisdiction, it could simply refuse to cooperate in the consultation, ensuring failure, and also refuse to agree on a third country, leaving arbitration through DPRK institutions as the only option for an aggrieved foreign party.

Language also plays a key and somewhat political role in the body of common exceptional law in the DPRK. All documents have to be filed in Korean;

<sup>139</sup> For United Nations Resolutions, see for example UN Security Council Resolution 1718 (October 14, 2006) and UN Security Council Resolution 1874 (June 12, 2009) (placing economic sanctions on North Korea in response to a nuclear test). For United States sanctions, see DIANNE E. RENNACK, CONG. RESEARCH SERV., RL31686, NORTH KOREA: ECONOMIC SANCTIONS (2006) (detailing the sanctions against North Korea).

<sup>140</sup> Daewi gyeonggyeyakbeop [DPRK Law on External Economic Contracts], Feb. 22, 1995, art. 8, (N. Kor.), available at [http://www2.law.columbia.edu/course\\_00S\\_L9436\\_001/North%20Korea%20materials/external%20contract.htm](http://www2.law.columbia.edu/course_00S_L9436_001/North%20Korea%20materials/external%20contract.htm).

<sup>141</sup> Kwang-Rok Kim, *Settling Business Disputes with North Koreans in the Advent of the External Economic Arbitration Law*, 16 TRANSNAT'L LAW. 401, 480 (2003).

<sup>142</sup> Uiguktujaeunhaengbeop sihaenggyujeong [Regulations on the Implementation of the Law on Foreign-Invested Banks], 1994, art. 68 (N. Kor.) (trans. by author).

if the original document is in a different language, an official translation must be provided by the litigating party. Payment of a variety of taxes is required, and all tax forms and documents must be filed in Korean.<sup>143</sup> In nearly all cases, if there is a dispute over the Korean version and versions in other languages, the Korean version is considered definitive and prevails.<sup>144</sup> There are even language issues with documents in Korean, particularly in relation to agreements between North and South Korea; as a result many agreements between North and South Korea have an appended glossary to specify precise meanings in cases where the languages of the two Koreas diverge.<sup>145</sup>

Another persistent element that runs through the common exceptional law is the general theme that investment and investment-related activities in North Korea are to serve the political and economic needs of the DPRK first and foremost; the economic needs of the outside investor are not at any point to override these. It is possible, for instance, to establish a wholly foreign-owned enterprise in North Korea, but in nearly every phase of planning and development, including selecting a location, the DPRK would have considerable power of control and supervision. According to the Regulations on the Implementation of the Law on Foreign-Owned Enterprises, a wholly foreign-owned enterprise may be established in certain economic sectors only if it fulfills at least one of the following conditions: (1) it supplies high-technology or other up-to-date technology; (2) it produces internationally competitive goods; or (3) it will improve the quality of existing DPRK products up to international standards.<sup>146</sup> At the same time, the foreign-owned enterprise must ensure that it does not engage in any activities that might interfere with the security of the DPRK, effect public health or the environment, or prove "detrimental to the sound ideas and emotions and the mode of life of the local people."<sup>147</sup> Foreign-owned enterprises are also precluded from certain sectors of the economy, such as education, broadcasting, public health, telecommunications, and "other sectors where the establishment of a foreign-owned enterprise is prohibited by the state."<sup>148</sup> An implied result of these articles is that what may have been a permissible sector at the start of an enterprise may not be so upon completion or after operations commence, making the entire operation illegal or subject to state expropriation.<sup>149</sup> The risks are considerable, and with venues of dispute resolution and arbitration open to political manipulation and party interference, the chances of

<sup>143</sup> *Uiguktujaeop mich uigukinsegeumbeop sihaenggyujeong* [Regulations on the Implementation of the Tax Law for Foreign-Invested Businesses and Foreign Individuals], Feb. 21, 1994, art. 7 (N. Kor.) (trans. by author).

<sup>144</sup> See, for example, *Daewigyeongjejungjaebeop* [DPRK Law on External Economic Arbitration], 1999, art. 37 (N. Kor.) (trans. by author), which states: "In case of a discrepancy between the Korean version and the translation, the former shall apply." Based on the language, the Korean language version is always assumed to be the original document (*joseoneo wonmun*).

<sup>145</sup> See, for example, *Namboksai charyangui dorounhaenge gwanhan gibunhapuiseo* [North-South Agreement on Vehicles and Road Traffic], N. Kor.-S. Kor., 2002 (trans. by author), which has an appended glossary with official equivalents in the Korean usage in North and South Korea. For the term "matter" or "item," for instance, the South specifies the Korean word *sahang* where the northern equivalent is *munje*.

<sup>146</sup> *Uigukingieopbeop sihaenggyujeong* [Regulations on the Implementation of the Law on Foreign-Owned Enterprises], 2000, art. 10 (N. Kor.) (trans. by author).

<sup>147</sup> *Id.*, art. 11.

<sup>148</sup> *Id.*, art. 12.

<sup>149</sup> *Id.*, art. 73. This article lists the rather generous conditions under which the DPRK may expropriate any business venture, even if foreign-owned.

successfully extricating one's enterprise from the DPRK system in a fair and transparent fashion are quite low indeed.

There are also a number of provisions embedded within the structure of common exceptional law that create problematic exceptions to the general tone and tenor of the various rules and regulations. The Law on External Civil Relations, for instance, mostly provides for citizens of other countries to access various legal protections from their home countries, but there is an unpredictable and incongruous provision stating that "rights concerning such intellectual properties as copyright and patent shall be governed by the law of the DPRK."<sup>150</sup> Copyright and patent law are unexpectedly prominent in the DPRK—CDs, books, and other media sold in the country usually include the standard international statements about unauthorized use and duplication of the work in question, and the DPRK has signed the Berne Convention, the international copyright agreement, and several instruments of the World Intellectual Property Organization (WIPO).<sup>151</sup> There are even constitutional protections for the copyright of intellectual property and artistic creation. But according to North Korea's Copyright Law, a foreign copyright holder may only have recourse to international laws of copyright protection if such person is from a country that is party to the same international convention of which the DPRK is also a member; otherwise only North Korean law applies.<sup>152</sup> It is also the case that any work that is or becomes prohibited by DPRK law loses both its copyright protection under DPRK law and the capacity for recourse to international law.<sup>153</sup> Invention and patent rights are also covered through constitutional and other special legislation, but while the language may be strong in some provisions, elsewhere the state reserves the right to take over any patent deemed necessary for the "public interest" or to invalidate and rescind any patent through a unilateral decision of the State Invention Examination Committee.<sup>154</sup> Although the state is bound to reimburse or otherwise compensate the owner of the patent, it is unclear who determines whether compensation requirements apply, and even when they do, the value of the compensation seems entirely up to the DPRK state.<sup>155</sup>

<sup>150</sup> Daewi minsagwangyebeop [Law on External Civil Relations], Sept. 6, 1995, art. 23 (N. Kor.) (trans. by author).

<sup>151</sup> In addition to the Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, S. Treaty Doc. No. 99-27, and the Convention Establishing the World Intellectual Property Organization, July 14, 1967, as amended Sept. 28, 1979, available at [http://www.wipo.int/treaties/en/convention/trtdocs\\_wo029.html](http://www.wipo.int/treaties/en/convention/trtdocs_wo029.html), to date North Korea has acceded to (dates of accession are in brackets): Paris Convention on the Protection of Industrial Property Rights, Mar. 20, 1883, 21 U.S.T. 1583 (amended July 14, 1967) [1980]; Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645 [1980]; Madrid Agreement Concerning International Registration of Marks, Apr. 14, 1891, 828 U.N.T.S. 389 (revised July 14, 1967) [1980]; Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs, Nov. 6, 1925, (amended July 2, 1999) [1992]; Locarno Agreement Establishing an International Classification for Industrial Designs, Oct. 8, 1968, 8 I.L.M. 1 [1997]; Nice Agreement Concerning the International Classification of Goods and Services to which Trademarks are Applied, June 15, 1957, 23 U.S.T. 1336 [1997].

<sup>152</sup> Jeojakgweonbeop [Copyright Law], Mar. 21, 2001, amended by Decree No. 1532, Feb. 1, 2006, art. 5 (N. Kor.), available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=226323](http://www.wipo.int/wipolex/en/text.jsp?file_id=226323).

<sup>153</sup> *Id.* art. 6.

<sup>154</sup> Joseon minjujuui inmin gonghwaguk balmyeongbeop [Invention Law of the DPRK], May 13, 1998, arts. 27(3), 31, amended Mar. 11, 1999 (N. Kor.), available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=228072](http://www.wipo.int/wipolex/en/text.jsp?file_id=228072).

<sup>155</sup> Yoon Hee Kim, *Analysis of the North Korean Invention Act*, 5 J. KOREAN L. 145, 166 (2005) (noting that since the DPRK state still does not recognize private ownership of property, recognition of patent rights may be utterly meaningless).



Although most of the exemptions from the general exceptional law arise due to violations of criminal provisions, civil cases may also arise as a result of economic actions involving foreign individuals and corporations. For such cases, North Korea's practice of civil procedure, addressed in the Civil Proceedings Act of the DPRK, covers both rules of procedure and claims of jurisdiction.<sup>156</sup> The Civil Proceedings Act applies not only to any civil disputes that arise between citizens and institutions within the DPRK, but also to "the settlement of disputes between the institutions, enterprises, organizations and citizens of the DPRK and their foreign counterparts, or the disputes among the foreign institutions, enterprises and organizations and individuals referred to a court of the DPRK," which includes foreign-invested businesses and foreign nationals in the DPRK.<sup>157</sup> Original jurisdiction is claimed for acts that involve foreign corporate bodies and foreigners; that jurisdiction may be exercised not only by the Central Court, but also by lower-level provincial courts and even local People's Courts, depending on the location of the dispute or where the civil rights violations occurred.<sup>158</sup> The Act requires that the state ensure "scientific accuracy, impartiality[,] and prudence" (*gwahakseonggwa gaekpanseong, sinjungseong*) in all civil proceedings, but it also requires that all civil proceedings be conducted "by relying on the popular masses" (*inmindaejunge uigeohayeo*).<sup>159</sup> Presumably there are limits to "scientific accuracy, impartiality and prudence," since constitutionally courts cannot render decisions that undermine the position of the KWP or the stability of the state without being held criminally responsible. Considering the generous powers of the Central Court and of the state itself to claim jurisdiction, this leaves a rather large loophole in place that allows the DPRK to claim jurisdiction where it is convenient or expedient to do so, or where it is necessary to override the principles, regulations, and stipulations of general exceptional law.

