State Practice Notes on Korea

A Critical Study on the Violation of the Human Rights of the Residents of the Five Islands in the West Sea under the Fishing Vessel Safety and Fishing Act

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1 Introduction

The five West Sea islands of Yeonpyeong Island, Baengnyeongdo, Daecheongdo, Socheongdo and U Island (“Five Islands”) are the starting point of the Northern Limit Line (NLL) in the West Sea where the constant possibility of military conflict lingers near the border with North Korea. However, there is a harsh reality for the residents of these islands who risk their lives and property daily.

The problem of human rights violations among residents of the Five Islands is closely related to inter-Korean relations. Namely, the fundamental solution to the violation of human rights for those living on the Five Islands is to establish and consolidate a peace regime between the South and the North, and to achieve peaceful unification.

In the October 4th Joint Declaration between the two Koreas in 2007, both sides agreed to establish a peace and cooperation zone in the West Sea, and in the Panmunjom Declaration in April 2018, the two leaders agreed to “make the NLL a peace zone to prevent accidental military clashes and ensure safe fishing activities.” However, this has yet to be realized.

Every citizen has the right of human worth, dignity and to pursue happiness. It is the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals. The freedoms and rights of citizens may be restricted by law only when necessary for national security, the maintenance of law and order or for public welfare. Furthermore, even when such restrictions are imposed, no essential aspect of the freedom or right should be violated.

The Korean government’s neglect of the basic rights of the residents of the Five Islands for national security is tantamount to acquiescing in the infringement of their human rights beyond tolerable limits. Therefore, the Korean government must pay attention to the human rights issues of the residents of the Five Islands to faithfully fulfill its constitutional obligations. While the

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Korean government has implemented various policies in accordance with laws to support the Five Islands, their effectiveness remains questionable.

Therefore, to ensure the human rights of these residents, a careful consideration of the options by the Korean government must be discussed. It is necessary to pay attention to the various aspects of human rights violations of the residents of the Five Islands and propose realistic solutions.

First, it is necessary to clarify the legal standards before analyzing the human rights violations of the residents of the five islands in the West Sea. Various international human rights conventions guarantee human rights and fundamental freedoms declared in the Universal Declaration of Human Rights. They include the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights.

In particular, the expansion of fishing areas, the extension of fishing hours, and transfer of resident control to the private sector have been long-desired by the residents. Therefore, this note will analyze them based on the corresponding economic and civil rights, considering that fishing is only possible within a limited area due to the border area of North Korea, and that night fishing has been prohibited since 1964, and that free movement to and from has been restricted due to security reasons.

1.1 *Fishing as an Economic Right*

Households dependent on fishing account for about 30% of the population of Yeonpyeong-myeon, Baengnyeong-myeon, and Daecheong-myeon as of 2018 which demonstrates that the fishing industry is one of the most important sources of income for residents of these Five Islands.

In addition, the total catch of fishery products was 6,744.121 (M/T) in 2014, 4,330.768 (M/T) in 2015, 6,599.560 (M/T) in 2016, 7,170.950 (M/T) in 2017 and 6,661.379 (M/T) in 2018, which is similar to the last five years. However, it can be seen that the value of fishery products increased to 52,463,580,000 won in 2014, 38,227,984,000 won in 2015, 49,951,089,000 won in 2016, 48,765,328,000 won in 2017 and 64,717,090,000 won in 2018. In particular, in 2018, the total catch decreased compared to 2017, but the amount of income increased.

Meanwhile, night fishing on the Five Islands has been banned since 1964 due to the military confrontation between the two Koreas, and the fishing area of the Five Islands has been maintained at 1,614km² since the expansion of 280km² in 1992.¹ In other words, fishing rights as economic rights of residents of the Five Islands have been restricted for a long time because it is geographically

1 The area of this fishery is as follows for each administrative district. The area of Baengnyeong, Daecheong, and Socheong fishing ground is 368km². The case for Yeonpyeong fishing ground

adjacent to North Korea and the security issues of the Navy and the Coast Guard.

As the South and the North decided to create a peace zone near the NLL in the West Sea and take practical measures to ensure safe fishing activities through the Panmunjom Declaration in April 2019, the Pyongyang Joint Declaration in September of that year, and the military agreement between the two Koreas, the South Korean government partially lifted restrictions on fishing on the five islands after collecting opinions from various sources.

