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Legal Responses and Tasks Ahead on Floating Propaganda Leaflets to North Korea

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Floating propaganda leaflets to North Korea undermines peace and escalates military tensions on the Korean Peninsula while threatening the livelihoods and safety of those living in the border area. Hence, such an act exceeds the boundaries of freedom of expression, deeming regulations through existing laws possible. The Supreme Court of Korea has presented the Act on the Performance of Duties by Police Officers and the civil law as legal grounds for prohibiting the dissemination of propaganda leaflets. In order to devise a special law on prohibiting the floating of propaganda leaflets and punishing those who have committed such an act, constitutional legitimacy should be secured through fulfilling the Constitutional Court's standards on the rule against excessive restriction.

1. Introduction

On June 4, 2020, the North Korean Worker's Party's First Vice-department Director Kim Yo-jong has warned of the complete demolition of Gaeseong Industrial Complex, closing of the Joint Liaison Office, and termination of the Inter-Korean Military Agreement as consequences of the violation of the Panmunjeom Declaration and 9·19 Military Agreement (the Agreement on the Implementation of the Historic Panmunjeom Declaration in the Military Domain of 2018). On the June 16, North

Korea demolished the Gaeseong Joint Liaison Office, once a symbol of progress in inter-Korean relations and peace on the Korean Peninsula. Also, the General Staff of the North Korean People's Army fortified a demilitarized region—demilitarized as agreed by inter-Korean negotiations in the past—followed by a public declaration to strengthen military alert. Inter-Korean military tensions are escalating as a North Korean defector group floated propaganda leaflets to North Korea on June 22, three days before the 70th anniversary of the Korean War. In return, North Korea forewarned their own plans to float 12 million propaganda leaflets to South Korea.

The debate on floating propaganda leaflets is contested between those emphasizing the freedom of expression and those arguing for regulations to safeguard the livelihoods and safety of those living in the border region. Article 21 Clause 1 of the Constitution states that “all citizens shall enjoy the freedom of speech and the press, and the freedom of assembly and association,” guaranteeing the freedom of expression. Also, the International Covenant on Civil and Political Rights Article 19 Clause 2 states that “everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers [···].” On January 26, 2015, as a plenary committee decision, the National Human Rights Commission of South Korea expressed the opinion that, based on the freedom of expression, floating propaganda leaflets to North Korea should not be regulated.

2. Possibility of Regulation under Current Laws

However, freedom of expression does have boundaries. Article 37 Clause 2 of the Constitution states that “the freedom and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare.” Floating propaganda leaflets to North Korea undermines peace on the Korean Peninsula and escalates military tensions and stands in conflict with guaranteeing national security and securing order. Such an act can also be interpreted as undermining public welfare since it threatens the lives and safety of those living in the border region. Regarding the North Korean defector ○○○'s reparation

charges against the South Korean government for causing psychological damage by prohibiting the floating of propaganda leaflets to North Korea, the Constitutional Court ruled in favor of regulating the floating of propaganda leaflets on the grounds that floating propaganda leaflets to North Korea creates imminent threats to the lives and bodies of, and causes serious dangers for, citizens living in the border area.¹⁾

The legal status of the Panmunjeom Declaration can be debatable as it did not receive consent from the National Assembly nor ratification from the President. However, regardless of the legal character of the Declaration, the prohibition on floating propaganda leaflets should be adhered to as an agreement among the leaders. Only then, inter-Korean relations can progress and peace on the Korean Peninsula develop. If the prohibition were to be implemented on the grounds of guaranteeing national security and maintaining order, it needs legal justifications. While laws such as the Waste Control Act, Marine Environment Management Act, Inter-Korean Exchange and Cooperation Act, Public Waters Management and Reclamation Act, Aviation Safety Act, and Framework Act on the Management of Disasters and Safety are discussed as potential legal justifications, criticisms about their applicability also exist. In the aforementioned case, the Constitutional Court justified their decision based on Article 5 Clause 1 of the Act on the Performance of Duties by Police Officers, which governs the prevention of hazard, and Article 761 Clause 2 of the Civil Law, which governs the self-defense and emergency evacuation. Other laws require processes of reducing the range of interpretability through revisions and by maintaining consistency in their execution.

3. Applying Constitutional Principles in Devising a Special Law

Clause 37 Article 2 of the Constitution states that the freedoms and rights of citizens may be restricted when necessary for national security, the maintenance of law and order or for public welfare, but no essential aspect of the freedom or right shall be violated. On the objective of this Article, the Constitutional Court

1) Constitutional Court of Korea, Mar 29, 2016, 2015Hun-Da247394.

interpreted that while limitations on basic rights for public welfare could be allowed in exceptional cases, essential aspects of the freedom or rights should not be violated against the proportionality law, or against excessive restriction.²⁾ As standards of assessment on whether the rule against excessive restriction is violated, the Constitutional Court has suggested 1) legitimacy of objective, 2) appropriateness of method, 3) minimalization of damage, and 4) balancing of the benefit and protection of the law.³⁾ When a special law on prohibiting and penalizing the floating of propaganda leaflets was to be devised, it should be elaborately devised to be able to gain Constitutional legitimacy by abiding by the four standards. Otherwise, the special law will face the controversy of being unconstitutional. Especially, controversy may arise on what kind of regulations would be imposed on the perpetrators who floated the leaflets to North Korea regarding the third standard – minimalization of damage. On this matter, the Constitutional Court stated the following.

“[...] even when imposing restrictions on nonfulfillment is deemed appropriate, it will be considered a violation of the minimal infringement principle of the rule against excessive restriction if a law obligates a duty on a citizen and imposes restrictions on the citizen for nonfulfillment when the objective can be fulfilled via less limiting measures or no obligations at all.”⁴⁾

As the statement implies, even if the special law is being devised to foster progress in peace on the Korean Peninsula and inter-Korean relations and safeguard the citizens of the border region, restrictions on violations should remain minimal and as a last resort.

To sum up, the act of floating propaganda leaflets can be regulated under the current law because it surpasses the limits of the freedom of expression by

2) Constitutional Court of Korea, Sept 3, 1990, 89Hun-Ga95.

3) Constitutional Court of Korea, Dec 24, 1992, 92Hun-Ga8.

4) Constitutional Court of Korea, Jun 29, 2006, 2002Hun-Baa80, 87, 88, 2003Hun-Ka22(Aggregate).

undermining peace and escalating military tensions on the Korean Peninsula as well as threatening the lives and safety of those in the border region. Devising a special law on the matter should be accompanied by legal and policy efforts on adopting the Constitutional rule against excessive restriction. ©KINU 2020

APPENDIX: A Precedent of Constitutional Court that Provides the Standard for the Law of Excessive Restriction

“The rule against excessive restriction indicates basic principles, or limitations posed, to the government’s legislative activities restricting citizens’ basic rights. It is a principle of proportion, a foundational principle for a constitutional state, declaring that the objectives behind any legislative measures to restrict the basic rights of citizens ought to be legitimized by the Constitution and the legal system (legitimacy of objective) and that one use efficient and appropriate methods to fulfill the objectives (appropriateness of method), limit the restrictions on basic rights to a minimum by employing more relaxing form or methods even if the legislator’s choice of restrictions is appropriate for fulfilling the objective (minimalization of damage), and that the degree of public interest protected should outweigh the degree of infringements on private interest (balancing of the benefit and protection of the law).”⁵⁾

※ The views expressed in this paper are entirely those of the author and are not to be construed as representing those of the Korea Institute for National Unification (KINU).

5) Constitutional Court of Korea, Dec 24, 1992, 92Hun-Ka8.