#### D. Special Exceptional Law in the DPRK

The special exceptional law of the DPRK consists of the separate legal regimes that govern each of the special economic regions set up by the DPRK, namely Raseon, Sinuiju, Kaeseong, and Geumgangsan. The area of special exceptional law also includes any other special economic arrangements set up outside of those regions, such as the specific contract given to an Egyptian company Orascom to renovate and complete the beleaguered Ryugyong Hotel project in Pyongyang.<sup>160</sup> It also includes the legal arrangement created for the Korean Peninsula Energy Development Organization (KEDO), which was established after the General Agreement of 1994 between the United States and North Korea to

<sup>156</sup> KWON JAE-YEOL ET AL., *BUKHAN UI BEOPCHEGYE [THE NORTH KOREAN LEGAL SYSTEM]* 287-291 (2004) (trans. by author).

<sup>157</sup> *Minsasosongbeop [Civil Proceedings Act]*, Jan. 10, 1976, art. 6, *amended* May 25, 1994 (N. Kor), available at [http://www2.law.columbia.edu/course\\_00S\\_L9436\\_001/North%20Korea%20materials/civil%20proceeding.htm](http://www2.law.columbia.edu/course_00S_L9436_001/North%20Korea%20materials/civil%20proceeding.htm).

<sup>158</sup> *Id.* art. 54.

<sup>159</sup> *Id.* art. 4 (reliance on the masses), art. 5 (scientific accuracy and art).

<sup>160</sup> Jon Herskovitz, *North Koreans Revamp 'World's Worst Building'*, THE INDEPENDENT, July 18, 2008, available at <http://www.independent.co.uk/news/world/asia/north-koreans-revamp-worlds-worst-building-870858.html>; Institute for Far Eastern Studies, *North Korean Pride in the Ryugyong Hotel Growing*, NK Brief No. 09-5-13-1 (2009).

supply interim energy to North Korea and to construct two light-water nuclear reactors for the provision of North Korea's long-term energy needs.<sup>161</sup>

In the general practice of law, when there is a conflict of laws regarding a particular topic or interpretation, what is specific customarily takes precedence over what is general. Yet this practice is not explicitly spelled out in DPRK law and DPRK legal practice is not consistent enough to establish it as an accepted principle. Hence, while special exceptional law differs from general exceptional law in the DPRK, there is no operative principle that determines which would take absolute precedence in the instance of a procedural or jurisdictional conflict. Nor is there, considering the peculiar relationship of legal, political, and party institutions in the DPRK, any operative principle that determines when special exceptional law retains its special and exceptional status and when it does not. Until a comprehensive program of legal reform is implemented in the DPRK, there will always remain a considerable amount of uncertainty about the legal guarantees and protections that apply to natural and juridical persons of foreign origin conducting business in the DPRK economy.

Some analysts have gone so far as to claim that special exceptional law, or at least parts of it, can be compared to the special economic zones established in China (after which the DPRK versions were modeled), or can be seen in some ways as "mini-constitutions" within the DPRK state that provide much stronger legal protections than obtain elsewhere in the DPRK state.<sup>162</sup> This interpretation may be true in terms of North Korea's intent, but it does not hold up well in terms of practice and outcome. First of all, the special economic zones established in China were deeply embedded in a well-articulated body of law that had been consistently upheld in Chinese courts and had the added guarantee behind of China's World Trade Organization membership, which obligated China to apply economic laws consistently and fairly to domestic and foreign economic actors alike.<sup>163</sup> China has implemented a comprehensive program of legal reform that was transparently accessible in its special economic zones and elsewhere.<sup>164</sup> The DPRK has not yet carried out a similar and requisite program of legal reform.

Secondly, even if the collective legal regimes of some of the special economic zones in North Korea aspired to the status of "mini-constitutions," the problematic and inconsistent nature of constitutional law in North Korea means that any framework of constitutional law must still submit to the principle of party supremacy as well as to the "military first" policy, and so cannot be taken as a reliable guarantee of legal transparency or protection. And lastly, the special legal

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<sup>161</sup> ERIC YONG-JOONG LEE, *LEGAL ISSUES OF INTER-KOREAN ECONOMIC COOPERATION UNDER THE ARMISTICE SYSTEM* 58 (2002) (noting the multi-state legal arrangement between the United States, South Korea, and Japan to create KEDO and the legal powers and obligations of KEDO in North Korea).

<sup>162</sup> See, e.g., Joongi Kim, *The Challenges of Attracting Foreign Investment into North Korea: The Legal Regimes of Sinuiju and Gaeseong*, 27 *FORDHAM INT'L L. J.* 1306, 1311 (2004).

<sup>163</sup> Deborah Z. Cass, *China and the 'Constitutionalization' of International Trade Law*, in *CHINA AND THE WORLD TRADING SYSTEM: ENTERING THE NEW MILLENNIUM* 40 (Deborah Z. Cass et al. eds., 2003) (detailing the push-pull legal effects of China's accession to the WTO and international trade law).

<sup>164</sup> Jianfu Chen, *Market Economy and the Internationalisation of Civil and Commercial Law in the People's Republic of China*, in *LAW, CAPITALISM AND POWER IN ASIA* 69 (Kanishka Jayasuriya ed., 1999) (detailing the need for legal substance over ideological correctness for the law to facilitate growth in China).

arrangement of “one country, two systems” that was contrived to allow for the continued existence of Hong Kong’s exceptional legal regime within the general context of domestic law in China after 1997 is also not a good comparative model with which to compare the regimes of special exceptional law in North Korea.<sup>165</sup> Hong Kong’s legal system was already in place when the handover of Hong Kong to China occurred in 1997, and so already had decades of practice and precedent in place to provide the type of stability and consistency that occurs with well-established institutional inertia. None of the special legal regimes in North Korea have this sense of inertia, as they were created from scratch and brought into existence by separate political initiatives. The rule of law is a hallmark of the Hong Kong legal system; it is not yet a part of the DPRK legal system, and the principles of regime stability and longevity, and of party dominance in all spheres of activity, preclude the establishment of the rule of law as a foundational principle of legal practice in the DPRK.

While each of the regimes of special exceptional law share some similarities in both content and practice, they differ, at times considerably, in terms of the details, the structures, and the operational principles that govern each of the regions. What follows is a comparative analysis of each of the four major regimes of special exceptional law in the DPRK. The general argument remains the same: the inconsistent practice of law within these regions and the often contradictory principles and structures created by these different legal regimes collectively preclude the establishment of a coherent program of legal reform and jurisdictional consistency of the type that is necessary for a comprehensive program of economic liberalization.

### 1. *Raseon*

The creation of the Raseon Economic and Trade Zone in 1993 is significant for two principal reasons. First, it was the first attempt by the DPRK to establish a special economic zone and hence produced the first attempt at a comprehensive set of legal principles to govern the zone. Second, it has for the most part failed in achieving its stated objective of attracting foreign investment, largely due to its poor institutional design and unwieldy regulatory structure. Indeed, all subsequent clusters of special exceptional law—for Sinuiju, Gaeseong, and Geumgangsan—were a response to the shortcomings of the original regulations and laws of the Raseon experiment.

The Raseon Economic and Trade Zone was something of a hybrid structure.<sup>166</sup> As originally conceived in the Law of the DPRK on the Raseon

<sup>165</sup> See Patricia Goedde, *The Basic Law of the Sinuiju Special Administrative Region: A Happy Medium Between the DPRK Constitution and Hong Kong Basic Law?*, 3 J. KOREAN. L. 77, 109–121 (2003) (comparing and detailing the differences between DPRK exceptional law and Hong Kong Basic Law); CHOE MYONG-GIL, NAMBUKHAN KWA JUNGUK DAEMAN UI GYORYU HYOPRYOKBEOP (NORTH-SOUTH KOREA AND CHINA-TAIWAN COOPERATIVE TRADE LAW)), 354–361 (2006) (trans. by author) (arguing that China-Taiwan economic and legal relations are a better comparative model for North-South economic and legal relations).