Night fishing, which had been banned so far, was allowed for 30 minutes each before and after sunrise, and the fishing area of the Five Islands was expanded by 245km² from 1,614km² to 1,859km². It expanded each 46km² and 44km² to the east and west of the existing Yeonpyeong fishing grounds, and expanded about 155km² to the east of the existing B fishing grounds. In particular, the expansion and the extended fishing times were not decided under agreement with North Korea, but was independently carried out by the South Korean government. At that time, the Minister of Oceans and Fisheries expected the catch of fish to increase by at least 10 percent due to the expansion of the fishing grounds.

Regarding the opinion that “there is still a lot of space left to the south of the NLL, and we may be able to expand a little more if we decide to,” then Minister of Oceans and Fisheries Kim Young-choon replied, “the fishing ground most frequently requested by fishermen in Baengnyeong and Daechong islands is between the NLL, but if we expand it, we will be too close to the NLL, and we cannot guarantee that peace settlement is complete.” Furthermore, as to the issue of “whether the discussion on the joint fishing area between the two Koreas is under way,” the minister replied, “there is no formation of a joint military committee to set up a joint fishing area yet.” In particular, the minister stressed that overall, there must be limits to expansion due to restrictions on the safety of so-called fishing boats, the number of naval patrol boats and maritime police forces in the five islands of the West Sea.

However, the situation was different in the East Sea border of the NLL. The northernmost “Jeodo Fishing ground” in the East Sea was opened to allow entry from April to December every year. Despite the danger of crossing the border and kidnapping just 1.8 kilometers away from the NLL, fishing guidance ships and military and police vessels were deployed at all times during the opening period to conduct safety management of fishing boats.

is 815km². The area of A fishery grounds is 61km². The area of B fishing grounds is 232km² and C fishing grounds area is 138km².

Various circumstances, such as environmental and geographical differences between the East and West Seas, actual military conflicts, and the number of ships subject to management and protection, should be viewed together to determine whether discrimination is based on rational reasons. Nevertheless, issues regarding the differences between the West and East Seas have arisen.

1.2 *Freedom of Movement as a Civil Right*

After the artillery attack by North Korea on Yeonpyeongdo, military control over the daily lives of residents of the Five Islands has changed dramatically. This control is aimed to ensure the safety of residents from North Korean provocation or infiltration. At that time, residents in lodging businesses, travel and tourism industries thought it would be impossible to operate normally for at least half a year, and from November 23 to December 3 of that year, 879 of the 5,078 residents and 90 out of 227 military families left the island.

Until now, fishermen have been fined or assessed administrative measures if they violate various restrictions, such as crossing the fishing line or refusing to comply with the military authorities. Given these events, it is questionable whether the military's control of civilians can be justified. Currently, the South and the North are in a state of a truce, and though the Five Islands are closely located by the NLL but it is not a real war situation. Focusing on the fact that human rights are generally understood as the right not to experience undue governmental interference, the residents of the Five Islands also have the right to enjoy freedom in their living areas.

2 **The Fishing Vessel Safety and Fishing Act**

The Fishing Vessel Safety and Fishing Act was enacted as No. 16569 on Aug. 27, 2019, and took effect on August 28, 2020. The Act was enacted to contribute to the safe operation of fishing boats and the protection of people's lives and property from the risk of accidents caused by potential confrontation between South and North Korea in the waters off the Five Islands.

However, the law was enacted at a time when peace between the South and the North was in full bloom. It was said that the Act would degrade the purpose of the Panmunjom Declaration, the Pyongyang Joint Declaration, and the military agreement in April 2018 which would run counter to the direction of guaranteeing human rights for residents of the Five Islands. This note will examine the problematic clauses of the Fishing Vessel Safety and Fishing Act for human rights violations experienced by the residents of the Five Islands.

The Act defines the “fishing limit line”, “specific sea area”, “the fishing boat” and “the fishing-restricted area” in relation to fishing. Specifically, the fishing line is that area where Korean fishermen can operate from the northern line of the West Sea and East Sea. This is prescribed by Presidential Decree. The Enforcement Decree of the Act clearly specifies the starting point of the line. Furthermore, the Act prohibits fishing or navigation across this fishing line, but not in exceptional cases prescribed by the Presidential Decree.