<sup>166</sup> The Raseon project was also developed to incorporate North Korea into a regional development program that would include both China and Russia, known as the Tumen River Area Development Project. This area was to include Special Economic Zones (SEZs) in each of the countries: Yanji and Hunchun in the Yanbian region of China, Nakhodka in Russia (and Vladivostok),

Economic and Trade Zone, Raseon emerged as a peculiar space: it was not directly a part of the normal DPRK state structure, and hence was imbued with unusual freedoms not found elsewhere in the DPRK, but at the same time it was not completely autonomous.<sup>167</sup> It was not really a *free* trade area as much as a preferential area for economic activities beneficial to the state.<sup>168</sup> The control and regulation of Raseon fell directly under the leadership of the SPA, and aside from the special laws that deal directly with Raseon itself, the laws and regulations of the DPRK that applied to general economic activity also applied to the zone, as did the protection and enforcement of those rights.<sup>169</sup> The foundational piece of legislation provided for a local administrative authority, in the form of the Raseon City People's Committee (*Raseonsi inminuiwon hoeui*) as well as a vaguely defined "Central Economic Cooperation Administrative Body" (*jungang gyeongje hyeopjo gwanrigigwan*); a close inspection of the language used to describe the responsibilities and duties of these administrative bodies shows that they are legally empowered only to "direct," to "guide," and to "implement," and so forth, which clearly shows them to be subordinate or at best supplemental administrative organs in relation to the DPRK state.<sup>170</sup> The Raseon City People's Committee is allowed (but not required) to form a Consultative Committee (*jamun uiwonhui*) to deal with foreign investors and trade issues, but it is only empowered to "hold consultations" and not to take autonomous action.<sup>171</sup>

The currency of Raseon is the North Korean won. Foreign economic actors may utilize other currencies, provided they are freely convertible hard currencies, although it is not clear whether the two can be perfectly substituted; the exchange rate is determined by the DPRK foreign exchange bank.<sup>172</sup> The financial administration in Raseon is not straightforward and, like so much else of the special exceptional law, is often muddled or even outright contradictory. The general law for Raseon states that a foreign investor may open a bank account with a DPRK bank (for which preferential treatment is offered) or with a foreign bank approved by the DPRK, but the regulations state that the resident representative for any foreign enterprise is required to open a bank account specifically with a DPRK bank.<sup>173</sup> It is unclear what would happen if the resident representative did not comply with this requirement. The same regulations also state that the "legitimate rights and interests of the resident representative office shall be protected by the law

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and Rajin-Sonbong (Raseon) in the DPRK. On this, see the AGREEMENT ON THE ESTABLISHMENT OF THE TUMEN RIVER AREA DEVELOPMENT COORDINATION COMMITTEE (1995), Appendix 1. For an evaluation of the institutional infrastructure required for the Tumen River Project, see UNDP Asia-Pacific Institute, *Study of the Commercial and Investment Banking Needs in the Tumen River Economic Development Area* (Final Report) (1997).

<sup>167</sup> Raseon gyeongjemuyeokjidaebeop [Law of the Raseon Economic and Trade Zone] (1993) (N. Kor.) (trans. by author).

<sup>168</sup> *Muyeokjidae* translates directly as trade zone—no analog of "free" is embedded in the legal description.

<sup>169</sup> Law of the Raseon Economic and Trade Zone, *supra* note 167, art. 3 (cabinet jurisdiction), art. 4 (protection and enforcement), art. 6 (applicability of DPRK general law).

<sup>170</sup> *Id.* art. 8 and art. 9.

<sup>171</sup> *Id.* art. 16.

<sup>172</sup> *Id.* art. 30.

<sup>173</sup> *Id.* art. 31 and art. 39; Regulations for the Resident Representative of Foreign Enterprises in the Raseon Economic and Trade Zone, 1993, art. 19 (N. Kor.), available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=228816](http://www.wipo.int/wipolex/en/text.jsp?file_id=228816).

of the DPRK," but this seems to place the responsibility for determining what constitutes a "legitimate" (*hapbeopjeok*) right and interest in the hands of the DPRK state. It also suggests that jurisdiction would fall to the DPRK court system, and not to any dispute settlement body in Raseon proper.<sup>174</sup> Perhaps even more worrisome, should the resident representative find herself in a position of needing to consult with the home office about any of this, the transmission of secure, reliable, or unmonitored communication might be difficult, as the regulations also require that "all communications, internal and external, required for the business of the resident representative office shall be provided by the relevant telecommunications body of the DRPK."<sup>175</sup>

There is similar disagreement within the dispute settlement process listed in each of the instruments that constitute the special exceptional law for Raseon. The Basic Law of Raseon conforms to the requirements of most instruments in DPRK general exceptional law in listing the default dispute settlement clauses.<sup>176</sup> But other legal instruments contain alternative or more specific dispute settlement requirements that differ from the default clause, often in significant ways. Regarding the resident representative office, for instance, while consultation is the first level of dispute settlement, if consultation fails, the second and final level is settlement "by an arbitration body or court of the DPRK."<sup>177</sup> The option of a third country has been removed.<sup>178</sup> The Regulations on Entrepot Trade in Raseon state that in case of a dispute, "a complaint or a petition may be lodged" and the complaint or petition must be settled within 30 days, although where the complaint or petition is to be settled, and where and to whom the complaint or petition is to be filed, is not specified.<sup>179</sup> The regulations established for forwarding agencies using Raseon as a point of transit state that disputes will be settled by consultation or by a DPRK arbitration body or court if consultation fails, as with the resident representative office. They then add, however, that any violation of the regulations themselves shall be remedied through "fining and other administrative penalties . . . and penal responsibility in case of a severe breach."<sup>180</sup> Since most disputes arise over differing interpretations of the regulations in question, this provision opens the door for a forced settlement by the DPRK state by arguing that an agent who has filed a complaint is in fact in violation of the regulations.

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<sup>174</sup> Regulations for the Resident Representative of Foreign Enterprises in the Raseon Economic and Trade Zone, *supra* note 173, art. 8. There is a disturbing tautology in the definition and translation of "legitimate" in this case: a "legitimate" (*hapbeopjeok*) interest is something that conforms to the law (*beop*) as defined by the DPRK.

<sup>175</sup> *Id.* art. 24.

<sup>176</sup> Law of the Raseon Economic and Trade Zone, *supra* note 167, art. 42 (stating that disputes shall be settled either by (1) consultation, (2) arbitration or legal procedures provided by the DPRK, or (3) arbitration agencies in a third country approved by the DPRK).

<sup>177</sup> Regulations for the Resident Representative of Foreign Enterprises in the Raseon Economic and Trade Zone, *supra* note 173, art. 29.

<sup>178</sup> This crucial change in wording is not unique, nor is it uniform in the Raseon legal instruments. The same removal of a third country option, for instance, can also be found in the Raseon gyeongjemuyeokjidae cheongbugeonseol gyujeong [Raseon Regulations on Contract Construction], 2000, art. 42. (N. Kor.) (trans. by author).

<sup>179</sup> Raseon gyeongjemuyeokjidae junggyemuyeok gyujeong [Regulations on Entrepot Trade in Raseon], 2000, art. 20. (N. Kor.) (trans. by author).

<sup>180</sup> Raseon gyeongjemuyeokjidae junggyejimimja daerieopmu gyujeong [Regulations for Forwarding Agencies in Raseon], 1999, art. 31 (N. Kor.) (trans. by author).

The same possibility occurs even more ominously in the unexpected set of regulations that govern the compiling of statistics in Raseon, which every individual and corporate economic actor is obligated to do—although the regulations do not specify what these statistics must cover. The regulations require that each actor, in compiling quantitative information, “shall ensure scientific accuracy, objectivity, and timeliness of statistics.”<sup>181</sup> Rather strangely, this creates the possibility that a statistical methodology that the DPRK finds lacking in scientific accuracy might actually be a breach of the regulations and subject to fine or penal culpability.

Movement within North Korea has always been tightly regulated by the state, both for DPRK citizens and foreigners. One of the incentives North Korea offered for doing business in the Raseon zone was to relax the regulations regarding travel, immigration and tourism. Foreigners coming directly to or departing from Raseon without passing through any other part of the DPRK may do so without a visa, provided they have a proper invitation from the DPRK or a foreign-invested enterprise doing business in Raseon.<sup>182</sup> But this relative liberty is still regulated by other provisions that require, among other things, that travel occur only in daytime, only on routes designated by the state, and never on Sunday or a bank holiday—unless one is traveling by ship, plane, or train or if it is “urgent business.”<sup>183</sup> Anyone who is an “international terrorist, drug addict, drug smuggler, patient with contagious and infectious disease, insane person or other undesirable person” cannot enter or leave Raseon and so cannot establish a business there.<sup>184</sup> Tourists wishing to visit Raseon may do so with approval, and once approved, their personal safety is guaranteed by the DPRK.<sup>185</sup> In the case of any disputes or incidents involving foreign tourists, consultation may be arranged, but as with other instruments of Raseon, should consultation fail the settlement is referred to a court or institution of the DPRK.<sup>186</sup>

On paper, the Raseon zone continues to operate and North Korea continues to participate in the regional development agenda that includes cross-border trade with China and Russia.<sup>187</sup> But in practice, the laws that underpin the Raseon zone have never been secure enough or consistent enough to attract the type of large-scale, free-flowing investment that the regional initiative would require to succeed. Thus, as North Korea’s first real foray into the practice of special economic zones, the Raseon zone must be regarded as a failure. In spite of anemic progress and participation in regional economic trade, the greatest constraint on the potential of

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<sup>181</sup> Raseon gyeongmuyeokjidae tonggye gujeong [Regulations on Statistics in Raseon], 1999, art. 4. (N. Kor.) (trans. by author).

<sup>182</sup> Raseon gyeongmuyeokjidae uigukinchulim mich cheryu gyujeong [Regulations on Immigration and Residence in Raseon], 2000, art. 7. (N. Kor.) (trans. by author).

<sup>183</sup> *Id.* art. 5.

<sup>184</sup> *Id.* art. 6. It is unclear how the DPRK authorities would determine if a businessperson were insane.

<sup>185</sup> Raseon gyeongmuyeokjidae gwangwang gyujeong [Regulations on Tourism in Raseon], 2000, art. 6. (N. Kor.) (trans. by author).

<sup>186</sup> *Id.* art. 38.

<sup>187</sup> North Korea continues to participate in meetings regarding the regional development of the Tumen River area. It was a signatory and participant in the 2007 meetings called by the Tumen Secretariat in China, as seen in the VLADIVOSTOK DECLARATION, Nov. 15, 2007, issued at the 9<sup>th</sup> Consultative Commission Meeting of the Greater Tumen Initiative, available at [http://www.undp.org.cn/downloads/gti/Vladivostok\\_Declaration.pdf](http://www.undp.org.cn/downloads/gti/Vladivostok_Declaration.pdf).

the Raseon zone is its inconsistent and contradictory legal infrastructure.

By comparison, in Russia, free trade is now a central part of the democratic state and its legal architecture.<sup>188</sup> In China, special economic zones have been paired with a strong array of legal support that gives mostly transparent access to the Chinese legal system and conforms to international legal standards regarding trade and investment.<sup>189</sup> These are very different from the DPRK system, as evident in Raseon, which showcases a state that is unwilling to relinquish sufficient political control in the area to attract and protect investment and economic enterprise. Above all else, the legal shortcomings of the Raseon area assure that, unless there is some form of comprehensive revision of its legal framework, it will never be able to achieve its stated objective to attract and encourage foreign investment in North Korea.

## 2. Sinuiju

The legal structure of special exceptional law in the Sinuiju Special Administrative Region was in many ways designed to address the shortcomings and the vagaries of the law that created and governed Raseon. Raseon as an economic region failed for a variety of reasons, most of which stemmed from the shortcomings of its legal or institutional framework. These shortcomings of the Raseon legal framework were specifically addressed in the special exceptional law of Sinuiju. Although Sinuiju was not explicitly designed to attract investment from China, that was apparently one of the primary goals of the project. Sinuiju is located directly across from the town of Dandong in China, the only rail transport entry point into North Korea from China. In addition, Yang Bin, a wealthy entrepreneur of Chinese descent and Dutch nationality, was initially appointed as chief administrator of Sinuiju.<sup>190</sup> At the same time, the location of Sinuiju is also intentionally far away from other centers of power and other populated centers to minimize the possibility of direct linkage effects; North Korea may want substantive investment in Sinuiju and vibrant cross-border trade, but it is unlikely to want liberalized trade practices permeating other parts of the DPRK. Clearly Sinuiju was meant to be a revenue-generating project for the DPRK, but its location and the extreme caution prevalent in its structural design make it unlikely to constitute some type of cornerstone for a larger region-wide or nation-wide network of sites that collectively compose a project of legal and economic reform.

The main body of law that governs economic actors in the Sinuiju region is the Basic Law of the Sinuiju Special Administrative Region.<sup>191</sup> Among the first things that are readily apparent in the Basic Law is the considerable degree of autonomy that is given (or putatively given) to the Sinuiju region, especially when

<sup>188</sup> See generally JOHN M. LETICHE, *RUSSIA MOVES INTO THE GLOBAL ECONOMY* (2007) (discussing the impact of economic reforms on Russian development).

<sup>189</sup> YASHENG HUANG, *CAPITALISM WITH CHINESE CHARACTERISTICS: ENTREPRENEURSHIP AND THE STATE* (2008).

<sup>190</sup> *Chinese-Dutch Exec To Head North Korea's Special Zone*, JAPAN ECONOMIC NEWSWIRE, Sept. 23, 2002. As previously noted, China arrested Yang Bin on charges of bribery immediately after his appointment. See Chu, *supra* note 112.

<sup>191</sup> *Sinuijuteukgu kibunbeop jeonmun* [Basic Law of the Sinuiju Special Administrative Region], 2002 (N. Kor.) (trans. by author).

compared to the many regulations and stipulations in the laws of Raseon that seemed to allow for interference from the central government of the DPRK. Sinuiju, for instance, is required to have its own government with executive, legislative, and judicial branches; the independence of this government is assured by a clause that prevents official institutions of the DPRK from interfering in the internal administrative operations of the Sinuiju zone.<sup>192</sup>

But there is no sense that this is an island of limited democracy in the midst of the authoritarian framework of the DPRK; indeed, upon closer examination the Basic Law of Sinuiju seems more like an exercise in creative legal rewording than a concerted effort for substantive reform. In spite of promises of autonomy, Article 1 of the Basic Law states quite clearly that the Sinuiju region is "under the sovereignty" of the DPRK and "under the central authority of the State" (*kukka-nun sinuiju tukbyeolhaengjeonggu-lul jungang-e jikhalsikanda*).<sup>193</sup> The Sinuiju administration is allowed to issue passports independently, but this independence is bounded by the discretion of the central government.<sup>194</sup> The DPRK reserves the right to station military personnel in the Sinuiju region when necessary and to declare a state of emergency, during which relevant DPRK laws supersede Sinuiju laws.<sup>195</sup> The Sinuiju region is also entitled to its own flag, but the description of the flag makes it more a symbol of the subordination of Sinuiju to the DPRK: the flag is to contain an image of a white peony flower on a light blue background, the top banner is to proclaim clearly "Democratic People's Republic of Korea," and the bottom banner to proclaim "Sinuiju Special Administrative Region."<sup>196</sup>

Things get even more dubious when the administrative details are put under close inspection. The Governor (*janggwan*), who represents the executive branch of the "autonomous" government of Sinuiju, is appointed to a term of indefinite length rather than elected.<sup>197</sup> He or she retains the appointment by upholding a pledge to be faithful to the DPRK and to the Sinuiju administration, an oath that is taken not in the Sinuiju administration but rather at the plenary meeting of the Presidium of the Supreme People's Assembly.<sup>198</sup> The appointment process gives the DPRK government an opportunity to intervene in the administrative process of Sinuiju in spite of the provisional autonomy that is assured by the other regulations of the Basic Law. Once appointed, the Governor has nearly absolute

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<sup>192</sup> *Id.* art. 2 (legislative, executive, and judicial powers), art. 6 (non-interference in Sinuiju administrative affairs by the cabinet, committees, ministries, and central organ of the DPRK). Note that article 6 is mute on party interference in Sinuiju and specified non-interference by various government actors, who are legally subordinate to the Korean Workers Party.

<sup>193</sup> *Id.* art. 1.

<sup>194</sup> *Id.* art. 8. This article also empowers the DPRK to conduct all foreign affairs relating to the Sinuiju region, further constraining the region's autonomy.

<sup>195</sup> *Id.* art. 7 (stationing of military personnel when necessary) and art. 11 (declaring states of emergency). No written guidelines are available to specify when military personnel would be necessary, so this is retained at the discretion of the DPRK state. The same holds true of conditions that would require a state of emergency. The text specifies war or armed insurrection, but these are part of a non-exhaustive list generalized under the rubric of "anything similar" (*katun sayuui balsaengsi*). Article 58 empowers the Sinuiju administration to determine a system for military conscription for DPRK citizens resident in Sinuiju, but the wording also implies that military conscription is a duty determined by the DPRK state.

<sup>196</sup> *Id.* art. 99 (authorizing independent flag and emblem), art. 100 (describing design), art. 101 (mandating the proper ration of width to length and emblem size).

<sup>197</sup> *Id.* art. 78.

<sup>198</sup> *Id.*



power, with the ability to appoint, hire, and terminate at will the other members of the Sinuiju administration.<sup>199</sup> Aside from potential conflicts with other branches of the administrative institutions in Sinuiju, this opens the door for all sorts of potential official corruption because the Governor, as chief administrator, seems quite able to appoint friends, family, or political sycophants to lucrative and remunerative positions in the Sinuiju region. The Governor is accountable not to the residents of Sinuiju but to the DPRK government,<sup>200</sup> which mocks the promise of autonomy; the non-interference clause in Article 6 states that any DPRK interference in Sinuiju can only be carried out with the Governor's consent. Considering that the Governor must be faithful to the DPRK state and is directly accountable to it, a person who is chosen for this post who wished to continue to maintain the position would therefore consent to all requests to override the non-interference clause.

The legislative and judicial branches, while similarly imbued with what seems to be a generous degree of autonomy and independence, lack the necessary power to check and monitor the actions of one another to provide the degree of consistency and transparency necessary for thriving and sustainable economic growth in the region. The legislative branch, in the form of the Legislative Council of Sinuiju, is elected via secret ballot by the residents of the Sinuiju region and its adopted decisions become law in Sinuiju.<sup>201</sup> The Governor has the power to return legislation back to the Legislative Council up to two times if it is not "in the interest of the region"; the Supreme Legislative Body of the DPRK can also refuse to record any Legislative Council decision, making it unofficial or invalid, or return it for revisions indefinitely.<sup>202</sup> In other words, the Legislative Council has little meaningful autonomy and has no chance of becoming even nominally democratic.

While the judicial branch courts and procuracies have the capacity to enforce laws and decisions of the Legislative Council within the boundaries of Sinuiju, the interpretation of the law, even within Sinuiju, remains firmly in the hands of the SPA. There is no separate procedural code for Sinuiju, and the framework of the judicial process is the same as in the rest of the DPRK.<sup>203</sup> In a small nod to autonomy, the Sinuiju regional court is specified as the final court of appeal, but there is also the caveat that special cases will be closed to the public, making the process non-transparent and open to state manipulation.<sup>204</sup>

Considering that North Korea's primary motive for establishing the Sinuiju zone was economic enterprise and investment, one would expect that at least in economic areas the laws would be clear, uniform, and designed to facilitate efficient economic activity. On the surface, the Basic Law provides quite generously for a

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.* art. 76, which states that the Governor shall have the "confidence of the people" (of Sinuiju), but it is unclear how this would be determined.

<sup>201</sup> *Id.* art. 62.

<sup>202</sup> *Id.* art. 80 (empowering the Governor to return legislation to the Legislative Council), art. 74 (stating that the DPRK Supreme Legislative Body must record Legislative Council decisions or can return them unrecorded for indefinite revision).

<sup>203</sup> *Id.* art. 95 (stating that the bench shall consist of a judge and two people's assessors). Article 93 states only that "trials will be adjudicated according to the laws" (*jaepanun ojik beope uikeohayeo dokjajeokeuro handa*), but what laws are to be used in what circumstances is not specified. *Id.* art. 93.

<sup>204</sup> *Id.* art. 98 (stating that the regional court is the final court of appeal), art. 96 (stating that special cases may be closed to the public).

legally secure regime of land use rights embedded in apparent guarantees of inheritance rights, transfer rights, and rights to manage these land use rights as if they were durable economic goods.<sup>205</sup> But a careful reading shows that most rights guaranteeing ownership, control, and protection of transfer and inheritance rights are not actually addressing the land use rights but rather private property. The Basic Law makes it quite clear that all of the land and all of the natural resources in the Sinuiju region are the property of the State, and that land use rights do not in any way infringe upon or compromise State ownership.<sup>206</sup> Land use rights are therefore not private property, and the guarantees of inheritance rights and exhortations for the DPRK state to protect private property do not apply to most tangible assets in Sinuiju that an enterprise would need to operate.<sup>207</sup> The DPRK state also reserves the right to expropriate private property for reasons of national security; while compensation is promised, the rates are decided by the DPRK state, not by the local Sinuiju administration.<sup>208</sup> Thus, though the wording is different from the stricter provisions for the Raseon zone, the intent is still the same: the provisions leave control and supervision firmly in the hands of the DPRK state.