The Act allows the Minister of Defense or the Chief of the Korea Coast Guard to restrict fishing or navigation, if he or she deems that fishing boats have a significant impact on safe fishing or navigation unless they immediately restrict fishing or navigation. Article 17 of the Act provided the legal basis for military control over civilians on the five islands in the West Sea by stipulating the scope of fishing grounds under the Presidential Decree among the border areas connected to the NLL. Additionally, Article 11 of the Enforcement Decree stipulates the scope of fishing grounds under the control of military units as Baekryeongdo, Daechongdo, Socheongdo, Yeonpyeongdo, Ganghwa Island, and its surrounding waters.

Article 30 of the Act further stipulates that those who disobey such military control shall be sentenced up to one year in prison or fined up to 10 million won. The issue has been raised as to whether the Fishing Vessel Safety and Fishing Act, which was enacted to protect fishermen, has valid grounds for the criminal punishment of fishermen, but more importantly, in a situation when they fail to comply with military control only in the area of the Five Islands. In other words, criminal prosecution is only permitted in the area of the Five Islands as well as administrative disposition in case of violations of the law.

The enactment of the law has made it official for the military to manage operations in the areas of the Five Islands. Management is not undertaken by local governments or the Coast Guard. Park Tae-Won, the former head of a fishing village society on Yeonpyeong Island said that “if we leave the fishing zone, we will be sent to jail. Control is getting stronger than it was under the military regime.” The government seems to have forgotten its promise to turn the Five Islands into a peace zone. Jang Tae-heon, the head of the fishing village fraternities of Baengnyeong Island also expressed his concern that “Baekryeong Island often crosses the fishing limit line due to its small fishing grounds, and if the law is enforced, fishing will be further reduced.”

The Act has also been criticized for being completely opposed to measures to create a peace zone in the West Sea following the inter-Korean summit. The Minister of Oceans and Fisheries expanded the fishing area and fishing time of the Five Islands in the West Sea, and the Ministry of National Defense

also lifted the military facility protection zone 26 times the size of Yeouido, focusing on the border area. While the incumbent administration is working on measures to protect property rights and establish a peaceful atmosphere, the National Assembly passed a law that clamps down on the human rights of fishermen.

In addition, even before the Fishing Vessel Safety and Fishing Act, there were frequent fishing controls as military units conducted live fire training. However, after the law took effect, fishermen face criminal punishment if they fail to comply with the control over the entry and exit of fishing grounds by the head of a military unit. It follows that the control exercised by the commander of a military unit has resulted in a loss of fishing activities. The Supreme Court decided that the right to claim compensation for loss does not arise if the reason for fishing restrictions is pursuant to Article 34 (1) of the Fisheries Act which concurrently meet the requirements of “when deemed necessary for national defense” and the requirements of one of the industrial projects such as projects for defense and military affairs. The Supreme Court’s position is likely to be the same for losses incurred by a fishermen’s failure to engage in fishing activities due to the control of a military unit chief under the Fishing Vessel Safety and Fishing Act. In other words, as arbitrary control of the head of a military unit is legalized, infringement on the fishing rights of fishermen may intensify.

Even in the process of enacting the Fishing Vessel Safety and Fishing Act, criticism has been raised about the lack of democratic accountability in the collection of opinions from local residents. From the perspective of the residents of the Five Islands, a conflict has been escalating as they are excluded from the process of enacting laws as well as preparing for implementation. Kim Young-ho, the current head of Daechong Island’s fishing village society has said, “it does not make sense to implement the law without informing the parties, let alone not collecting any opinions.” The Ministry of Oceans and Fisheries indicated that a public hearing was held, but confirmed that none of the representatives who attended the hearing were related to the Five Islands in the West Sea.

3 Overseas Cases of Fishery Control in Border Sea Areas

It is not easy to find examples abroad that are factually similar to this situation, as the Fishing Vessel Safety and Fishing Act reflects the division of the two Koreas. In response, this note will analyze overseas cases of fishermen control measures.

3.1 *United States of America*

The United States may inspect the movements of foreign or domestic vessels in U.S. territorial waters at any time and deploy patrol boats when it recognizes a national emergency. The control of the ship and its crew with the consent of the President is possible, if it is necessary to prevent damage to the ship, to prevent encroachment on the U.S. ports or territorial waters, or to comply with U.S. rights and obligations.

On this basis, rules were enacted for the Coast Guard to control all vessels sailing in U.S. territorial waters. The rules stipulate that the commander of the U.S. Coast Guard can control the movement of ships, and that if vessel fails to comply with the commander's control, the operator of the vessel will be sentenced to prison. A court can also impose a fine of up to \$10,000 USD at its discretion.