Some of the provisions in the Basic Law seem decidedly liberal when seen outside the context in which they appear. The Basic Law, for instance, provides a generous package of residency rights for individuals who choose to live in Sinuiju.<sup>209</sup> But just as the first DPRK Constitution provided progressive and comprehensive rights for all ethnic minorities living in North Korea—something which was easy to do considering that North Korea had almost no ethnic minorities—it is unclear how many people will be clamoring to take up permanent residency in an isolated trade zone with little to see, aside from a handful of casinos and *noraebang* (karaoke) bars. There are many provisions mandating a rich and vibrant cultural community in the region, as long as those cultural activities do nothing to hinder “the unification of the country” (*naraui tongil*) or undermine “the unity of the people.” (*minjukui tangyeol*).<sup>210</sup> Of interest here, too, is the fact that these provisions for a cultural community call upon the State to induce the Sinuiju administration to provide cultural and educational facilities, rather than entrusting

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<sup>205</sup> *Id.* art. 16 (allowing for acquisition, lease, and sublease of land use rights), art. 17 (safeguarding inheritance rights).

<sup>206</sup> *Id.* art. 12 (stating that all land and natural resources are the property of the DPRK state). The DPRK has not yet liberalized its land use rights market, as have other socialist countries such as Vietnam, leaving incongruities between DPRK land law and property law in other countries from which investors would be drawn for DPRK economic zones. Incongruities also exist among the economic zones and between the economic zones and general land use law in the DPRK. See PAK JEONG-WON, BUKHAN TOJUEDOUI BYEONHWAWA JEONMANG [NORTH KOREAN LAND USE SYSTEM: CHANGE AND PROSPECTS] 42–46 (2006) (trans. by author).

<sup>207</sup> This would get even more complicated if a DPRK citizen were involved with any enterprise, since inheritance rights for DPRK citizens are in fact reverted to State authorities for decisions about what is inheritable and what is not. Gajeok beop [Family Law Act of the DPRK], 1990 (N. Kor.) (trans. by author); Sangsok beop [Code of Inheritance Law], 2002 (N. Kor.) (trans. by author).

<sup>208</sup> Basic Law of the Sinuiju Special Administrative Region, *supra* note 191, art. 17 (stating that private property may be nationalized for reasons of state security, and the owner of said property will be compensated for its value).

<sup>209</sup> *Id.* art. 62 (stating that a person with residency rights may become a Legislative Council member, and that a Legislative Council member may become a citizen of the Sinuiju zone). There is no provision that allows a permanent resident of the Sinuiju region to become a citizen of the DPRK.

<sup>210</sup> *Id.* art. 36 (mentioning limitations on cultural or artistic activities).

responsibility directly to the administration.<sup>211</sup>

Lastly, the Basic Law also provides for what seems to be a liberal package of civil and political rights and liberties. A resident of the Sinuiju region, for instance, has the right to freedom of religion, as long as the exercise of this right does not “harm the social order” (*sahoejilseo-lul haechinunte liyunghal su opsda*).<sup>212</sup> A resident also has the right to work, but this seems both redundant and irrelevant because one cannot become a resident of the Sinuiju region unless one is already employed by an enterprise in the region (if a DPRK citizen) or has already had a legitimate occupation and resided for seven years in the region (if a foreigner).<sup>213</sup> In any case, considering that the primary goal of the Sinuiju region is to attract investors and entrepreneurs from China, it is unlikely that there is any real threat that someone would take advantage of these freedoms in ways that would cause concern or suspicion by the DPRK state. It is significant that some of these rights, most notably freedom of religion, are noticeably absent from other bodies of special exceptional law such as that of Gaeseong, which targets investors from South Korea, where—unlike China—rights have legal substance and religion plays an important role in public and civic life.

Lest there be any remaining doubt about the extent to which the DPRK remains firmly in control of all aspects of the administration of Sinuiju, one need only refer to Article 4 of the “Additional Rules” (*puchik*) to the Basic Law, which states clearly and succinctly: “The Presidium of the Supreme People’s Assembly will interpret this law.”<sup>214</sup>

### 3. Gaeseong

The project of establishing the Gaeseong Industrial Complex differed considerably from Raseon and Sinuiju in terms of both intent and design. Raseon and Sinuiju are located at border sites—Raseon near the Russian border and Sinuiju near the Chinese border—and away from significant population and political centers. The Gaeseong Zone is centrally located in North Korea, much closer to Pyongyang and next to Gaeseong city proper, the second largest city in the DPRK. Both Raseon and Sinuiju are economic projects, whose intent and purpose is to generate investment and revenue for the DPRK. Gaeseong is different because it is simultaneously an economic and a political project; when the Presidium of the Supreme People’s Assembly approved the foundational Laws on the Gaeseong Industrial Zone in November 2002, they were doing so as a result of a larger initiative that had developed in South Korea under President Kim Daejung known

<sup>211</sup> *Id.* ch. 3 (articles on culture). The wording is such that the State (*kukka-nun*) is the subject of the provisions, while the Sinuiju region is the area where the action occurs (*Sinuiju teukbyeolhaengjeonggu-eseo*), so the general tone is “The State shall make X happen in the Sinuiju area.”

<sup>212</sup> *Id.* art. 46 (detailing the right to and the restriction of freedom of religion).

<sup>213</sup> Basic Law of the Sinuiju Special Administrative Region, *supra* note 191, art. 50 (detailing a right to work according to desire or ability), art. 42 (detailing residency qualifications). The only exception to these residency qualifications is either to be a DPRK citizen residing in the region before the Sinuiju special zone was formed or to be recommended for residency status by the Governor or the Legislative Council—a decision that is ultimately made by the DPRK state.

<sup>214</sup> *Id.* art. 4.

as the Sunshine Policy.<sup>215</sup> The Sunshine Policy was designed to shift the nature of North Korea-South Korea relations away from one of mutual hostility and suspicion and toward one of mutual benefit and peaceful coexistence.<sup>216</sup> Part of this shift was to open up avenues of cooperation as part of a confidence-building platform; the Kim Daejung administration even went so far as to unlink official and informal channels of cooperation, allowing private enterprises to approach the DPRK regime directly and independently.<sup>217</sup> One of South Korea's largest conglomerates, the Hyundai Corporation, took up this invitation right from the start and became the primary private enterprise resource for the establishment of Gaeseong.<sup>218</sup>

The Gaeseong project thus shared the goal of raising foreign investment and revenue in the DPRK with Raseon and Sinuiju, but also contained an additional political element aimed at enhancing cooperation and trust between the two Koreas.<sup>219</sup> The subtext of reunification, whether real, potential, or imagined, was and remains ever-present in a way that is entirely lacking from Raseon or Sinuiju.<sup>220</sup> In other words, there is much more at stake here than merely economic initiatives and investments, so it is no surprise that the special exceptional law of Gaeseong contains elements not found in the legal regimes of either Raseon or Sinuiju. Indeed, the administrative structure of Gaeseong is not only remarkably different from that of either Raseon or Sinuiju, but is sufficiently peculiar to contain a number of legal idiosyncrasies that if left unaddressed have tremendous potential to jeopardize or derail the entire project altogether.

The administrative structure of the Gaeseong economic zone contains a number of shared elements between North and South Korea, and between public and private actors.<sup>221</sup> Cabinet-level bodies in both North and South Korea inform the administrative process of the Gaeseong zone: in South Korea, the Gaeseong Industrial Complex Business Support Group (GICBSG) is housed in the Ministry of Unification, and its North Korean counterpart is the Central Special District General

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<sup>215</sup> MARK MANYIN & DICK K. NANTO, CONG. RESEARCH SERV., RL34093, THE KAESONG NORTH-SOUTH INDUSTRIAL COMPLEX 8, 19 (2011), <http://www.fas.org/sgp/crs/row/RL34093.pdf>.

<sup>216</sup> See *id.*

<sup>217</sup> These actions were facilitated through a series of legal treaties that emerged from the summit between Kim Daejung and Kim Jong-il in 2000. The foundational document legalizing economic initiatives between South Korean and North Korea is the Agreement on Reconciliation, Nonaggression, and Exchanges and Cooperation, N. Kor.-S. Kor., Dec. 13, 1991 (otherwise known as the Basic Agreement). For more information on these agreements, see Jhe Seongho, *Four Major Agreements on Inter-Korean Economic Cooperation: Legal Measures for Implementation*, 16 E. ASIAN REV. 19 (2004).

<sup>218</sup> The actions of Hyundai Asan, as with all private economic actors from South Korea operating in North Korea, are still subject to the constraints of South Korea's Gukga Boanbeop [National Security Law], Act No. 5454, May 31, 1991, arts. 6-7 (S. Kor.) (addressing security limits on economic activities).

<sup>219</sup> Seong-ho Sheen, *Strategic Thought Toward Asia in the Roh Moo-hyun Era*, in SOUTH KOREAN STRATEGIC THOUGHT TOWARD ASIA 101, 104-06 (Gilbert Rozman et al. eds., 2008) (noting that South Korean president Roh Moo-hyun continued the Gaeseong projects for their political utility even when their economic viability was called into question); Gi-Hyoung Oh, *The Legal Framework of the Gaesung Industrial Complex*, 5 J. KOR. L. 21, 43 (2005) (noting that the Gaesung project is considered to be integral in the process of reunification).

<sup>220</sup> Hong Sun-jik, *Gaeseong gongdangae balui gyeongjejeok hyogwawa seonggongjogeon* [*The Economic Effects of the Development of Gaeseong and the Conditions for Success*], 82 TONGIL KYONGJE 52 (2002) (trans. by author).