3.2 *Taiwan*

Taiwan has experienced hostilities with China. Taiwan's "Kinmen Island," in particular, was the last line of defense for Chiang Kai-shek to stop the Chinese army from advancing towards the island. This led to the rapid military fortification, and political guides were dispatched to each village to monitor residents. After 8 PM, daily lives of residents were heavily restricted which included curfews and permission for movement. As a result, access to the coast was strictly controlled along with the maintenance of military-oriented economic activities such as services for soldiers. However, as economic development of the area was slowed due to security restrictions, traditional cultural assets were maintained which created tourism opportunities for the benefit of local residents.

4 Conclusion

4.1 *Non-Discriminatory Control of Residents by Military Commanders and Clarification of their Scope of Control*

Shirakusa's principle is that an individual's right of freedom should be restricted to non-discriminatory and minimum limits on the basis of law while taking into account the need for public interest and the principle of proportionality with the basic rights of the individual limited by the measure. First, under Article 30 of the Fishing Vessel Safety and Fishing Act, criminal punishment will be imposed on those who fail to comply with controls near the West Sea border. In the case of East Sea border, however, there is a different set of rules. Failure to implement control at the same border area will result

in human rights violations of residents of the Five Islands if discrimination is made without reasonable reasons.

In addition, the Protection of Military Bases and Installations Act stipulates that the designation of protected areas, civilian control lines, flight safety zones and anti-aircraft defense cooperation zones should be made within the minimum extent necessary for the protection of military bases and facilities, the smooth performance of military operations, and the flight safety of military aircraft. In addition, the scope of prohibited or restricted acts within a protected area is quite narrow, and the scope of criminal sanctions, such as imprisonment for up to three years and minimum confiscation, is wide depending on the type of violation.

While the Protection of Military Bases and Installations Act seems to be more strict in the imposition of criminal penalties stipulated in comparison to Article 30 of the Fishing Vessel Safety and Fishing Act, it more clearly sets the scope of the regulations by setting forth standards as specific as possible rather than simply providing for penalties.

4.2 *Limitations on When Military Control Is Required*

According to General Comment No. 29 adopted at the Seventy-Second Session of the Human Rights Committee, allowing measures to suspend human rights violations in special circumstances, such as a public emergency that threatens the existence of a nation beyond the general standard of limitations, is only possible in urgent public emergencies that threaten the existence of the country by law. In other words, the restriction must be exceptional, temporary and limited in scope.

However, Article 17 (1) of the Fishing Vessel Safety and Fishing Act only stipulates that the head of the military unit in charge of the area can control access to fishing grounds prescribed by Presidential Decree among the border areas connected to the NLL in the West Sea. In other words, residents of the Five Islands are allowed to control their entry and exit under the judgment of the commander of the military unit, not only during wartime circumstances, but also quasi-wartime situations involving a localized provocation. In the West Sea, where there is a possibility of a military conflict at all times under the ever-changing relations between the two Koreas, it is too burdensome for residents to be subject to control by the arbitrary judgment of the military commander.

4.3 *Mitigation of Sanctions for Non-Compliance*

The shift from administrative to criminal sanctions is severe. This also poses the risk of turning residents of the Five Islands into potential criminal perpetrators, not as human rights victims, which in turn creates a stigma for the residents.

Article 30 of the Fishing Vessel Safety and Fishing Act requires those who simply violate Article 17 of the same Act to be criminally punished without exception for refusing to comply with the control orders for the West Sea border area. If they cross the control line established by the military unit commander in waters where there still is no clear boundary established, they will be subject to criminal prosecution.

4.4 *Establish Procedures to Collect Public Opinion from Residents in the Process of Improving Legislation*

It is rather questionable whether the fishing boat safety law was based on consensus through social public discussion, including the opinions of the residents of the Five Islands. Furthermore, there was no in-depth consideration of whether such restrictions of basic civil rights were justified, even though there was a high possibility of infringement for violations that would be subject to criminal sanctions solely because non-compliance with the orders given by the military commanders in the waters bordering the West Sea.

The Office of the United Nations High Commissioner for Human Rights and the United Nations Secretary-General stress the importance of ensuring the participation of all affected people in determining the country's countermeasures and policies, especially the relevant experts who are free to speak and share information – which is particularly important to each other and with the public. Therefore, there will certainly be a need to reduce social conflict and friction caused by the enforcement of the law, by collecting and reflecting the opinions of actual residents, rather than legislating with any input from those who will be affected by the rules.