<sup>221</sup> See Ministry of Justice, BUKHAN GAESEONG GONGEOPJIGUBEOP BUKSEOK [AN ANALYSIS OF NORTH KOREA'S GAESONG INDUSTRIAL DISTRICT LAW] (2003) (S. Kor.).

Bureau (CSDGB).<sup>222</sup> The Gaeseong Industrial District Management Committee (GIDMC), the local administrative body in the Gaeseong zone, is the only direct and official administrative unit in the Gaeseong zone that serves as a two-way communication link between South Korea's GICBSG and North Korea's CSDGB.<sup>223</sup> The GIDMC is a strange legal and administrative concoction: it is officially a North Korean body, but it is composed solely of South Korean members appointed jointly by the Gaeseong Land Corporation (GLC) and the Hyundai Asan Corporation. The GLC is a subordinate body that reports to the GIDMC and oversees the more specialized task of portioning out and administering the land-use rights of the Gaeseong zone to tenant companies who wish to set up an economic enterprise in the Gaeseong zone.<sup>224</sup> Management of the GLC is entrusted to the Hyundai Asan corporation, giving a private economic actor a public administrative presence in Gaeseong that is jointly responsible to both South Korean and North Korean economic law.<sup>225</sup>

The intertwining of public and private actors and of South Korean and North Korean entities generates numerous benefits in the political arena, but in the legal realm, it is fraught with a variety of problems ranging from jurisdictional uncertainty to interpretive ambiguity.<sup>226</sup> Considering the landlocked nature of the Gaeseong zone, legal assurance has been given that South Korean citizens will enjoy "personal inviolability" while in transit to Gaeseong, and will also enjoy exemption from trial in North Korea for violations of North Korean law, including the notorious "defamation" laws which make it a crime to make a negative statement about the DPRK and its leaders.<sup>227</sup> Real estate and land leases seem to be secure, but there is an exception that undefined "unavoidable circumstances" can always change the status of the land without notice.<sup>228</sup> The Basic Law of the Gaeseong zone states that only the Basic Law is in effect in the zone itself, but also includes a provision for the applicability of "other ordinances" that either side may put into place.<sup>229</sup> There are no clear guidelines for what these other ordinances may address or cover, nor for the process by which they may be promulgated. Some areas of service provision in the Gaeseong are shared, again as part of the political project of the zone; for example, while fire-fighting duties are the responsibility of South Korea (through public or private actors), security issues are the responsibility of North Korea. This security provision opens up at least one possible loophole that would give the security forces and the military of North Korea legal justification to

<sup>222</sup> *Id.*

<sup>223</sup> In Korean, the GIDMC is *gaeseong gonggeop jigu jiweon jaedan*. Further information and news updates can be found at the official website in both Korean and English at [www.kidmac.com](http://www.kidmac.com).

<sup>224</sup> See HANGUK, SUCHUL IBUNHAENG, GAESEONGGONGDAN TUJAHWANGYEONG [THE INVESTMENT ENVIRONMENT OF THE GAESEONG INDUSTRIAL COMPLEX], 7-9 (2005) (trans. by author), for details of the administrative structure.

<sup>225</sup> See SON KEY-YOUNG, SOUTH KOREAN ENGAGEMENT POLICIES AND NORTH KOREA: IDENTITIES, NORMS AND THE SUNSHINE POLICY 82 (2006) (describing the semi-public arrangement of Hyundai initiatives in North Korea).

<sup>226</sup> Dae-Kyu Yoon, *Overview of the Legal Structure of Foreign Investment in the DPRK*, 5 J. KOREAN L. 1, 14 (2005) (describing the establishment of this administrative arrangement as a "desirable measure" to facilitate trade).

<sup>227</sup> Gaeseong gonggeop jigu beop [Gaeseong Basic Law], 2002, art. 8 (N. Kor.) (trans. by author).

<sup>228</sup> Gaeseong gonggeop jigu budongsan gyujeong [Gaeseong Real Estate Regulations], 2004, art. 15, 16 (N. Kor.) (trans. by author).

<sup>229</sup> Gaeseong Basic Law, *supra* note 227.

intervene in or oversee the administration of the Gaeseong zone.<sup>230</sup>

There are other parts of the framework that seem to invite problems as well. Though the Gaeseong zone is set up to be a free trade zone, it is in fact administered through a one-company monopoly—namely Hyundai Asan—that seems to contradict the premise of the entire project. Other companies have moved into the zone, but the project seems riddled with uncertainty and even suspicion from both sides. One of South Korea's biggest and best-known banks, Woori Bank, was the first bank to open a branch in the Gaeseong zone, but it has a zero-interest policy for deposits since the money cannot be invested elsewhere in North Korea.<sup>231</sup> It seems to play the role of a political asset or even a good marketing symbol, but economically it is a nonproductive liability at the present. The Korea Electric Power Corporation (KEPCO) is established in the Gaeseong zone to set up a power grid for the zone—essential since the power supply in North Korea is intermittent, even in Gaeseong city proper, but there is lingering concern that the North Korean state or military may try to divert some of the power from the power grid for its own purposes.<sup>232</sup> Korea Telecom (KT) established a direct communication line between Seoul and the Gaeseong zone, but there is always the vulnerability that the line may be cut or tapped by the North Korean state.<sup>233</sup>

In spite of the sanguine rhetoric about cooperation and integration between North and South Korea through the activities of the Gaeseong zone, part of the suspicion that lingers just underneath the surface stems from the fact that entire project is based on the mutual need of each side to exploit the resources of the other. South Korean investors and entrepreneurs are hoping to use Gaeseong as an exclusive and privileged zone of cheap North Korean labor and comparatively cheaper administrative costs in order to give their companies a competitive edge in the global market.<sup>234</sup> The tax laws of Gaeseong set the standard corporate tax rate at 14%, but this rate, especially coupled with various incentives permitted by the tax laws, still makes the corporate taxes of Gaeseong less onerous than those in China, Vietnam, and other locations in Asia (including South Korea).<sup>235</sup> Labor laws also reveal a strong interest from South Korea in keeping wages as low as possible in Gaeseong. North Korean workers are paid far less than their South Korean counterparts, which creates a strong incentive to hire them; although the Labor Law

<sup>230</sup> This is especially problematic given the DPRK military's initial objection to the creation and location of the Gaeseong zone, due to its proximity to sensitive military areas near the Demilitarized Zone.

<sup>231</sup> Some exceptions can be made if the deposits are made in the much-desired form of hard currency (mainly US dollars), although it is unclear how interest rates or exchange rates are determined. Gaeseong gonggeop jigu uihwa gwanri gyujeong [Gaeseong Foreign Exchange Control Regulations], 2004, art. 11 (N. Kor.) (trans. by author).

<sup>232</sup> See NORMAN LEVIN & YONG-SUP HAN, *SUNSHINE IN KOREA: THE SOUTH KOREAN DEBATE OVER POLICIES TOWARD NORTH KOREA* (2002) (documenting diversion of power and financial resources to the North Korean state and military).

<sup>233</sup> These issues would supposedly be covered by the Gaeseong Agreement on Telecommunications. On the Gaeseong telecommunications infrastructure, see Marcus Noland, *Telecommunications in North Korea: Has Orascom Made the Connection?*, 5 N. KOREAN REV. 62, 68 (2009).

<sup>234</sup> HUMAN RIGHTS WATCH, *NORTH KOREA: WORKERS' RIGHTS AT THE KAESONG INDUSTRIAL COMPLEX* (2006), available at <http://www.unhcr.org/refworld/docid/453897724.html>.

<sup>235</sup> Gaeseong gonggeop jigu segeum gyujeong [Gaeseong Tax Regulations], 2003, art. 19 (N. Kor.) (trans. by author). The tax rate is lowered to a preferential 10% for enterprises focusing on infrastructure development or high-tech industry.

states that North Korean workers are to be paid directly (article 34), in practice the wages are handed over to the CSDGB, which then pays the North Korean workers only after first extracting taxes for the North Korean state.<sup>236</sup> North Korean workers who are in training receive only 70% of the formal wage rate (article 26), and wage increases cannot exceed 5% annually and must be approved by both the CSDGB and the KIDMC.<sup>237</sup> The goal again seems to be to keep North Korean wages lower, indeed far lower, than those in the rest of Asia, in order to keep labor costs down and to give a competitive edge to South Korean companies.

North Korea probably agrees to these conditions not because it is in a subordinate or inferior position, but because it also benefits from what appears to be an unequal relationship. By creating strong inducements to hire North Korean laborers, an increasing number of North Korean workers are gaining access to advanced forms of technology and receiving what is in essence free training (since the costs are borne by the South Korean companies) to learn to operate and manage strategic parts of the production process. There is a constant concern among South Korean managers about the possibility of theft by North Korean workers of material or intellectual property that would allow North Korea to master the entire process and then oust the South Korean companies from Gaeseong, though the necessity of cheap labor and operating costs forces South Korean companies to hire North Korean workers in spite of these concerns.<sup>238</sup> North Korea also wants to keep wages low to avoid creating a strong incentive to other North Koreans to relocate to Gaeseong, and as a result has done very little to improve the basic infrastructure—housing, water, or electricity provision—of Gaeseong city proper. Indeed, payment to North Korean workers through the CSDGB is often made in whole or in part through “in kind” forms of payment or chits, rather than directly in cash. Aside from ordinary state taxes, the CSDGB also extracts 15% of North Korean workers’ wages as a form of labor insurance, in case of accidents or worker-related issues.<sup>239</sup> This allows the DPRK to directly control a considerable amount of the revenue generated by the Gaeseong zone, and to give as little to the North Korean workers as possible.

As attractive as this arrangement of mutual exploitation may be for both sides, it also creates obstacles that may ultimately sour the relationship produced by the Gaeseong zone, and not for reasons that emerge out of either South Korea or North Korea, but rather for reasons that emerge out of international law and trade and security regulations that govern the global economy. The World Trade Organization’s Rules of Origin (ROO) regulations that require a national labeling for products entering the global economy have so far been reluctant to accept a “Made in Korea” label for goods manufactured in Gaeseong for export to the global

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<sup>236</sup> Gaeseong gonggeop jigu rodong gyujeong [Gaeseong Labor Regulations], 2003, art. 34 (N. Kor.) (trans. by author).

<sup>237</sup> *Id.* art. 26.

<sup>238</sup> Theft by North Korean workers is monitored, investigated, and policed by the People’s Safety Agency of North Korea, which has an on-site office in the Gaeseong zone. This leaves the security and enforcement mechanisms in the hands of the DPRK state and gives little monitoring power to the South Korean companies.

<sup>239</sup> South Korean workers are covered by existing South Korean labor laws, such as the Industrial Accident Compensation Insurance Act. The payment of the 15% labor insurance is mandated in the Gaeseong Labor Regulations, *supra* note 236, art. 42.

economy.<sup>240</sup> Goods manufactured in the Gaeseong zone are considered part of domestic trade in both North and South Korea, largely due to the legal ambiguities regarding the lack of recognition of each other's complete sovereignty, and therefore remain tariff-free in inter-Korean trade.<sup>241</sup> This means that goods made in the Gaeseong zone would most likely be considered by foreign states as North Korean products and would have no legal recognition as South Korean goods, according to the rules of the World Trade Organization (of which North Korea is not a member) or the South Korea-United States Free Trade Agreement.<sup>242</sup> South Korea has tried to define joint ventures and economic interaction between South Korea and North Korea as internal economic activity (and not international), which would allow South Korean companies to market Gaeseong zone goods as South Korean, but the WTO has not accepted this definition, and so products manufactured in the Gaeseong zone have so far faced difficulties entering the global market. There are also security concerns that some of the high-tech transfer that may occur in the Gaeseong zone, in terms of equipment and training, may violate United Nations sanctions against technology transfer to North Korea. Similarly, the United States has strongly opposed the direct shipment of ambiguously labeled goods (such as "Made in Korea" or even "Made in South Korea") from the Gaeseong zone and out of North Korean ports, since the Container Security Initiative and the Proliferations Security Initiative of the United States expressly forbid any container from North Korea from entering US ports. In other words, a considerable part of the global economy is and will remain closed to goods from the Gaeseong zone until North Korea's interface with rest of the world is completely restructured.

#### 4. *Geumgangsán*

The Geumgangsán (also known as Mt. Geumgang) complex, launched officially in 1998 and given legal charter in 2002, is unique among all of the exceptional zones in that it is a tourist resort area rather than a free trade zone; the goal is to attract tourists, specifically South Korean tourists, rather than entrepreneurs, investors, or manufacturers.<sup>243</sup> The area does operate as a business zone, not only for tourist-related business but also for any South Korean business wanting to set up shop in the comfortable surroundings of a resort area, but the primary focus is tourism and tourism-related activities.<sup>244</sup> As with the Gaeseong

<sup>240</sup> Governed generally by Namboksaie georaetwinun mulpumui wonsanji hwagin jeolchae gwanhan hapuiseo [North-South Agreement on the Process of Identifying the Country of Origin of Manufactured Goods] 2003 (trans. by author).

<sup>241</sup> Gaeseong gonggeop jigu segwan gyujeong [Gaeseong Customs Regulations], art. 7 (N. Kor.) (trans. by author).

<sup>242</sup> See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154; United States—Korea Free Trade Agreement, U.S.-S. Kor., June 30, 2007, 46 I.L.M. 642 (providing that "each Party shall accord national treatment to the goods of the other Party"); see also Tae-shik Kwon, *Mulpumui banip mich banchul* [Import and Export of Goods] in *GAESEONG GONGGEOP JIGU: BEOPGYU MICH JEDOHAESOL* [THE GAESEONG INDUSTRIAL ZONE: A COMMENTARY ON LAWS AND POLICIES] 133, 166 (Yi Haewon ed., 2005) (trans. by author).

<sup>243</sup> See Ki-jung Kim & Deok Rryong Yoon, *Beyond Mt. Kumkang: Social and Economic Implications*, in KIM DAE-JUNG GOVERNMENT AND SUNSHINE POLICY: PROMISES AND CHALLENGES 106 (Chung-in Moon & David I. Steinberg eds., 1999).

<sup>244</sup> Advertising is permitted, within limits prescribed by law, in the Geumgangsán tourist zone,



economic zone, the South Korean conglomerate Hyundai Asan is the key economic player in Geumgangsán, but unlike Gaeseong, where Hyundai plays the role of dominant caretaker, in the Geumgangsán resort area Hyundai Asan is the sole economic agent. In effect, Geumgangsán is a tourist resort area with a contiguous economic zone, constructed and operated by Hyundai Asan. At first glance, this would seem to simplify the legal arrangements necessary to secure the optimal financial success of the tourist resort area; having Hyundai Asan as a partner in and administrator of the operations of other private actors in the zone and the conduit between the governments of North Korea and South Korea, gave the economic conglomerate an unusual position of being a partially public and partially private actor in the management of the Gaeseong zone. Geumgangsán acts as a sort of economic fiefdom, with Hyundai Asan as both political and economic administrator of the entire area.<sup>245</sup> This does not necessarily simplify things so much as create new economic peculiarities that, as with the other cases of special exceptional law, have the potential to create unforeseen and tragic consequences, such as the death of the South Korean tourist in July 2008 and the jurisdictional confusion that followed, or even to undermine the whole project altogether.

One of the first areas of legal concern relating to the Geumgangsán project dealt with transportation: How would citizens from South Korea, normally banned from entering North Korea, be able to get to the resort area, which was located approximately 50 kilometers into North Korean territory on the eastern coast? With no airport in the region, the answer came in two forms: one was by sea via specially chartered ships that would leave South Korea and dock only at Geumgangsán, and the other was by ground transportation via a special, dedicated highway that would lead across the border into North Korean territory and proceed directly and only to the Geumgangsán resort area.<sup>246</sup> This highway, a crucial piece of infrastructure, opened in 2005 after being built as a private project by Hyundai Asan—not by the DPRK government. According to the January 2004 agreement on transportation to and visits in the Geumgangsán resort area, South Korean citizens would enjoy legal inviolability during transit to and from Geumgangsán and during their stay in the resort area.<sup>247</sup> This regime of extra-legality or extraterritoriality appeared to ensure that South Korean citizens in North Korea who were engaged in activities related to the Geumgangsán resort area would remain exclusive subjects of South Korean law, even if the laws of the DPRK were violated.

As with other special zones in the DPRK, the Geumgangsán area has its own special exceptional law to serve as the foundational agreement with the DPRK government for the project: the Geumgangsán Tourism Zone Law, signed on 13

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presumably because South Korean companies would want South Korean tourists to know who has been responsible for the development of the resort area, or which companies are participating in the development of the region. The governing law here is found in the Regulations on Business Advertising in the Geumgangsán Tourist Zone 2004.

<sup>245</sup> Kim Ko-jung, *Hyundai's taebukkyeonghyeop: Songgwawa kwaje* [Hyundai's Economic Cooperation in North Korea: Achievements and Tasks], in GEUMGANGSAN GWANGWANG SAEOPKWA NAMBUKKYEONGHYEOP [THE GEUMGANGSAN TOURISM PROJECT AND NORTH KOREAN ECONOMIC COOPERATION] (Institute for Far Eastern Studies, 1999) (trans. by author).

<sup>246</sup> Kim Yeong-yun, *Yungno gwanggwang hwalseonghwabanggwawa kwaje* [Method and Tasks to Activate Overland Travel] 80 TONGIL GYONGJE 42 (trans. by author).

<sup>247</sup> Geumgangsán gwangwangjigu chulim, cheryu, geojugyujeong [Geumgangsán Regulations on Transit, Immigration, and Residency], 2004, art. 17 (N. Kor.) (trans. by author).

November 2002.<sup>248</sup> Since the Geumgangsan resort was created as part of the same political and legal agenda that created the Gaeseong zone, with the same main economic actor, the Geumgangsan Law greatly resembles the Gaeseong Basic Law, particularly in its basic regulations and major provisions. But there also crucial differences between a “tourist zone” [*gwangwang jigu*] like Geumgangsan and an “industrial zone” [*gongjeop jigu*] like Gaeseong that need to be considered in order to understand the structure and the peculiarities of the special exceptional law that governs the Geumgangsan resort area.

Unlike industrial and trade areas, where businesses are required to maintain accounts in DPRK won and hard currency, in the tourist zones, individual tourists and the tourist enterprises that serve them are not allowed to operate using DPRK won. South Korean currency cannot be used either because accepting it could be seen as legal recognition of the independent existence of South Korea. Consequently, tourists must use a freely-convertible currency unit—preferably the U.S. dollar—for all tourist activities.<sup>249</sup> A different set of rules apply to businesses that operate in the industrial park area of the Geumgangsan resort project, but these business must adapt to the tourist zone rules if their activities take them outside of the industrial park region of the zone. There is no direct taxation for tourists in Geumgangsan, while various tax incentives apply to tourist-related business in the tourist zone of Geumgangsan; these tax incentives seem to differ from the standard tax incentives that apply in the industrial park of Geumgangsan, which are comparable to those found in other industrial and trade zones in the DPRK, such as Raseon and Sinuiju.<sup>250</sup> Because of the unique environment of the tourist zone, and the need to keep the area ecologically sound, the DPRK is only permitting environmentally-friendly and pollution-minimizing industries to operate in the Geumgangsan zone, with a preference for high-tech and scientifically advanced forms of industry.<sup>251</sup> It is unlikely that environmentalism is the prime motivation here, but rather the desire by North Korea to acquire new forms of industrial technology, here under the guise of environmental concern.

A governing body is also established by the foundational law in the form of the Central Tourist Zone Guiding Organ (*jungang gwangwang jidogigwan*), which is in essence an administrative organ and a communication conduit between the Geumgangsan tourist zone and the DPRK.<sup>252</sup> As with Gaeseong, the Guiding Organ is a strange legal concoction that is simultaneously private and public; as the zone is run by Hyundai Asan, this makes Hyundai Asan a private company that functions as a proxy government in the zone with direct responsibility to the South Korean government. The mandate of the Guiding Organ is therefore determined by a

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<sup>248</sup> Geumgangsan gwangwang jigu beop [Basic Law of Geumgangsan], 2002 (N. Kor.) (trans. by author).

<sup>249</sup> Geumgangsan gwangwang jigu wuihwa gwanri gyujeong [Regulations on the Management of Foreign Currency Holdings in the Geumgangsan Tourist Zone], 2004, art. 12 (N. Kor.) (trans. by author).

<sup>250</sup> Geumgangsan gwangwang jigu giop changseol unyeong gyujeong [Regulations on the Establishment, Registration, and Operation of Enterprises in the Geumgangsan Tourist Zone], 2003, arts. 7, 24, 31 (N. Kor.) (trans. by author). Enterprises are required to set up a reserve fund equivalent to ten percent of the registered capital; the funds used for this reserve are to be set aside only after the payment of income tax. Enterprises that operate in a profitable manner for 15 years continuously become exempt from tax payments.

<sup>251</sup> *Id.* art. 18.

<sup>252</sup> BASIC LAW OF GEUMGANGSAN, *supra* note 248, art. 15.

peculiar mixture of legal and political responsibilities that operates within an unclear jurisdiction. When the South Korean tourist was killed in July 2008, the Guiding Organ set up an investigation with South Korean officials on the grounds that the Guiding Organ and Hyundai Asan had jurisdiction based on the legal identity of the South Korean tourist. But the DPRK quickly established its own interpretation of jurisdiction based on territorial boundaries; since the shooting occurred outside of the tourist zone, the DPRK made it clear that it was a matter for DPRK authorities alone, and denied requests for jurisdiction and cooperation from South Korean officials and Geumgangsán resort administrators.

The Regulations on Labor in the Geumgangsán Tourist Zone establish the parameters of labor conditions and treatment in the tourism zone.<sup>253</sup> This may seem straightforward, but the tourist environment creates a special challenge for the DPRK, which seeks to minimize contact between North Korean citizens and South Korean citizens. As a result, aside from a very small contingent of laborers from the DPRK, much of the labor in the resort areas of the tourism zone, especially in services and businesses that have direct contact with tourists, is done by ethnically Korean Chinese citizens. The Regulations on Labor are therefore necessary to clarify the overlap of labor laws and responsibilities, since Chinese citizens would not fall under the direct legal oversight of Hyundai Asan or the Central Guiding Organ of Geumgangsán in the same way that South Korean citizens would, nor would Chinese citizens be governed directly by DPRK law as DPRK citizens would. While tourists from South Korea do not require visas to travel to Geumgangsán, laborers require a special work permit that is revocable for infractions of the Regulations on Labor or for violations of the terms of the contract.<sup>254</sup>

The Geumgangsán complex remains heavily dependent on the good will and tolerance of the DPRK regime to continue to operate. It may function as a special tourist zone with various guarantees of legal autonomy, but this autonomy is presently designed to facilitate the influx of hard currency into North Korea via South Korean tourists, who are drawn to the region by the opportunity to set foot on North Korea soil, by the beauty of the mountainous Geumgangsán area, and by the possibility that such tourism may facilitate better relations between North and South Korea.<sup>255</sup> The latter has certainly not happened yet, and events like the killing of the South Korean tourist and the non-cooperative response from North Korean authorities—including a unilateral threat by the DPRK to nullify all Geumgangsán agreements<sup>256</sup>—made it clear that special exceptional law, for all its promise and potential, remains precisely what it is: exceptional.

<sup>253</sup> Geumgangsán rodong gyujeong [Labor Regulations of Geumgangsán Tourist Zone], 2004 (N. Kor.) (trans. by author).

<sup>254</sup> *Id.*, art. 46 (noting that other sanctions such as fines may also be added to both the laborer or the employing enterprise).

<sup>255</sup> Ko Yu-hwan, *Geumgangsán gwangwang saeopui uimiwa pyeongga* [The Significance and Assessment of the Geumgangsán Tourism Project] 80 TONGIL KYONGJE 28 (2002) (trans. by author).

<sup>256</sup> *N. Korea Threatens To Seize S. Korean Assets at Mount Kumgang*, YONHAP NEWS AGENCY (Mar. 18, 2010), <http://english.yonhapnews.co.kr/northkorea/2010/03/18/48/0401000000AEN20100318009600315F.html>.

*E. Assessing exceptional law*

The main rules and laws that protect the DPRK state and shield it from outside influence, and the interpretive obfuscation that characterizes the application and enforcement of those rules and laws, makes any economic activity in the DPRK a process fraught with multifaceted forms of risk.<sup>257</sup> For South Korean conglomerates such as Hyundai Asan, the risk was always outweighed by the perceived political advantages that would accrue to Hyundai Asan, to the South Korean government, and to the general state of North-South Korean relations. The tax incentives provided by the DPRK government, and the attraction of access to cheap North Korean labor, only seemed to confirm the soundness of setting up economic enterprises in the special economic zones of the DPRK. But after years of efforts and billions of dollars of investment in the various projects in North Korea, the risk seems never to have dissipated, and the perceived payoffs have never materialized, at least not to the point where continuous or even expanded levels of investment seem to be worth the cost, in spite of the political and economic benefits associated with these initiatives.

The most important way to overcome the current limited profitability of these special economic zones is for the DPRK regime to engage in the type of legal restructuring necessary to bring North Korean domestic law into alignment with international legal standards regarding the protection and governance of economic activity by international actors within the geographic boundaries of North Korea. The only way that such a restructuring can occur is for the DPRK regime to overhaul its domestic legal system to emphasize legal consistency. Transparency may not be necessary in all spheres of legal activity—indeed, it would be unrealistic to expect the DPRK to radically change all of its secretive ways—but without consistency in legal interpretation and enforcement, the DPRK will never be able to engage in the types of economic reform necessary to ensure the stability and prosperity of the DPRK state.

## IV. CONCLUSION

Starting in December 2008, in response to what the DPRK state saw as the increasingly hostile stance of the new Lee Myung-bak administration in South Korea toward North Korea, the DPRK began shutting down both the Gaeseong Industrial Complex and the Geumgangsan Tourist Zone, making them economic ghost towns.<sup>258</sup> In the months leading up to North Korea's launch of what it called a peaceful satellite for space exploration in early April 2009, the shutdown gathered steam, at one point stranding scores of South Korean workers in the Gaeseong zone with no way to return to South Korea, since their legal status only applied to them

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<sup>257</sup> See generally Lee Jang-hi, GEUMGANGSAN SAEOPUN BUKHANUI KAEHYEOKKAEBANGEUL CHOKJINHALGEOSINGA? PEOPJEDOJEOK JEOMGEOMGWA DAECHAOK [DOES THE GEUMGANGSAN TOURIST PROJECT FACILITATE NORTH KOREA'S REFORM AND OPENING? AN ANALYSIS OF LAWS, INSTITUTIONS, AND MEASURES] (1999) (stating that the results of economic activity of tourism in the Geumgangsan area are difficult to analyze and ever-present risks weaken the potential impact of economic initiatives in North Korea).

<sup>258</sup> *Pyongyang Slams Seoul's Reaction to Border Crossing Ban*, YONHAP NEWS AGENCY, Dec. 7, 2008.

while they remained in the zone and since North Korea had sealed off the only road that led to South Korea.<sup>259</sup> At least one South Korea worker was reportedly detained during this period for criticizing the DPRK regime, after which the DPRK refused requests to let outside actors meet with the detained workers (or any workers) since the investigation into the activities of the accused was ongoing.<sup>260</sup> Finally, in May 2009, the CSDGB, the North Korean governing body of Gaeseong, declared a unilateral nullification of all contracts with the South regarding the Gaeseong zone and began a unilateral revision of all laws and regulations pertinent to existing business in the zone.<sup>261</sup>

The fragility of the legal guarantees inscribed in the body of special exceptional law in North Korea becomes painfully apparent under any type of strained circumstance. Such legal fragility cannot support or sustain a successful program of economic reform and expansion. The special economic zones set up by the DPRK can be compared to the successful Chinese versions of economic liberalization through special domestic trade zones, but the North Korean initiatives have all failed in one way or another. The failure occurred for two reasons: the law of the DPRK is not consistent, and the law in the DPRK has not been disengaged or decoupled from politics. Both of these factors create legal peculiarities that preclude any meaningful program of economic liberalization in North Korea. To resolve these peculiarities, North Korea would have to engage in fundamental legal reform, of the type that would potentially force a drastic realignment of the legal and political institutions of the DPRK. The current political mandate of “military first” would have to be scuttled in favor of an “economy first” or at least a “special economic zone first” approach, one that provides a constitutional foundation for meaningful and secure economic autonomy for both domestic and international actors. The DPRK regime has currently reached the limits of what can be accomplished without a comprehensive program of legal restructuring and reform. Without effective action to address the opacity of North Korean law, subsumed as it is by the political vicissitudes of the state, the DPRK regime may find that it will ultimately reach corresponding political limits as well, making the institutional structure of the state increasingly brittle and liable to catastrophic collapse. The key to long-term viability for the DPRK lies not in military expansion but in economic development, and the economy can go nowhere without the law first paving the pathway to meaningful reform.

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<sup>259</sup> *N. Korea Reseals Border, Strands S. Koreans Amid Tension Over Rocket Launch* YONHAP NEWS AGENCY, Mar. 14, 2009.

<sup>260</sup> *S. Korean Worker Held in DPRK*, XINHUA GENERAL NEWS SERVICE, Mar. 30, 2009.

<sup>261</sup> Kim Sue-young, *North Korea Scraps Gaeseong Contracts*, KOREA TIMES (May 15, 2009), [http://www.koreatimes.co.kr/www/news/nation/2009/05/113\\_44975.html](http://www.koreatimes.co.kr/www/news/nation/2009/05/113_44975.html).

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